

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

8th Report of Session 2009–10

Crime and Security Bill
Energy Bill
Mortgage Repossessions (Protection of Tenants Etc .) Bill

Government response:
Constitutional Reform and Governance Bill

Legislative reform:
**Draft Legislative Reform (Industrial and Provident
Societies and Credit Unions) Order 2010**
**Draft Legislative Reform (Licensing) (Interim
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The Delegated Powers and Regulatory Reform Committee

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Historical Note

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

Eighth Report

CRIME AND SECURITY BILL

Introduction

1. Nearly two-thirds of this Bill (clauses 2 to 23) is devoted to new provisions about the taking and destruction of fingerprints and samples in connection with criminal investigations. The remainder of the Bill is concerned with a variety of matters, including domestic and gang-related violence (clauses 24 to 39), a compensation scheme for victims of terrorism overseas (clauses 47 to 54) and further restrictions on the sale and supply of alcohol (clause 55). The Home Office have prepared a memorandum for the Committee, printed at Appendix 1, about the powers to make subordinate legislation conferred in the Bill.

Clause 13 — Fingerprints and samples

2. Clause 7 inserts into the Police and Criminal Evidence Act 1984 a new section 65A to define “qualifying offence” for the purposes of Part 5 of that Act. The expression is used quite widely in the provisions inserted in the 1984 Act by clauses 3, 6 and 14 to denote an offence of a relatively serious character. For instance, under the new arrangements in new sections 64 to 64ZN (substituted by clause 14) for the retention and destruction of samples and data, the fingerprints, footwear impressions and DNA profile of a 16 or 17 year old who has been arrested for but (in the event) not convicted of a “qualifying offence” will be retained for six years, rather than the three years that would have applied had he been arrested for, but not convicted of, some other offence (section 64ZG).
3. New section 65A(2) specifies the offences that are to be a “qualifying offence”: the list includes serious violent, sexual or terrorist offences. Subsection (3) enables the Secretary of State to amend list by order subject to the affirmative procedure.
4. Clause 13 includes an equivalent power in new Article 53A, which defines “qualifying offence” for the purposes of Part 5 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (where clauses 8 to 13 of the Bill insert provision corresponding to that inserted in the 1984 Act). But the exercise of the power is in this case to be subject only to the negative procedure. The Committee was not persuaded by the explanation in paragraph 7 of the memorandum, that the negative procedure is appropriate because the order will not be amending primary legislation. Orders in Council made under Schedule 1 to the Northern Ireland Act 1974 are in character more akin to primary than to subordinate legislation. However, all of the powers conferred in the 1989 Order (including powers to specify offences by order for the purposes of the 1989 Order) appear to attract only the negative procedure. As it seems likely that the offences specified by order under Article 53A may not differ significantly in character from those specified by order under new section 65A of the 1984 Act, the Committee does not regard the negative procedure as inappropriate in this particular case.

Clauses 42 to 44 — Security industry licensable activities, and appeals

5. Clauses 42 to 44 amend the Private Security Industry Act 2001 to make further provision about the licensing by the Security Industry Authority of businesses carrying out vehicle immobilisation or the restriction or removal of vehicles. Clause 42 inserts a new section 4A into the 2001 Act, which provides that it shall be an offence for any person to engage in licensable conduct, except in accordance with a licence. Paragraphs (a) and (b) of subsection (2) specify, by reference to provisions of Schedule 2, activities which are to be licensable conduct. Paragraph (c) allows the Secretary of State to specify other activities as licensable conduct, by order subject to the negative procedure. In paragraph 21 of the memorandum, the Home Office explain that the negative procedure is appropriate because the power conferred by new section 4A(2)(c) “mirrors that which exists for individual licences at section 3(3) of the 2001 Act”. But the offence to which that section applies is only triable summarily; the offence created by new section 4A may be tried on indictment, in which case the offender could be liable to imprisonment for up to five years. In effect subsection (2)(c) enables the Secretary of State to specify conduct which can amount to a relatively serious criminal offence. **The Committee therefore recommends that the power in new section 4A(2)(c) should be subject to the affirmative procedure.**
6. Clause 44 inserts a new section 22A into the 2001 Act requiring the Secretary of State to provide by negative regulations for appeals in connection with charges made as a condition of the release of a vehicle. The regulations must specify the grounds on which an appeal may be made, make provision about the person to whom the appeal is to be made, and provide for matters such as appeal fees, the award of costs and the effect and enforcement of decisions on appeal.
7. This is to be a distinct area of appellate business under the 2001 Act, confined to immobilisation and removal charges, and so provision for it is being made separately from the existing appeal provisions in the Act, which are set out in sections 11 and 18 themselves. Although the provision to be made under new section 22A is described in paragraph 34 of the memorandum as “largely procedural and technical in nature”, it will clearly deal with substantive matters such as grounds of appeal, identity of the appellate body and powers on disposal of appeals. **The Committee recommends that the first time the power conferred by new section 22A is exercised, the regulations should attract the affirmative procedure.**

Clauses 47 to 54 — Compensation for victims of overseas terrorism

8. Clauses 47 to 54 make provision enabling the Secretary of State to make arrangements for compensating victims of overseas terrorism. There is nothing in the Bill requiring the introduction of such arrangements. Clause 47(1) merely provides that the Secretary of State “may” make arrangements for making payments to or for victims of overseas terrorism, which may include the making of a scheme (clause 48(1)) to be subject to the approval of both Houses. **The Committee draws to the attention of the House that under the Bill as presently drafted it will be up to the Government whether or not to bring forward a compensation scheme: there is no commitment to do so on the face of the Bill.**

ENERGY BILL

Introduction

9. This Bill deals with carbon capture and storage and decarbonisation (Part 1), schemes for reducing fuel poverty (Part 2) and regulation of gas and electricity markets (Part 3). There is a memorandum from the Department of Energy and Climate Change on the delegated powers in the Bill, printed at Appendix 2.

Clauses 9 to 15 — schemes for reducing fuel poverty

10. Clause 9 enables the Secretary of State to make by regulations “one or more schemes for the purposes of reducing fuel poverty”. Under subsection (2), a scheme must make provision requiring benefits to be provided by licensed suppliers to whom the scheme applies and under subsection (3) the scheme must provide for the benefits, taken as a whole, to be provided wholly or mainly to customers determined by or in accordance with the scheme. The regulations will provide for:
 - the suppliers covered;
 - the customers covered (but the Bill enables this to be left entirely to the scheme suppliers – clause 9(5)(b));
 - whether or not there should be criteria by which a scheme supplier is to determine who is a customer and, if so, what those criteria are – clause 9(6);
 - the amount of the benefit and the form it will take – clause 9(7).

The customers who may benefit are not limited to those living in fuel poverty or belonging to a fuel poverty risk group, provided that the regulations are made for the purpose of reducing fuel poverty.

11. Clause 10(6) allows the regulations to enable the Secretary of State to disapply or modify any requirement of the scheme, not just in circumstances to be prescribed in the regulations, but in any cases or circumstances that the Secretary of State decides.
12. The framework for so flexible a power is not robust. To ascertain what “reducing fuel poverty” means, it is necessary first to look at clause 15(1) and (2). Under clause 15(2) a person is living in fuel poverty if he would be regarded as living in fuel poverty for the purposes of the Warm Homes and Energy Conservation Act 2000. Under section 1 of that Act a person is to be regarded as living in fuel poverty if he is a member of a household living on a lower income in a home which cannot be kept warm at reasonable cost. What is meant by “lower income” and “reasonable cost” is left to regulations by the Secretary of State under section 1 of the 2000 Act, and the Secretary of State may anyway by regulations replace the entire definition in the 2000 Act. In both cases the regulations are subject only to negative procedure. Accordingly, the scope of the very significant power in clause 9 of this Bill can be altered by regulations (under the 2000 Act) subject to negative procedure.
13. **The Committee considers that two changes to the Bill are necessary in order to subject the power to make schemes to more appropriate control. Any regulations which redefine or determine the scope of**

“fuel poverty” for the purposes of this Bill should be subject to affirmative procedure; and the Secretary of State’s power in clause 10(6) to disapply or modify any requirement of the scheme should be exercisable only by statutory instrument subject to the affirmative procedure.

14. Clause 15(2)(b) defines what is meant by “the extent to which a person is living in” fuel poverty. Clause 15(4) enables the Secretary of State to alter this definition by regulations subject to negative procedure only. **The Committee considers that this power should also be subject to the affirmative procedure.**

Clause 31(4) – negative procedure

15. It is clear from the Department’s memorandum that instruments under clauses 11, 15(4), 23, 28(5) or 29(2) are intended to be subject to negative procedure. However, clause 31(4) provides that any such instrument “is (unless a draft of the statutory instrument has been approved by a resolution of each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament”. This is in similar terms to the provision in Schedule 2 to the European Communities Act 1972, which gives the Minister making the instrument the choice of whether it should be subject to affirmative or negative procedure.
16. The Committee has in the past made the point that as a matter of principle the choice of procedure should not, except in exceptional cases, be left to the executive (see, for example, paragraphs 10 to 12 of the Committee’s 19th Report for 2003-04 and paragraph 25 of the 3rd Report of the current session). In practice, this principle is normally departed from only where Bills enable material which would otherwise be subject to negative procedure, instead of being subject to that procedure, to be included in an instrument required to be subject to affirmative procedure, provided the whole instrument is subject to affirmative procedure (as, for example, clause 208(4) and (6) of the Equality Bill). This can, provided the discretion is used sparingly and sensibly, assist Parliament in considering a package of measures. But clause 31(4) is not a provision of that kind and **the Committee recommends that the words in brackets be removed.**

MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC.) BILL

17. This Private Member's Bill provides, where a mortgagee claims possession of mortgaged property, for the delivery of possession to be postponed by the court for up to two months to protect the interests of an unauthorised tenant of the property. It also requires the mortgagee to give notice before taking steps to execute a possession order in relation to a dwelling house. The four powers conferred by clause 2 are fully explained in paragraphs 5 to 11 of the memorandum submitted by the Department for Communities and Local Government, printed at Appendix 3, and there is nothing that the Committee wishes to draw to the attention of the House.

CONSTITUTIONAL REFORM AND GOVERNANCE BILL — GOVERNMENT RESPONSE

18. We reported on this bill in our Seventh Report (HL Paper 97) and the Government have now responded by way of a letter to the Chairman from the Rt Hon Michael Wills MP, Minister of State at the Ministry of Justice, printed at Appendix 4.

