

HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

Third Report of Session 2009-10

Child Poverty Bill

Equality Bill – Parts 6 to 15

Equality Bill – Parts 1 to 5: *Government response*

Consumer Emissions (Climate Change) Bill [HL]

Damages (Asbestos-Related Conditions) Bill [HL]

Live Music Bill [HL]

Rehabilitation of Offenders (Amendment) Bill [HL]

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The Delegated Powers and Regulatory Reform Committee

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Background Note

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

Third Report

CHILD POVERTY BILL

Introduction

1. This Bill had its Second Reading on 5 January. It makes provision about the steps to be taken at a national and local level with a view to eradicating child poverty. Part 1 imposes duties on the Secretary of State to ensure that four income targets relating to child poverty are met in the UK in relation to the financial year 2020-21 and subsequent years. Part 2 makes provision requiring co-operation between local authorities and other agencies in tackling child poverty. A memorandum explaining the delegated powers conferred by the Bill, printed in Appendix 1, has been prepared by the Department for Children, Schools and Families, the Department for Work and Pensions and