DRAFT LEGISLATIVE REFORM (INDUSTRIAL AND PROVIDENT SOCIETIES AND CREDIT UNIONS) ORDER 2010

19. This LRO was laid by HM Treasury, together with an Explanatory Document (ED). It had previously been laid in December 2009 but was withdrawn because of drafting errors. This LRO has been laid under the super-affirmative procedure, and under section 1 of the Legislative and Regulatory Reform Act 2006, which focuses on the removal or reduction of a burden.
20. The LRO will amend a number of existing statutes, including the Industrial and Provident Societies Act 1965 – the key registration vehicle for cooperatives, benefit of the community societies and credit unions; the Credit Unions Act 1979, which also makes provisions for credit unions; and the Industrial and Provident Societies Act 1968, which makes further provision about credit unions and industrial and provident societies (IPs).
21. The LRO is linked to the Co-operative and Community Benefit Societies and Credit Unions Act (“the Act”) which received Royal Assent on 18 March 2010. The Treasury say that they form an integrated reform package for the sector, with the measures in the LRO designed to remove or reduce restrictions that hinder the growth and development of societies, and the Bill providing for the future development of the legislation for mutuals, in particular improving governance and administrative arrangements (ED, paragraph 2.12).

Overview of the proposal

22. The draft Order seeks to amend the 1965 Act, the 1979 Act and the 1968 Act to give effect to a number of changes for IPSs and credit unions. These are:

Amendments to the 1965 and 1968 Acts

- Remove the minimum age for membership of a society and reduce the minimum age for an officer of a society, while allowing societies to retain the ability to make contrary provision in their rules (proposal A1);
- Modify the rules on share capital so that the current £20,000 limit only applies to withdrawable shares with no limit on transferable shareholdings (proposal A2);
- Amend the provision on fees for a copy of the society's rules. Current legislation limits the fee to 10 pence. The LRO will increase this limit to £5 for non-members, but with no charge for members. The LRO will also give the Treasury power to vary the £5 limit by negative resolution statutory instrument (proposal A3);
- Facilitate the easier dissolution of registered societies which have become dormant (proposal A4);
- Give societies the flexibility to decide their own accounting year-ends to suit their commercial and financial convenience. The LRO aligns the provisions of the 1965 Act with the equivalent provisions of the Companies Act 2006 (proposal A5); and
- Remove the requirement on IPSs to have interim accounts audited. The LRO will amend the current legislation so that an IPS can publish unaudited interim accounts provided they are clearly identified as such and are published alongside the most recent audited annual accounts (proposal A6).

Amendments to the 1979 Act

- Amend the requirements relating to membership qualifications and rename them "common bonds". The legislation will allow a combination of any number of common bonds; however, where a credit union has a common bond based on locality, membership will be limited to 2 million (proposals B1 and B2);
- Amend the restrictions on non-qualifying members of credit unions. The LRO will repeal the 10 per cent limit on non-qualifying members, allowing credit unions to set their own limits via their own rules (proposal B3);
- Allow credit unions to admit corporate bodies to membership, while capping the proportion of corporate membership (including companies, unincorporated associations or partnerships) to 10 per cent, and limiting the proportion of total assets held by, or loans made to, corporate members (proposal B4);
- Allow credit unions to offer interest on deposits, provided certain requirements are met (proposal B5);

- Abolish the 8 per cent per annum limit on dividends (except on the dissolution of a credit union) (proposal B6);
- Amend the “attachment¹ of shares” provisions so that in the case of unsecured loans, the decision on whether withdrawal will be allowed would be made at the time of the loan (proposal B7); and
- Allow credit unions to charge what they consider a reasonable rate for providing ancillary services to their members, with the intention of bringing credit unions into line with other financial service providers and allowing them to consider providing other services (proposal B8).

Consultation

23. The ED gives an overview of the consultation process (paragraphs 3.4 to 3.11). As part of its review of mutuals legislation, the Treasury informally consulted the sector on modernising the legislative framework for cooperatives and credit unions in Great Britain before publishing its first consultation document in June 2007. The summary of responses was published in December 2007. The Treasury consulted on the proposals which form the basis of the draft Order in July 2008, and published the Government’s response in April 2009. The Treasury also set up a Working Group of experts to help develop policy and to advise on its implementation. The views of the Working Group were invited on the draft Order in May 2009. A near final version of the Order was published on the Treasury’s website in July 2009.
24. The ED says the Treasury received 75 responses to its July 2008 consultation. The responses were from a wide group of stakeholders ranging from individual members of credit unions and IPSs, representative bodies, individual societies, other Government departments and firms providing service to the sector (ED paragraph 3.9). The Working Group has had the opportunity to comment on the draft Order and is content with its provisions. The ED (paragraph 3.34) says there is widespread support for this Order from the sector, and includes a summary of revisions made to the Order following consultation (ED Box 3; page 11).

Tests in the Legislative and Regulatory Reform Act 2006 – proposal B8

25. Section 3 of the 2006 Act requires an LRO to satisfy six preconditions. The Committee has given particular consideration to precondition (e), which is that the provisions do not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise, in relation to proposal B8.
26. Under the 1979 Act credit unions may only charge on a cost-recovery basis for services which are ancillary to accepting a deposit or making a loan, such as making or receiving payments, issuing and administering chequebooks and money transactions. Proposal B8 is described as being to allow credit unions to charge the market rate for providing ancillary services to their members (e.g. ED paragraph 2.14). The Treasury say (ED paragraph 4.112) that they consider the impact on those who have to pay more for ancillary services is

¹ The term “attachment” means the procedure under which credit union members are actively restricted (by administrative procedure) from entering a debit position in relation to their credit union by making a withdrawal of shareholding greater than the amount of any loan

outweighed by the public interest of giving credit unions an additional source of funding and encouraging them to offer ancillary services where they do not do so already. However, in removing a member's right to pay for ancillary services at only a cost recovery rate, proposal B8 does remove a significant and longstanding right from existing members which, it seems to the Committee, those members have a reasonable expectation that they should continue to receive. As such, it appears that the proposal fails to satisfy the precondition set out in section 3(2)(e) of the 2006 Act. **The Committee therefore concludes that proposal B8 should be amended so that it applies only to new members, and not to the existing members of credit unions.**

27. The ED describes proposal B8 as being to allow credit unions to charge "the market rate" for ancillary services (e.g. paragraph 2.14). But the draft LRO itself actually proposes to allow a credit union to charge "such fee as it considers appropriate for" providing ancillary services (article 20). **The Committee draws to the attention of the House the apparently very broad discretion given to credit unions by article 20.**

Delegated powers – proposals B4 and B1/B2

28. Four delegated powers in the LRO require consideration. In implementation of proposal B4, article 15 inserts a new section 5A into the 1979 Act, which introduces new provision for corporate members of a credit union. Under section 5A(2) the corporate members must not exceed 10% of the membership or such a higher percentage as may be specified by an order made by the Treasury. Under section 5A(3) corporate members may not hold more than 25% of shares (other than non-deferred shares), or such higher percentage as may be specified, again by order made by the Treasury. These orders are to be subject to the negative procedure. However, the new provision for corporate membership will change the essential character of a credit union – a proposal which appears not to have been wholly uncontroversial (paragraphs 4.70 to 4.72 of the ED). The delegated powers to change the percentage figures need to be seen in that context. **The Committee therefore recommends that the order-making power in new section 5A(2) and (3) should be subject to the affirmative procedure.**
29. Similarly, in implementation of proposals B1 and B2, article 13 inserts a new section 1B into the 1979 Act. This section includes powers, to be subject to the negative procedure, for the Treasury to specify common bonds which must satisfy the further requirements in section 1B, and to allow the number of potential members to exceed 2 million. **The Committee draws these powers to the attention of the House, in order that consideration can be given to whether they too should be subject to the affirmative procedure.**

Conclusion

30. **The Committee considers that the majority of the proposals in the LRO satisfy the requirements of the 2006 Act, but that proposal B8 does not meet the precondition in section 3(e) that the provision must not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The Committee accordingly recommends that proposal B8**

should be amended so that it does not apply to existing members of credit unions. The Committee also concludes that the delegated powers in article 15 require amendment. In other respects the LRO is appropriate to proceed under the super-affirmative procedure.

DRAFT LEGISLATIVE REFORM (LICENSING) (INTERIM AUTHORITY NOTICES ETC) ORDER 2010

31. This Legislative Reform Order (LRO) has been laid, together with an Explanatory Document (ED), by the Department for Culture, Media and Sport (DCMS). The LRO is laid under both section 1 (removal or reduction of burdens) *and* section 2 (better regulation) of the Legislative and Regulatory Reform Act 2006.
32. The LRO extends some of the time periods set out in the Licensing Act 2003, with the intention of making it more easy for premises to keep on trading following the unexpected death or incapacity of the licence holder; and to allow the police more time before deciding whether to object to certain proposals under the Licensing Act.

Overview of the proposal

33. There is a procedure under the 2003 Act for the continuation of permissions under a premises licence if the licence holder dies or becomes insolvent or mentally incapable, causing the licence to lapse. In these circumstances a person with a freehold or leasehold interest in the premises, or a person connected to the former holder of the licence, may give the licensing authority an “interim authority” notice (IAN), to enable the business to continue trading for up to two months. If no IAN has effect, a person entitled to apply for the grant of a premises licence under section 16 of the 2003 Act may apply for the transfer of the licence to them pending the determination of the application (a reinstatement on transfer or “RT”). At present, both IANs and RTs must be made within 7 days of the death, incapacity or insolvency of the licence holder. The LRO proposes to extend this period to 28 days for both IANs and RTs, in order to reduce the number of failures to secure IANs or RTs in the often difficult period following the death, incapacity or insolvency of the licence holder, and therefore reducing the potential disruption to the carrying on of the business.
34. At present the police have up to 48 hours to object to an IAN. The LRO proposes to change this period to two working days, in recognition of the fact that many police stations are not now staffed seven days a week, and that the current 48-hour period can severely curtail the ability of the police properly to consider an IAN and object if they wish to do so.
35. The LRO also proposes to extend the period during which interim authority can have effect from 2 to 3 months.
36. Finally, the LRO proposes to extend the period during which the police may object to a Temporary Event Notice (TEN) from 48 hours to 2 working days.

Consultation

37. As required the Department conducted a consultation, which ran from 8 December 2009 to 9 February 2010. The Secretary of State has decided only to proceed (for the time being) with the proposals set out above: various other proposals mentioned in the consultation are not included in this LRO. The consultation summary in the ED indicates that there was very broad, though not universal, support for the changes proposed in the LRO. Further details are set out in paragraphs 28 to 67 of the ED.

Conclusion

38. The Government have proposed the negative procedure for this LRO, on the grounds that the proposals are essentially procedural, and uncontentious (ED paragraph 27). While it is true that the consultation responses do not indicate any significant level of dissatisfaction with the proposals, licensing remains a contentious subject. The Committee considers that the House should be required expressly to approve these proposed changes to the licensing regime, and therefore recommends the affirmative procedure.
39. **The Committee considers that the Order meets the tests in the 2006 Act, is not otherwise inappropriate for the LRO procedure, and recommends that it be upgraded to the affirmative procedure.**

APPENDIX 1: CRIME AND SECURITY BILL

Memorandum by the Home Office

Introduction

1. This memorandum identifies every provision for delegated legislation in the Bill and explains its purpose, describes why the power has been left to delegated legislation rather than being included in the Bill, and explains the choice of Parliamentary scrutiny procedure provided for each power.

Clause 7: Power to amend the list of qualifying offences for the purpose of the provisions on the taking and retention of DNA and other material

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

2. New section 65A(3) to be inserted into the Police and Criminal Evidence Act 1984 (“PACE”) permits the Secretary of State to make an order amending the list of qualifying offences specified in subsection (1) of that section. Under provisions in this Bill, it will be possible to take fingerprints and DNA samples from people convicted of a qualifying offence abroad on their return to England and Wales (see new sections 61(6D)(b) and 63(3E)(b) of PACE inserted by clause 3). There will also be no time limit on how long after the conviction those convicted of a qualifying offence (whether in England and Wales or elsewhere) can be required to attend a police station for the purpose of having their fingerprints or sample taken (see paragraphs 3(5) and 11(5) of new Schedule 2A to PACE inserted by clause 6).

3. The classification of an offence as a “qualifying offence” is also relevant for the purposes of provisions in this Bill on the retention, destruction and use of fingerprints, DNA and impressions of footwear. 16 and 17 year olds arrested but not convicted of a qualifying offence will have their profile and/or fingerprints retained for 6 years rather than the 3 year period which will apply to those 16 and 17 year olds arrested for, but not convicted of, all other offences and children under 16 whatever the offence. Young people under 18 who have one conviction for an offence other than a qualifying offence will have their profile and/or fingerprints retained for 5 years rather than the indefinite period which will apply to all other convictions.

4. An order under this clause would be subject to the affirmative resolution procedure. The Department considers that the affirmative resolution procedure is appropriate because the power allows for the amendment of primary legislation and because of the consequences of an offence being added to or removed from the list of qualifying offences as outlined above. This approach also accords with that taken in section 130 of the Sexual Offences Act 2003 (power to amend the list of offences in Schedule 3 and 5 to that Act) and section 41 of the Counter-Terrorism Act 2008 (terrorism offences).

Clause 13: Power to amend the list of qualifying offences for the purpose of the provisions on the taking and retention of DNA and other material in Northern Ireland

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

5. New Article 53A to be inserted into the Police and Criminal Evidence (Northern Ireland) Order 1989 (“the 1989 Order”) permits the Secretary of State to make an order amending the list of qualifying offences specified in paragraph (1) of that Article. Under provisions in this Bill, it will be possible to take fingerprints and DNA samples from people convicted of a qualifying offence abroad on their return to Northern Ireland (see new Articles 61(6D)(b) and 63(3D)(b) of the 1989 Order inserted by clause 9). There will also be no time limit on how long after the conviction those convicted of a qualifying offence (whether in Northern Ireland or elsewhere) can be required to attend a police station for the purpose of having their fingerprints or sample taken (see paragraphs 3(5) and 11(5) of new Schedule 2A to the 1989 Order inserted by clause 12).

6. The classification of an offence as a “qualifying offence” is also relevant for the purposes of provisions in this Bill on the retention, destruction and use of fingerprints, DNA and impressions of footwear. 16 and 17 year olds arrested but not convicted of a qualifying offence will have their profile and/or fingerprints retained for 6 years rather than the 3 year period which will apply to those 16 and 17 year olds arrested for, but not convicted of, all other offences and children under 16 whatever the offence. Young people under 18 who have one conviction for an offence other than a qualifying offence will have their profile and/or fingerprints retained for 5 years rather than the indefinite period which will apply to all other convictions.

7. An order under this clause would be subject to the negative resolution procedure. The Department considers that the negative resolution procedure is appropriate because, unlike the provisions which will apply in England and Wales, the order will not be amending primary legislation.

Clause 22: Power to make provision for the destruction of material taken before commencement

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

8. This clause requires the Secretary of State to make an order providing for the destruction of fingerprints, samples, impressions of footwear and DNA profiles taken prior to the coming into force of relevant provisions of this Bill, if such material would have been destroyed under those provisions had they been in force when the material was taken. Effectively, therefore, it provides for the retention periods for different categories of data that are set out in the Bill to be applied to material that has already been taken.

9. The Department considers that it is appropriate for the destruction of such material to be set out in secondary legislation because a very large amount of material relating to unconvicted people is currently retained – including some 850,000 DNA profiles on the National DNA Database – and sufficient time needs to be allowed for the exercise of identifying and destroying this material. The order-making power will allow the Secretary of State to set a realistic deadline for that destruction date, without delaying the implementation of the new retention and destruction regime in relation to material taken after the coming into force of these provisions.

10. The Department has considered whether this same objective could be achieved if the Bill provided for suitable transitional provisions to be included in the commencement order which brought the new regime into force. However it has concluded that it is preferable to proceed by way of a separate order, because this topic is sufficiently important to warrant Parliamentary scrutiny in the form of the negative procedure (as opposed to a commencement order, which would normally not be subject to such scrutiny).

11. Subsection (2) of this clause makes equivalent provision in relation to material obtained by the Service police in each of the Armed Forces.

Clause 31: Power to issue guidance on the exercise of police functions in relation to domestic violence protection notices and orders

Power conferred on: Secretary of State

Power exercisable by: Issuing of guidance

Parliamentary procedure: None

12. Clauses 24 to 30 make provision in relation to alleged perpetrators of domestic violence. A senior police officer may issue a domestic violence protection notice (DVPN) in defined circumstances. After a DVPN is issued, the constable must apply to a magistrates' court for a domestic violence protection order (DVPO). The purpose of the DVPN and DVPO is to protect a victim of domestic violence by prohibiting the suspected perpetrator from molesting the victim, and by restricting the suspected perpetrator's access to, and residence in, the victim's home. The clauses make provision for the police to issue the DVPN and give notice of the hearing of the application for the DVPO, and for a power of arrest in the event of a breach of the DVPN or DVPO.

13. Clause 31 allows the Secretary of State to issue guidance to which the police must have regard in exercising their functions under the clauses. The guidance would deal with operational matters of a practical nature. The clause requires that before issuing the guidance, the Secretary of State must consult with the Association of Chief Police Officers, the National Policing Improvement Agency and such other persons as he thinks fit. In these circumstances it is considered that the scrutiny of Parliament is not necessary.

Clause 33: Power to make pilot schemes in relation to domestic violence protection notices and orders

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

14. This clause allows the Secretary of State to bring into force by order any of the clauses relating to DVPOs and DVPNs for a period of time specified in the order. An order may make different provision for different areas of the country, and there may be more than one order. The purpose is to allow pilot schemes to be conducted to assess the effectiveness of the provisions in practice.

15. In accordance with normal practice, no Parliamentary scrutiny is considered necessary for these commencement orders. Parliament will already have approved the provisions to be commenced by enacting them, and commencement by order is merely a means of bringing the provisions into force at a convenient time and to the extent thought necessary to conduct the pilot schemes effectively.

Clause 40(2): Power to set out requirements for a report into a person's family circumstances before an application is made for an ASBO under section 1 of the Crime and Disorder Act 1998

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

16. Clause 40 ensures that before applying for an anti-social behaviour order ("ASBO") under section 1 of the Crime and Disorder Act 1998 ("CDA") in respect of an individual aged under 16, the applicant authority must prepare a report on the individual's family circumstances. The court, when considering whether to make a parenting order under sections 8 and 9 CDA, or when making a parenting order under new section 8A (inserted by the Bill), must take into account this report. The report must be prepared in accordance with regulations made by the Secretary of State. These regulations will set out details of the content of the report and include the topics that any report should address, such as education, details of family circumstances and supportiveness of family environment.

17. The Department is mindful that different services are available in different areas and that reports should be tailored not only to the individual's circumstances but should also reflect the services available. Therefore the Department wishes to retain the flexibility for applicant authorities to use all the information available to them in preparing these reports, while at the same time setting out a minimum content that the report must address. It is considered that this is best done in regulations which will enable the Secretary of State to adapt both the minimum and desirable content as and when new initiatives are shown to be helpful in this area.

18. The Department considers that the negative resolution procedure provides an adequate level of Parliamentary scrutiny because the regulations can only set out

the detail whereas the overall purpose of the report is set out in the Bill – namely that the report is on the individual’s family circumstances and it must be taken into account by the court.

Clause 42(2): Power to designate additional activities as activities requiring to be licensed by the Security Industry Authority

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

19. Clause 42 amends the Private Security Industry Act 2001 (“the 2001 Act”) to require businesses carrying out the immobilisation, restriction or removal of vehicles to be licensed by the Security Industry Authority (“the SIA”). New section 4A(2)(c) of that Act, inserted by that clause, contains a power for the Secretary of State to designate additional activities of a security operative business, from the list set out in Part 1 of Schedule 2 to the 2001 Act, as licensable by order.

20. By virtue of section 24 of the 2001 Act, such orders can make different provision for different cases, and can contain incidental, supplemental, consequential or transitional provision.

21. An order under new 4A(2)(c) would be subject to the negative resolution procedure, which the Department considers appropriate as the provision mirrors that which already exists for individual licences at section 3(3) of the 2001 Act.

22. New section 4A(3) provides that in the application of the new provision to Scotland, an order under section 4A(2)(c) designating further activities of a security operative would be made by the Scottish Ministers, but following consultation of the Secretary of State. This again mirrors existing provision in respect of individual licences in section 3(3A) of the 2001 Act.

23. Under section 24(3A) of the 2001 Act, an order or regulations made by the Scottish Ministers will be subject to negative resolution in the Scottish Parliament.

Clause 42(2): Power to prescribe circumstances in which there is an exemption from the licensing requirement where suitable alternative arrangements exist

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

24. Clause 42 also inserts a new section 4B into the 2001 Act, which enables the Secretary of State to provide in regulations for circumstances in which there is an exemption from the new licensing requirement where he is satisfied that suitable alternative arrangements exist such that a licensing requirement is unnecessary.

25. By virtue of section 24 of the 2001 Act, such regulations can make different provision for different cases, and can contain incidental, supplemental, consequential or transitional provision. They would be subject to the negative resolution procedure, which the Department considers appropriate as the

provision mirrors that which already exists for individual licences at section 4 of the 2001 Act.

Clause 42(4): Power to approve a nomination by the Security Industry Authority of a body or scheme of which a business granted a licence must be a member

Power conferred on: Secretary of State

Power exercisable by: Approval

Parliamentary procedure: None

26. Clause 42(4) inserts new subsections (2A) to (2C) into section 9 of the 2001 Act, which enables the Secretary of State to prescribe the conditions on which a licence must be granted. Section 9(2A) allows a condition prescribed or imposed in relation to a licence to include a requirement for the licence holder to be the member of a nominated body or scheme, and section 9(2B) states that the nomination for these purposes is made by the SIA with the approval of the Secretary of State. Where those carrying out relevant activities are in Scotland, the Secretary of State must consult the Scottish Ministers before approving a nomination.

27. The Department considers that, to the extent that such an approval constitutes delegated legislation, it is appropriate for it to be exercised without any Parliamentary procedure, as it is essentially technical and regulatory in nature.

Clause 44(2): Requirement for Secretary of State to make provision for appeals where a charge has been made for vehicle release

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

28. Clause 44(2) inserts new section 22A into the Private Security Industry Act 2001 ('the Act'), providing for appeals in relation to activities to which paragraph 3 of Schedule 2 to the Act (demanding or collecting a charge for removal of a vehicle immobilising device), and paragraph 3A of Schedule 2 (demanding or collecting a charge as a condition of the release of a vehicle) apply.

29. New section 22A requires the Secretary of State to make regulations in relation to appeals. The regulations are to enable a person who would otherwise be entitled to remove the immobilised vehicle to appeal against the fee charged before the vehicle is released to them.

30. Subsections (3) and (4) provide for the grounds of appeal to be specified in regulations, which may include in particular contravention of a code of practice issued by the SIA, or breach of a condition of a licence granted under the Act.

31. Subsections (5) and (6) require the regulations to provide for the person to whom an appeal may be made (which could be a body established by the Secretary of State under the regulations or an existing body under another enactment).

32. Subsection (7) sets out various matters for which the regulations may make further provision, including procedural conditions to be satisfied before an appeal may be made (such as requiring initial complaint to be made to the business concerned); appeal procedure, enforcement of appeal decisions, and fees and costs. Subsection (8) enables decisions about payment of costs to be determined by the person to whom the appeal is made instead of by the regulations.

33. Clause 44 also amends section 24 of the Act to include new section 22A so that the regulations are subject to negative resolution procedure, and may contain incidental, supplemental, consequential or transitional provision.

34. The Department considers that it is appropriate for this matter to be left to delegated legislation subject to negative resolution, because it is largely procedural and technical in nature, and will enable the provisions to be readily refined and improved in the light of experience.

Clauses 47-54: Power to make a Victims of Overseas Terrorism Compensation Scheme.

Power conferred on: Secretary of State

Power exercisable by: Statutory scheme

Parliamentary procedure: Affirmative resolution for the first scheme and for changes to the scheme covering those matters set out in clause 54(3).
Negative resolution for all other changes to the scheme.

35. Clause 47 provides the Secretary of State with the power to make a scheme to make payments to victims of designated terrorist acts to be known as the “Victims of Overseas Terrorism Compensation Scheme”. The Scheme made under these provisions will broadly be based upon the domestic Criminal Injuries Compensation Scheme which is made under the enabling powers in the Criminal Injuries Compensation Act 1995. Clauses 48 to 52 of the Bill set out the matters in respect of which provision may be included in the Scheme, including eligibility criteria, how payment made under the Scheme are to be determined, the circumstances in which payments may be withheld, provision for the review of decisions taken in respect of applications and provision for rights of appeal. Such provisions will be complex and details and subject to periodic change and in these circumstances are properly a matter to be left to a subordinate instrument (in this case a statutory Scheme).

36. Clause 54 sets out provision for parliamentary control of the Scheme. The first such Scheme will be subject to the affirmative resolution procedure (*subsections (1) and (2)*). The parliamentary procedure applicable to any alterations to a Scheme will depend on the nature of the proposed changes to the Scheme. The affirmative resolution procedure will apply where the proposed alterations relate to the eligibility criteria for applicants, the determination of awards, the circumstances in which payments may be withheld or withdrawn, any maximum limit on the level of awards, and the review or appeals procedure (*subsections (3) and (4)*). In all other cases the negative resolution procedure will apply (*subsections (5) to (7)*). These provisions are analogous to those applicable to the Criminal Injuries Compensation Scheme under the Criminal Injuries Compensation Act 1995.

37. There are other precedents for the details of compensation schemes to be set out in subordinate instruments including the Armed Forces Compensation

Scheme made under the Armed Forces (Pensions and Compensation) Act 2004 and the Principal Civil Service Pension Scheme made under the Superannuation Act 1972.

Clause 55: Power to restrict sale and supply of alcohol

38. Under new provisions in this Bill, licensing authorities will have the power to make an order restricting the sale and supply of alcohol between the hours of 3am and 6am in either the whole or a part of their area; such an order may be expressed to apply on every day, or only on certain days of the week. The effect of an order is that any premises licence, club premises certificate or temporary event notice does not (unless specific exemptions apply) authorise the sale and supply of alcohol between those times in the early morning. Licensing authorities may only make an order if they consider it necessary to promote the licensing objectives in the Licensing Act 2003 (“the 2003 Act”).

Clause 55(2): Power to set out requirements for the proposed order

Powers conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

39. New section 172A(6) to be inserted into the Licensing Act 2003 permits the Secretary of State to make regulations prescribing the form and content of the order which the licensing authority proposes to make under new section 172A(1). The regulations are subject to the negative resolution procedure (see section 197(3) of the 2003 Act.) It is important that the detailed terms of the proposed order are clearly understood by those who may be affected by, or have an interest in, the making of the proposed order (e.g. premise license holders, local residents or businesses and public authorities with a particular interest in and expertise in relation to the promotion of the licensing objectives). In tandem with the requirement to advertise the proposal (see below), this will inform them in deciding whether they should make relevant representations (e.g. representations which are about the likely affect of the proposed order on the licensing objectives) to the licensing authority about the proposal.

40. The Department considers that it is appropriate for the regulations to set out the detailed format and content of the proposed order whereas the overall purpose of, and process by which, the proposed order is made is set out in the Bill. The Department will also consult on the draft regulations. This ensures that the Department will be able to finalise this detail in light of responses to that consultation.

41. The Department, therefore, considers that the negative resolution procedure provides an adequate level of Parliamentary scrutiny. Moreover, this is similar to the division between primary and secondary provisions in other, comparable areas of the 2003 Act (for example in relation to prescribing the content of forms for applications for premises licences or club premises certificates).

Clause 55(2): Power to set out requirements for the proposed order

Powers conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

42. New section 172B(1)(a) to be inserted into the 2003 Act permits the Secretary of State to make regulations (by negative resolution) prescribing the manner in which the proposed order is advertised. It is important that the licensing authority's proposal is brought to the attention of those who may be affected by or have an interest in the making of the proposed order (examples of these persons are set out above). This will inform them in deciding whether they should make relevant representations to the licensing authority about the proposal.

43. The Department considers that it is appropriate for the regulations to set out the detailed means by which the proposed order will be advertised. The overall purpose of, and process by which, the proposed order is made is set out in the Bill. This includes the requirement to advertise the proposal. The Department will also consult on the draft regulations and this ensures that the Department will be able to finalise this detail in light of responses to that consultation.

44. The Department, therefore, considers that the negative resolution procedure provides an adequate level of Parliamentary scrutiny. This is, again, similar to the use of negative resolution regulations in other areas of the 2003 Act where processes are required to be advertised (see, for example section 17(5)(a)).

Clause 55(2): Power to set out requirements for the proposed order

Powers conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

45. New section 172B(2)(c) to be inserted into the 2003 Act permits the Secretary of State to make regulations (by negative resolution) prescribing the form, manner and timing of relevant representations by those affected by or interested in the making of the proposed order. A licensing authority must hold a hearing to consider any relevant representations unless the authority and each person who made such representations agree that a hearing is unnecessary. The availability of a hearing represents an important part of the process by which a proposed order is made by ensuring e.g. that the rights of those affected by the proposal are addressed.

46. The Department considers that it is appropriate for the regulations to set out the detailed content of, and the means and time by which, relevant representations should be made. The overall purpose of, and process by which, the proposed order is made is set out in the Bill. The Department will also consult on the draft regulations and this ensures that the Department will be able to finalise this detail in light of responses to that consultation.

47. The Department considers that, as in the previous cases above, the negative resolution procedure represents a suitable level of Parliamentary scrutiny for

matters of detail of this kind. It is, again, similar to the treatment of comparable issues elsewhere in the Act (see, e.g. section 17(5)(c)).

Clause 55(2): Power to set out requirements for the proposed order

Powers conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

48. New section 172B(5)(j) to be inserted into the 2003 Act permits the Secretary of State to make regulations (by the negative resolution procedure) prescribing additional responsible authorities. A responsible authority is one of the classes of person who can make relevant representations in relation to the proposal to make an order. A responsible authority has this status by virtue of being one of the public authorities with a particular interest in and expertise in relation to the promotion of the licensing objectives. They include e.g. the police and fire authority for the area in which licensed premises are situated, those parts of the local authority for that area which exercise health and safety, environmental and child protection functions.

49. The Department considers that it is appropriate for the regulations to be able to add a responsible authority. This mirrors the existing power in the 2003 Act to prescribe additional responsible authorities in respect of other processes e.g. applications for the grant or review of an authorisation (see, e.g. section 13(4)(i)). The issue of what, if any, additional responsible authorities should be added to the list will be subject to public consultation before any regulations are made.

50. The Department, considers that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny for this matter, in line with existing, comparable provisions in the Act.

Clause 55(2): Power to set out requirements for publication of the order

Powers conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

51. New section 172C(2) to be inserted into the 2003 Act permits the Secretary of State to make regulations (by the negative resolution procedure) prescribing the form, manner and timing of the publication of the order once it has been made. The order will restrict the sale and supply of alcohol under existing and future authorisations within the geographical area and the times specified in it. It is, therefore, important that the existence of the order is brought to the attention of, and if necessary made available to, those who may be affected by or have an interest in compliance with it. Subject to consultation, the Department considers there may be a need to ensure that licensing authorities set out details of the order in a public forum (likely to be their websites, where available), and to require them to make hard copies of the order available to members of the public on request.

52. The Department considers that it is appropriate for the regulations to set out the detailed means by which the order will be published and otherwise made

available. The overall requirement for this is set out in the Bill. The regulations will be subject to public consultation.

53. The Department considers that the negative resolution procedure provides an adequate level of Parliamentary scrutiny for these detailed matters of form and process.

Clause 55(2): Power to set out exceptions to the order

Powers conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution

54. New section 172E(1) to be inserted into the 2003 Act permits the Secretary of State to make regulations prescribing cases or circumstances, by reference to particular kinds of premises (e.g. hotels which sell and supply alcohol to residential guests but not to the general public between 3am and 6am) or particular days (e.g. New Year's Day), to which an order does not apply.

55. The Department considers that it is appropriate for there to be a power for regulations to prescribe exceptions of these kinds. The new provisions in the Bill are being introduced in response to statistics which evidence an increase in alcohol-related crime between 3am and 6am and are an attempt to balance the powers available to licensing authorities to address this issue where it becomes necessary and the rights of those that may be affected by the making of an order. However, the Department is of the view that there will be specific situations and occasions (such as those mentioned above) where the existing *status quo* of the 2003 Act ought to be maintained, even if the licensing authority is of the view that an early hours order is otherwise necessary in the area concerned. In such cases, an early hours order will not operate, but all of the other safeguards the Act provides (such as reviews, closure orders etc.) will remain available.

56. The Department considers that the negative resolution procedure provides an adequate level of Parliamentary scrutiny in this instance. The Department notes that regulations made under section 173 of the 2003 Act, enabling the Secretary of State to prescribe places at which licensable activities are not to be treated as being carried on at all, is also subject to the negative resolution procedure. The Department is aware that an order under section 172 of the 2003 Act (Relaxation of opening hours for special occasions) is subject to the affirmative procedure. However, unlike section 172 which enables the Secretary of State to extend opening hours, with the consequent possibility of increased risks to the public etc. (e.g. through noise nuisance), regulations making exceptions to an order under section 171A would have (as noted above) the effect of restoring the position in relation to excepted cases or circumstances which existed prior to the order being made. In other words, the power could only be used to remove the effect of a blanket early hours prohibition in defined cases, but not in any other way affect the risks to the licensing objectives from activities authorised under the Act. In addition, regulations made under the power will be subject to full public consultation.

Clause 59: Commencement

Power conferred on: *Secretary of State and, in relation to provisions on the private security industry, the Scottish Ministers*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *None*

57. This clause contains a standard power to bring provisions of the Bill into force by commencement order. By virtue of subsections (4) and (5), an order can make different provision for different purposes and can make transitional provision and savings.

58. As is usual with commencement orders, they are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.

Home Office

March 2010

APPENDIX 2: ENERGY BILL

Memorandum by the Department for Energy and Climate Change

Introduction

1. This memorandum has been prepared by the Department of Energy and Climate Change and relates to the Energy Bill. It identifies the provisions in the Energy Bill which confer power to make delegated legislation. In each case 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. In the interests of transparency, the Memorandum also includes similar descriptions for certain other powers conferred by the Bill which are not strictly legislative but which the Department felt the Committee should be aware of.

2. The term Ofgem is used throughout this document to refer to both the Office for Gas and Electricity Markets (Ofgem) (the regulator of the downstream gas and electricity markets) and the Gas and Electricity Markets Authority (GEMA), a group of executive and non-executive members who govern Ofgem.

Background

3. The legislative framework for the energy sector is set out in a number of pieces of primary legislation, principally the:

- Gas Act 1986
- Electricity Act 1989
- Utilities Act 2000
- Energy Act 2004
- Energy Act 2008
- Climate Change Act 2008

4. The Government's long-term energy and climate policy objectives are set out in *The UK Low Carbon Transition Plan – a national strategy for climate and energy* published in July 2009². This strategy will deliver cuts in carbon emissions by 34% on 1990 levels by 2020 (18% on 2008 levels) on the way to achieving a reduction of at least 80% by 2050.

5. The Transition Plan acknowledges the importance of cutting emissions sustainably. This means ensuring our energy needs continue to be met, ensuring the costs, especially those borne by the most vulnerable households, of moving to a low-carbon economy are shared fairly and ensuring that we maximise the economic opportunities for UK businesses to develop and sell the green technologies of the future.

Overview of the Bill

6. The Transition Plan is being taken forward through a broad programme of activities and new measures, both legislative and non-legislative. This Energy Bill

² http://www.decc.gov.uk/en/content/cms/publications/lc_trans_plan/lc_trans_plan.aspx

implements some of the measures outlined in the Plan that require primary legislation. It will establish a financial support mechanism for Carbon Capture and Storage (CCS) commercial-scale demonstration projects, introduce mandated social price support for vulnerable consumers, and strengthen the powers of Government and the regulator to ensure that the energy markets are working fairly for consumers and delivering secure low-carbon energy supplies.

7. The Bill is divided into four Parts:

Part 1 – Carbon Capture and Storage

These provisions create the framework for a financial mechanism to support CCS demonstration projects. It is currently expected that the mechanism will be used to support four CCS demonstration projects on coal-fired power stations, including the winner of the original competition for a CCS demonstration project launched in 2007. The mechanism will, should it be needed, be able to provide support for additional CCS capacity to be fitted to these initial demonstration projects. There will be a levy imposed on electricity suppliers and funds will be disbursed through assistance schemes or via contractual means to projects selected by a competitive process.

In addition, there is a requirement for the Government to prepare regular reports on the progress that has been made on the decarbonisation of electricity generation in Britain and the development and use of CCS.

Part 2 – Schemes for Reducing Fuel Poverty

These provisions create the framework for schemes that will oblige energy suppliers to provide benefits to vulnerable consumers, for the purposes of reducing fuel poverty, when the current Voluntary Agreement³ with energy suppliers comes to an end in March 2011. The intention is, subject to consultation, that this will be in the form of an electricity bill rebate, to a specified group of households.

Part 3 – Regulation of the Gas and Electricity Markets

This Part contains a number of provisions relating to the energy market framework:

- Clarification of Ofgem's principal objective in relation to tackling climate change, ensuring secure energy supplies and the role of measures other than competition in protecting the interests of consumers;
- Powers for the Secretary of State to introduce a licence condition for electricity generators that will make it easier for Ofgem to address certain issues arising from the exploitation of market power where there are constraints on the transmission of electricity;
- Extension of the time limit within which Ofgem can impose financial penalties for breaches of licence conditions from twelve months to five years;
- Introduction of a power for the Secretary of State to modify energy supply licences to specify a period within which customers must be informed of

³ Government negotiated an agreement with energy suppliers that will deliver £100m spend on social programmes for vulnerable consumers in 2008-9, rising to £125m in 2009-10 and to £150m in 2010-11.

changes to the terms of their gas and/or electricity contracts including any changes to the charges made under those contracts; and

- Introduction of a power for the Secretary of State to address situations where cross-subsidies between gas and electricity suppliers lead to certain groups of consumers being disadvantaged.

Part 4 – Final Provisions

This Part contains provisions concerning the general duties of the Secretary of State and Ofgem, statutory instruments, licence modifications, interpretation and the extent, commencement and short title of the Bill. It also introduces a Schedule containing consequential amendments to the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000.

PART 1: CARBON CAPTURE AND STORAGE AND DECARBONISATION

Overview of the carbon capture and storage (CCS) provisions

8. Carbon Capture and Storage (CCS) is a process involving the capture of carbon dioxide from the burning of fossil (or other combustible) fuels, its transportation, and permanent storage in underground geological formations, for example in old oil and gas fields, or in saline aquifers. CCS can be used to reduce the carbon dioxide emissions from a range of industrial processes, including coal-fired and gas-fired electricity generation, by around 90%.

9. In June 2009 the Government published a consultation document: *A Framework for the Development of Clean Coal*.⁴ Amongst other things, this consultation set out proposals to provide financial support for four commercial-scale CCS demonstration projects on coal-fired power stations, including the winner, yet to be announced, of the competition launched in 2007. In the response to this consultation⁵, the Government announced that this financial support mechanism would also provide funding, if required, for the retrofit of CCS to the full capacity of power stations hosting demonstration projects funded by the Government.

10. The objective of these provisions is to set up a financial support mechanism to deliver funding for four commercial-scale CCS demonstration projects on coal-fired power stations and, should it be needed, provide funds for the fitting of additional CCS capacity to those projects at a later date.

11. The legislation provides the Secretary of State with a power to impose a levy on electricity supplies, to be paid by electricity suppliers. The Government intends that the levy will be collected by an administrator, initially Ofgem, who will also be responsible for enforcement.

12. The legislation also provides for the payment of financial assistance, either directly by the Secretary of State (which would be done under contractual arrangements) or by an administrator through ‘assistance schemes’, which will set out the obligations that CCS project developers will need to meet together with specific arrangements for financial assistance and the functions of the

⁴ “A Framework for the Development of Clean Coal”, Department for Energy & Climate Change, 17 June 2009

⁵ “A Framework for the Development of Clean Coal: consultation response”, Department for Energy & Climate Change, 9 November 2009

administrator. Under these provisions, financial assistance can be given for CCS demonstration and additional CCS use at any commercial-scale electricity generating station; however, as set out above, the Government's intention is that the financial support mechanism will be used to support demonstration at 4 coal-fired power stations.

Clause 1: Financial assistance

Power conferred on: Secretary of State

Power exercised by: Scheme (not by Statutory Instrument)

Parliamentary procedure: Laid before Parliament

13. This clause allows the Secretary of State to make an 'assistance scheme' (subsections (3) and (4)). These schemes enable the administrator (as defined in clause 6) to give the participants in one or more CCS demonstration projects financial assistance. These schemes may also specify financial assistance to be provided for "additional CCS use" (as defined in clause 7). The Government intends that financial assistance for additional CCS use will fund the retrofit of additional CCS capacity to the power stations that already have a CCS demonstration project receiving support. The Secretary of State may also amend or revoke (clause 2(3)) an assistance scheme.

14. The Secretary of State must consult the administrator, the Scottish Ministers (if the assisted activities are in Scotland) and such other persons as he thinks appropriate before making, amending or revoking an assistance scheme. There is also a requirement to gain consent from participants in assistance schemes before making, amending or revoking a scheme, unless (in the case of amendment or revocation) the scheme allows for the unilateral exercise of the powers.

15. These schemes would set out the detailed arrangements under which a CCS demonstration project (or "additional CCS use") receives funding. This scheme approach, rather than a contractual model, allows the Secretary of State to set a framework administered by Ofgem, drawing on its expertise as the electricity licensing authority. Like the terms of a contract, the obligations imposed on developers by a scheme may be project specific, and will form part of a package reached following a competitive selection process. They are also likely to contain a good deal of technical detail. As such, the Department does not believe that it would be appropriate to subject them to a Parliamentary procedure. The Secretary of State must, however, lay before Parliament a new or amended assistance scheme and a memorandum of revocation should a scheme be revoked.

16. Assistance schemes may make provision in a wide range of matters (clause 2(2)), including:

- activities to be carried out in a particular CCS demonstration project (or for additional CCS use),
- financial assistance to be provided,
- administration of the scheme,
- measurement and assessment of progress,
- postponement, reduction, withdrawal and repayment of financial assistance,

- payments to the administrator,
- disclosure, audit and provision of information,
- changes to the participants and activities of a project,
- termination of a scheme,
- compliance with the scheme, and
- reviews and appeals.

Clause 3: Regulations relating to assistance schemes

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

17. This clause confers on the Secretary of State a power to make regulations about assistance schemes. This power will enable the Secretary of State to set the broad framework within which these assistance schemes would operate. The regulations may make provision about any of the matters specified in clause 2(2) (see paragraph 16 above). In addition, regulations may specify the imposition of penalties, not including the creation of criminal offences, for non-compliance.

18. The consent of all participants must be gained if regulations are made which apply to an existing assistance scheme. This gives developers the certainty that if they consent to be part of an assistance scheme, the framework within which that scheme operates cannot be changed without their agreement. There is also a requirement to consult the administrator of the scheme, the Scottish Ministers and such other persons as the Secretary of State considers appropriate before making regulations. This consultation may occur before or after commencement of this power.

19. The Department believes the flexibility to make regulations, rather than specify the detail on the face of the Bill, is appropriate given the technical nature of the financing mechanism. As a novel technology, some of the processes of CCS are still being developed. The Department believes that it would be prudent to allow adequate flexibility in how to set up the financial support mechanism so that it can be adapted as experience develops. Furthermore, the framework may need to reflect differences in the CCS demonstration projects (the use of different capture technologies, for example) which are selected to receive financial assistance.

20. The Department considers the affirmative resolution procedure to be an appropriate level of scrutiny and is in line with the Parliamentary procedures associated with other financial support mechanisms for low carbon technologies such as the Renewable Heat Incentive introduced in the Energy Act 2008.

Clause 4: Electricity supply levy

Power conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Affirmative resolution*

21. This clause confers on the Secretary of State a power to make regulations providing for a levy, to be charged on electricity supply and paid by electricity suppliers, for the purpose of providing financial assistance to CCS demonstration projects (including for additional CCS use at projects that are already receiving financial assistance for demonstration). These regulations may include a number of different elements, including:

- defining electricity supply and electricity suppliers for the purposes of the levy,
- payment and administration of the levy,
- audit and provision of information,
- enforcement of the levy,
- imposition of penalties (not including the creation of criminal offences),
- insolvency, and
- reviews and appeals.

22. The Department believes the flexibility to make regulations in this regard, rather than specify the detail on the face of the Bill, is appropriate to allow the levy mechanism to be amended to cater for technological and economic changes during the lifetime of the CCS demonstration project(s).

23. Regulations will be made using the affirmative resolution procedure which provides Parliament with a level of scrutiny commensurate with a levy-making power. There is also a statutory requirement for the Secretary of State to consult with the administrator and such other persons as he thinks appropriate before making regulations. This consultation may occur before or after commencement of this power.

Clause 6: The administrator

Power conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Negative resolution*

24. This clause provides that Ofgem is the administrator of both the electricity supply levy and the financial assistance schemes. The Secretary of State can make regulations to permit another public body (including the Secretary of State) to become the administrator.

25. Before making regulations, the Secretary of State must consult the administrator and such other persons as the Secretary of State considers appropriate.

26. Regulations will be made using the negative resolution procedure; however, the affirmative resolution procedure must be used if the Secretary of State makes provision to change the administrator in regulations which also make provision under other clauses of Part 1, or which amend primary legislation (clause 31(3)). The Department considers the negative resolution approach strikes the right balance between giving Parliament an opportunity to scrutinise whilst recognising that regulations relating solely to the designation of an administrator are essentially administrative in nature.

PART 2: SCHEMES FOR REDUCING FUEL POVERTY

Clause 9: Schemes for reducing fuel poverty

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

27. This clause confers on the Secretary of State a power to make regulations which put in place schemes for the purpose of reducing fuel poverty. These schemes would require licensed electricity or gas suppliers to provide benefits (which may be in the form of financial benefits, goods or services) to customers. In particular, schemes will be targeted at customers belonging to a “fuel poverty risk group” (defined as where the proportion of the group living in fuel poverty is higher than the proportion of the population living in fuel poverty in Great Britain as a whole).

28. As provided for in Clauses 9 and 10, such schemes may specify:

- which groups of customers will receive benefits and the criteria for determining this,
- the form of these benefits and the ways in which they are provided, which may include rebates, discounted tariffs and/or the issuing of vouchers to be redeemed,
- the amount of any benefit to be provided and how that is calculated,
- the total amount of such benefits to be provided by all suppliers and the aggregate amount of benefits to be provided by any one energy supplier, and
- arrangements for identifying customers, and arrangements for bringing the scheme to the attention of those customers.

29. Clause 14 requires schemes to include a duration period. It also prevents the review, amendment or revocation of a scheme, or the introduction of another scheme applying to the same energy suppliers, except under specific circumstances that are set out in the scheme itself.

30. The Department believes that the flexibility of using regulations to make schemes, rather than specifying the details on the face of the Bill, is appropriate given the dynamics of the electricity and gas retail markets. This flexibility would allow the Department to respond to new information about how best to target and help the fuel poor and to respond to any changing circumstances such as significant energy price increases, therefore ensuring that the terms of the schemes

can best deliver the objective of reducing fuel poverty. Before regulations are made, the Secretary of State must consult Ofgem, licensed electricity or gas suppliers (or both, in the case of a scheme which applies to both) and such other persons as the Secretary of State considers appropriate, and obtain the consent of HM Treasury (clause 14(1) and (3)).

31. These regulations will be made using the affirmative resolution procedure. This provides Parliament with a level of scrutiny that the Department believes is appropriate given that the schemes will be providing a financial benefit.

Clause 11: Reconciliation mechanism: regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative resolution

32. It is possible that one or more supplier could have a disproportionate number of eligible people in their customer base. Depending on the design of the scheme, this could lead to an inequitable distribution of costs (i.e. amount of benefits provided to their customer base) amongst suppliers. If that happened it would disadvantage some suppliers and give an unfair advantage to others. In such situations, the Department may wish to put in place a reconciliation mechanism to redistribute some or all of the costs of the scheme.

33. Subsection (1) of this clause confers on the Secretary of State a power to make regulations which make provision for the establishment and operation of a reconciliation mechanism by Ofgem, or an alternative reconciliation scheme operator, which would allow such a redistribution to take place. A reconciliation mechanism is defined as the arrangements for ensuring that the costs of benefits provided to scheme customers are distributed fairly between energy suppliers. Such a mechanism may provide for payments to be made by energy suppliers to the reconciliation scheme operator or to other energy suppliers. Regulations can also include the amounts of such payments and set out provision for appeals. Before regulations are made, the Secretary of State must consult Ofgem, licensed electricity or gas suppliers (or both, in the case of a scheme which applies to both) and such other persons as the Secretary of State considers appropriate (clause 14(1)).

34. These regulations will be made using the negative resolution procedure. We believe that this strikes the right balance between giving Parliament an opportunity for scrutiny and recognition that the provision is administrative in nature.

Clause 12: Reconciliation mechanism: licence modifications

Power conferred on: Secretary of State

Power exercised by: Licence modification (not by Statutory Instrument)

Parliamentary procedure: None

35. This clause gives the Secretary of State the powers, for the purposes of the creation or operation of a reconciliation mechanism under this part of the Bill, to modify the conditions of transmission or supply licences issued under the

Electricity Act 1989 or documents or agreements related to such licences (such as codes of practice). Modification of transmission licences would be necessary if the creation or operation of a reconciliation mechanism required alteration of the Balancing and Settlement Code which was established under these licences. Modification of supply licences would be needed if the Government decides to introduce a new industry code specifically to govern the operation of the mechanism.

36. Before making any such modifications the Secretary of State is required to consult the holders of licences of the type being modified, Ofgem and such other persons as the Secretary of State considers appropriate. There is also a requirement to publish any such modifications as soon as reasonably practicable after they are made (clause 33(5)).

37. Given that the regulations setting up the mechanism are subject to Parliamentary scrutiny (see paragraph 34) and that the licence modifications that would be made through this power would simply implement elements of those regulations and would be very technical in nature, the Department considers that Parliamentary scrutiny of licence modifications made through these powers is not required.

Clause 15: Schemes for reducing fuel poverty: interpretation

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative resolution

38. For the purposes of this Part, the definition of fuel poverty is made by reference to the Warm Homes and Energy Conservation Act 2000. In the event that definition is amended, subsection (4) of this clause confers on the Secretary of State a power to make regulations that specify what is regarded as a reduction in the extent to which a person is living in fuel poverty.

39. These regulations will be made using the negative resolution procedure. This provides Parliament with a level of scrutiny that the Department believes is appropriate given that such regulations will only contain a technical definition. This reflects the approach taken with the power in section 1(2) of the Warm Homes and Energy Conservation Act 2000 relating to the definition of fuel poverty.

PART 3: REGULATION OF THE GAS AND ELECTRICITY MARKETS

Introduction of a Market Power Licence Condition (MPLC)

40. In March 2009 Ofgem launched a consultation on addressing market power concerns in the electricity wholesale sector.⁶ This initiative reflected the regulator's observation that the current market structure, coupled with limitations in physical transmission capacity in some areas, allows electricity generation companies to exploit unduly the balancing market operated by National Grid (which ensures

⁶ "Addressing Market Power Concerns in the Electricity Wholesale Sector - Initial Policy Proposals", Ofgem 30/09, 30 March 2009

that actual electricity generation closely matches demand) in a way that results in higher bills for the consumer.

41. The main examples of this exploitative behaviour are –

- Manipulation of where electricity is generated in order to achieve excess profits from the subsequent balancing mechanism arrangements.
- Making exploitative ‘bids’ into the balancing mechanism to take advantage of situations where a company is behind a transmission constraint and is the only company that National Grid can arrange balancing actions with.

42. Ofgem’s consultation considered a number of ways in which such behaviour could be addressed, including the introduction of a Market Power Licence Condition (MPLC). An MPLC would allow Ofgem to use its standard licence powers to monitor and act on any examples of the actions which unduly exploit the market as described above. Although it will not provide the long-term solution to the problem of ‘constraints’ (lack of physical transmission capacity in some areas), it will give protection to the consumer during a time when the required upgrading of the transmission system (which should resolve the issue in the long term) may create more potential for exploitation to occur.

43. These provisions allow the Secretary of State to introduce an MPLC targeted at the specific behaviours in paragraph 41. They also provide for a tailored appeals process which gives the electricity generation companies the right to appeal directly to the Competition Appeal Tribunal.

Clause 18: Power to make modifications

Power conferred on: Secretary of State

Power exercised by: Licence modification (not by Statutory Instrument)

Parliamentary procedure: Equivalent to negative resolution

44. This clause confers on the Secretary of State a power to modify specific generation licence conditions, general licence conditions or formal documents linked to licences. The power may only be exercised within a period of 5 years from commencement (with a possible extension of a further 2 years – see paragraphs 50-53).

45. This power may only be exercised for the purpose of limiting or eliminating the circumstances in which the licence holder might use market power to obtain excessive benefit from unduly exploiting balancing arrangements with National Grid, the system operator. Specific cases where the power may be exercised are set out in subsections (4)-(7) as where the licence holder:

- does not notify electricity generation that would have been economic to carry out and may receive excessive payments in connection with an increase in electricity generation in the relevant period,
- may pay an excessively low amount, or is paid an excessively high amount, in connection with a reduction in electricity generation in the relevant period,
- is paid an excessively high amount for an inter-trip arrangement, or

- may obtain an excessive benefit as a result of a difference between their notified generation and actual generation within a specific period.

46. Before exercising this power, the Secretary of State must consult the holders of electricity generation licences, Ofgem and such other persons as the Secretary of State considers appropriate. The Secretary of State must also publish the details of any licence modifications as soon as reasonably practicable after they are made (clause 33(5)).

47. In order to provide clarity for licence holders, Ofgem must publish a document (clause 19) that sets out advice and information regarding Ofgem's intended approach to the interpretation and enforcement of licence modifications made by the Secretary of State. Ofgem must consult generation licence holders, the Secretary of State and any other appropriate persons before publishing this document.

48. Licence modifications made by the Secretary of State are not always subject to Parliamentary scrutiny. They tend to be very technical in nature and are drafted to fit within existing complex industry licences and arrangements. For example, the licence modifications made by the Secretary of State to establish new electricity trading and transmission arrangements pursuant to sections 133 and 134 of the Energy Act 2004 were not subject to any Parliamentary scrutiny.

49. There are, however, some exceptions to the general approach: for example, sections 41-42 (feed-in tariffs) and 88-89 (smart meter roll-out) of the Energy Act 2008. These provisions require the licence modifications to be subject to a level of Parliamentary scrutiny that is equivalent to the negative resolution procedure for statutory instruments. Similar provision is made in the case of the MPLC. Though the arguments for this are finely balanced, it is considered that given the potential effect on the conduct of particular energy companies the need for a level of Parliamentary scrutiny is justified in this case.

Clause 23: Expiry of power

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution

50. This clause confers on the Secretary of State a power to make an order which would extend the period within which licence modifications can be made under the powers set out in clause 18 from 5 years to a maximum of 7 years in total. Any such regulations must be made within the original period of five years following commencement.

51. Before making an order under this clause the Secretary of State must consult the holders of generation licences, Ofgem and such other persons as the Secretary of State considers appropriate.

52. In consequence of making an order, subsection (7) of this clause would permit the making of any necessary consequential amendments to generation licences or documents associated with generation licences.

53. This power will be subject to the negative resolution procedure. The Department considers this an appropriate level of scrutiny for a short extension to the period within which the powers can be exercised. It also maintains equivalence

with the level of Parliamentary scrutiny for the powers relating to the imposition of licence modifications.

Notification period for changes to domestic gas and electricity supply contracts

54. Responses to Ofgem’s 2008 probe⁷ into the energy supply markets highlighted a number of problems arising from the length of time given to notify price increases. Ofgem’s subsequent consultation on proposed retail market remedies⁸ made it clear that best practice is for energy suppliers to inform their customers about price rises as soon as possible and preferably in advance, and that 65 working days should be regarded as a backstop.

55. Ofgem is currently considering whether to change this notification period through its powers under section 11A of the Electricity Act 1989 and section 23 of the Gas Act 1986 to propose modifications to the standard conditions of electricity and gas licences.

56. This clause introduces a power to allow the Secretary of State to modify domestic gas and electricity supply licences in order to change the period within which energy suppliers must notify customers of any changes in tariffs. The Government expects Ofgem to take appropriate action but considers it important to have the ability to step-in should it be required. This power will expire three years after coming into force which is considered sufficiently long to permit any such issue to be addressed.

Clause 25: Modifications of supply licences: notice of unilateral changes to domestic supply contracts

Power conferred on: Secretary of State

Power exercised by: Licence modification (not by Statutory Instrument)

Parliamentary procedure: Equivalent to negative resolution

57. This clause confers on the Secretary of State a power to modify specific or general conditions of domestic supply licences issued under the Gas Act 1986 or the Electricity Act 1989. The power may only be exercised within a period of 3 years from commencement.

58. The power may only be exercised for the purpose of ensuring that domestic consumers are notified about unilateral changes, by their gas or electricity supplier, of the terms of their contracts or the price charged for their gas or electricity, within a specified period.

59. Modifications that may be made under this power include:

- a requirement that notice be given before or after a change to which it relates is made;
- the form of such a notice and the manner in which it is given;
- the effect of a notice;

⁷ “Energy Supply Probe – Initial Findings Report”, Ofgem 140/08, 6 October 2008

⁸ “Energy Supply Probe - Proposed Retail Market Remedies”, Ofgem 99/09, 7 August 2009

- the effect of failure to give a notice; and
- a requirement that a notice is to be accompanied by other information.

60. Before exercising this power, the Secretary of State must consult the holder of any licence being modified, Ofgem and such other persons as the Secretary of State considers appropriate. The Secretary of State must also publish the details of any licence modifications as soon as reasonably practicable after they are made (clause 33(5)).

61. This power will be subject to a procedure equivalent to the negative resolution procedure for statutory instruments. Licence modifications made by the Secretary of State are not always subject to Parliamentary scrutiny as they tend to be very technical in nature and are drafted to fit within existing complex industry licences and arrangements. As with the market power licence condition provisions (clause 18), it is considered that given the potential effect on the operations of domestic energy suppliers the need for a level of Parliamentary scrutiny is justified in this case.

Adjustment of energy charges

62. The Utilities Act 2000, sections 69 and 98, inserted sections 43A and 43B into the Electricity Act 1989 and sections 41A and 41B into the Gas Act 1986 permitting the Secretary of State, by order, to adjust the charges of customers of electricity or gas supply companies respectively where he considers that a “disadvantaged group” of customers of a supplier are treated less favourably than other customers of that supplier and the adjustment of such charges would eliminate or reduce the less favourable treatment. The powers were always intended to be reserve powers and, up to the date of this memorandum, have never been used.

63. Last year a market probe⁹ by Ofgem found that energy suppliers in the domestic and small business markets consistently earned significantly higher margins for electricity supply compared to gas supply in the period 2005-07 and that this difference in margins was not justified by cost differentials. The existing provisions of the Gas and Electricity Acts mentioned above do not allow the Secretary of State to address this specific type of consumer detriment.

64. These clauses repeal and replace the powers in sections 41A and 41B of the Gas Act 1986 and sections 43A and 43B of the Electricity Act 1989. The new powers are derived from the pre-existing powers, but are amended to enable the Secretary of State to address situations where energy suppliers treat customers less favourably according to the type of energy supplied.

65. Ofgem have already taken steps to limit the worst aspects of this behaviour through the introduction of licence modifications^{10,11} (effective from 1 September 2009). The Government does not, therefore, at present envisage exercising this power but considers it important to have the ability to take action in the future should it be required to protect customers.

⁹ “Energy Supply Probe – Initial Findings Report”, Ofgem 140/08, 6 October 2008

¹⁰ “Notice of modification of the Standard Conditions of the Electricity Supply Licence requiring cost reflectivity between payment methods and prohibiting undue discrimination in domestic supply”, Ofgem 100/09, 7 August 2009

¹¹ “Notice of modification of the Standard Conditions of the Gas Supply Licence requiring cost reflectivity between payment methods and prohibiting undue discrimination in domestic supply”, Ofgem 101/09, 7 August 2009

Clause 26: Adjustment of charges to help disadvantaged groups of customers

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

66. This clause confers on the Secretary of State a power to make regulations which contains a scheme for the adjustment of charges for energy (gas and/or electricity) if the Secretary of State considers one set of customers (the “disadvantaged”) are treated less favourably than another set (the “advantaged”). Any regulations made under this power can only remain in force for a maximum of three years, although further regulations may be made at the end of that period.

67. Schemes created under this power must describe the disadvantaged customers, specify the energy companies whose gas and/or electricity charges will be adjusted by the scheme, the basis for this adjustment and the geographical area or areas to which the scheme applies (unless it covers the whole of Great Britain). In addition the scheme may require energy companies to supply relevant information to each other to facilitate the operation of the scheme, or to enable the making of the order.

68. Clause 28 requires the Secretary of State to give notice that he will be making regulations to establish a scheme. This notice would need to set out the effect of the scheme and the reasons for making the scheme. The Secretary of State must give at least 28 days for representations to be made in relation to the scheme.

69. The extent of the power closely mirrors that of sections 41A and 41B of the Gas Act 1986 and sections 43A and 43B of the Electricity Act 1989 which it replaces, with the addition of being able to address situations where energy companies are favouring either electricity or gas customers to the detriment of the other. With that in mind, the Department considers, as with sections 41A/B and sections 43A/B of the 1986 and 1989 Acts respectively, that the affirmative resolution procedure would provide an appropriate level of Parliamentary scrutiny.

Clause 28: Regulations adjusting energy charges: supplementary

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution

70. Subsection (5) confers on the Secretary of State a power to make an order which requires energy suppliers and relevant persons to supply information for the purpose of making regulations under clause 26.

71. This power will be subject to the negative resolution procedure. The Department considers this an appropriate level of scrutiny for a small scale power that is solely for the requisition of information.

Clause 29: Adjustment of energy charges: interpretation

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary procedure: Negative resolution

72. Subsection (2) confers on the Secretary of State a power to make an order which excludes certain customers from a provision to adjust energy charges.

73. This power will be subject to the negative resolution procedure. The Department considers this an appropriate level of scrutiny for a technical provision which gives the Secretary of State a degree of flexibility when establishing energy charge adjustment schemes.

PART 4: FINAL PROVISIONS**Clause 31: Orders and regulations**

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative resolution

74. Subsection (5) states that regulations or orders made under powers contained within the Bill can make incidental, consequential, transitional or supplementary provision by amending an Act.

75. Subsection (7) states that regulations under Part 1 may amend any provision made by or under an Act, including an Act of the Scottish Parliament (whenever made or passed). The Secretary of State must obtain the consent of Scottish Ministers before making regulations under Part 1 which contain provisions amending an Act of Parliament or of the Scottish Parliament if that provision extends to Scotland and would be within the legislative competence of the Scottish Parliament if contained in an Act of that Parliament.

76. There are a number amendments which we anticipate that we may want to make to bring the levy and assistance schemes within existing statutory frameworks. For example, we may want to amend statutory provisions relating to the calculation of interest on unpaid taxes so that they apply to the levy. In relation to the enforcement of either levy or assistance schemes, it might be appropriate to make compliance with the requirements of the levy regulations or schemes a 'relevant requirement' for the purposes of section 28(5) of the Electricity Act 1989, so that it can be enforced by Ofgem in the same way as a licence condition.

77. In addition, the power would enable us to amend future Acts. The reason for taking this power is that the schemes and the levy are intended to be used to provide financial assistance for CCS while the technology is at the demonstration and pre-commercial stage. As these important new technologies have yet to be demonstrated on a commercial scale, and the nature of the financial assistance which will be required will depend to some extent on the proposals brought forward by developers, it is very difficult at this stage to predict the categories of

legislation which it might be appropriate to amend as a result of the exercise of the powers in the Bill.

78. We hope that it will be possible to address the interaction of future primary legislation with the Energy Bill powers at the time of the passage of the future legislation itself. We anticipate that the technologies and the energy market as a whole will develop rapidly during the next decade, and it is likely to be difficult to ensure that the relevant provisions in future Bills which interact with these powers are accurately identified and the necessary action taken to ensure compatibility. In particular, it may be necessary to fund the retrofit of demonstration projects with additional CCS capacity some years after arrangements have been put in place to provide funding to demonstration projects, and it may not be possible to identify the changes required to legislation to support such schemes until the time at which the powers under Part 1 come to be exercised for this purpose.

79. The use of this power is limited in two important respects. Firstly, the powers under Part 1 can only be used to provide financial assistance to CCS demonstration projects on commercial-scale power stations, and for the provision of financial assistance for additional CCS use at power stations which carried out CCS demonstration. The scope of these powers is therefore narrow, particularly given that the Government intends to fund only four such projects on coal-fired power stations. Furthermore, any regulations under Part 1 which include provision amending primary legislation will be subject to the affirmative procedure (under clause 31(2) and (3)), which the Department considers would provide an appropriate degree of Parliamentary scrutiny of the exercise of such a power.

80. Subsection (9) disapplies any procedure which would otherwise apply to an instrument containing regulations under this Act by virtue of the standing orders of either House of Parliament treating it as a hybrid instrument.

Clause 37: Commencement

Power conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *None*

81. This is a standard commencement power and as such is not subject to Parliamentary procedure.

Department for Energy and Climate Change

March 2010

APPENDIX 3: MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC .) BILL

Memorandum by the Department for Communities and Local Government

1. This Memorandum describes the purpose and content of the Mortgage Repossessions (Protection of Tenants etc) Bill; identifies the provisions of the Bill which confer power to make delegated legislation; and explains why the power has been taken and the nature of, and reason for, the procedure selected.

Background and purpose of the Bill

2. This Bill empowers unauthorised tenants to apply to the county court for a delay of up to two months when their home is being repossessed. The term “unauthorised tenant” describes a tenant who has entered into a tenancy agreement with a landlord (“the mortgagor”) which does not bind the landlord’s mortgage lender (“the mortgagee”).

3. It is a standard term in most owner occupier mortgages that the mortgagor is prohibited from renting out their property either absolutely, or without the mortgagee’s consent. This Bill seeks to protect tenants where a mortgagor rents out their property in breach of the mortgage deed and then falls into arrears. Currently, if the mortgagee then commences possession proceedings against the mortgagor, the unauthorised tenant will have no right to stay in their home. This has led to unauthorised tenants being evicted at very short notice and without any opportunity to make alternative arrangements for their accommodation.

4. The Bill gives unauthorised tenants the opportunity to suspend repossession at two points in the process. When bringing possession proceedings the mortgagee must first obtain an order for possession at a county court hearing and must then apply to the court to obtain a warrant to enforce the order. Obtaining a warrant of possession is an administrative procedure and does not require a court hearing. Under the Bill, the court may either postpone the date for delivery of possession by two months or stay or suspend execution of the warrant for two months. The tenant will only be entitled to one period of suspension. The court may make any suspension conditional on the unauthorised tenant making payments for occupation. The Bill provides that no tenancy will arise between the mortgagee and unauthorised tenant during the period of suspension.

The Bill extends to England and Wales. It applies to in relation to Wales as it applies in relation to England. The Welsh Assembly Government is content that secondary powers are conferred on the Secretary of State and that separate regulation making powers are not required in relation to Wales.

Clause 2: notice of execution of possession order

Powers conferred on: Secretary of State with the consent of the Lord Chancellor

Power exercised by: order made by Statutory Instrument

Parliamentary procedure: negative resolution

5. Clause 2 provides for four regulation-making powers, to be exercised by the Secretary of State with the consent of the Lord Chancellor. Subsection (2)(a)

enables the Secretary of State to specify any step(s) taken for the purpose of executing a possession order must be preceded by a notice. Subsection (2)(b) provides that the warrant of execution may be executed only at the end of a prescribed notice period. Subsection (4) enables the Secretary of State to specify both the form of the notice to be given to the unauthorised tenant and the way in which notice must be given, for example by recorded delivery. Subsection (5) provides that regulations made under this clause may make supplementary, incidental, transitional or savings provision. The Secretary of State anticipates this may be necessary in order to give mortgagees time to adjust their administrative procedures.

6. The Government has carefully considered the need for the power to make subordinate legislation conferred by the Bill. The Department has agreed with the Ministry of Justice that the regulation making powers will only be exercised with the consent of the Lord Chancellor. This is to allay their concerns that, if this power was interpreted broadly, regulations made under it could interfere with the ability of the court to enforce possession orders. The Order will set out the detailed requirements for service of notice that the warrant of execution will be enforced. The Department submits that because the regulations will address matters of detail and administrative aspects of the procedure for recovering possession of the property it is appropriate to adopt the Parliamentary procedures provided for the making of subordinate legislation by negative resolution.

Clause 2(2)(a)

7. This enables the Secretary of State to specify that notice must be served on the unauthorised tenant before the mortgagee takes any step to execute the warrant of possession. Many possession orders are suspended on terms so do not result in a warrant of possession being made by which the tenant has to leave the property. The term “prescribed step” describes the situation where a mortgagee begins the process of enforcing the possession order, by preparing to or actually approaching the court. The Secretary of State considers this would include a letter to the unauthorised tenant/occupier warning that the mortgagee will be applying to the court, and/or filing papers with the court to obtain the warrant.

Clause 2(2)(b)

8. This enables the Secretary of State to specify that the mortgagee may only execute the warrant of possession at the end of a period prescribed by regulations. Clause 2(3) provides that the period will be prescribed by regulations made by the Secretary of State. The clause also empowers the Secretary of State to prescribe a period beginning with the day on which the notice is given, until the expiry of which they will not be able to obtain a warrant of possession. The Secretary of State plans to prescribe a period of two weeks. The Department considered the power to prescribe a period was necessary in order to give unauthorised tenants an opportunity to seek advice on their situation, and also in cases where there was a delay in the notice reaching the unauthorised tenant. It was considered that dealing with this point in secondary legislation would give the Secretary of State the flexibility to amend the prescribed period if necessary.

Clause 2(4)

9. This clause enables the Secretary of State to prescribe the form of notices and the way in which they must be given. The Secretary of State would like to specify how notices are delivered to ensure the best chance of them reaching any

unauthorised tenants. The Department has been advised by stakeholders that notices sent out under current legislation have been ineffective as tenants have thought they were intended for their landlords and have not opened or responded to notices. This has left them without the opportunity to make representations to the mortgagee. The new Bill provides that unauthorised tenants will be able to make representations to the county court to stay the execution of the warrant of possession. In order to make this provision effective it is essential that we take all reasonable steps to ensure the notice reaches the unauthorised tenant.

10. The Secretary of State intends to give mortgagees a choice of different methods of serving the notice. It is proposed that these would include first class post, recorded delivery, registered post or personal service by an agent of the mortgagee. The decision to take an enabling power rather than specify the notice requirements on the face of the Bill allows the Secretary of State flexibility. The most effective way of serving notices is likely to change over time and he would like to be able to update methods of service without needing to amend primary legislation. The Secretary of State may need to update the methods of service when he has experience of how the legislation works in practice, for example if service by recorded delivery proves most effective. Using delegated powers to do this enables him to make changes without having to make new primary legislation.

Clause 4: Commencement

11. Clause 4 provides for the Secretary of State to bring the preceding provisions of the Bill into force by order. Consistent with the usual practice, commencement orders under this clause are not subject to any Parliamentary procedure.

March 2010

Communities and Local Government

APPENDIX 4: CONSTITUTIONAL REFORM AND GOVERNANCE BILL — GOVERNMENT RESPONSE

Letter to the Chairman from the Rt Hon Michael Wills MP, Minister of State, Ministry of Justice

1. I am grateful to the Committee for their report on the Constitutional Reform and Governance Bill.
2. Under Clause 17, the Minister for the Civil Service and the Commission may agree that the Commission can carry out additional functions in relation to the Civil Service. In your report you recommend that the House seek confirmation that the power could not be used to confer functions on the Commission that are already conferred by statute on some other person or body. I can confirm that this power would not be used to confer functions on the Commission that are already conferred by statute on some other person or body.
3. Paragraph 14 of the Committee's report recommends that the Ministers' Pension scheme should be laid before both Houses of Parliament. In line with the Committee's recommendation, I can confirm that we intend to table an amendment to this end.
4. I can also confirm that the Government will table amendments to the Bill to deal with the recommendation in paragraph 17. The Committee recommends that the Order making power which allows Ministers to specify requirements to guarantee access to and from Parliament (wherever it sits) should be subject to the affirmative procedure or, if such Orders need to be made quickly, the "made affirmative" procedure could be used. The Government is content to provide that the powers which allow Ministers to specify requirements to guarantee access to and from the Palace of Westminster and to specify the "area around Parliament" should be subject to the affirmative procedure. In such cases, there will be no need for these Orders to be made quickly. However, the Government considers that Orders may need to be made quickly in order to specify a place outside of Westminster for a meeting of Parliament and the Order specifying the access requirements to that building. The Government proposes the "made affirmative" procedure in these cases. Although the report recommends that such Orders should only continue in force for 28 days without parliamentary approval, the Government considers that a period of 40 days is more appropriate. This will allow for any contingencies should Parliament be required to relocate following an emergency.
5. In paragraphs 13 and 14 of the Report the Committee invites the House to consider the procedure for the Order making powers set out in Part 4 of the Bill. In line with the Committee's report, the Government will consider this issue further in the light of debates in the House.
6. I have placed a copy of this letter in the library.

Ministry of Justice

March 2010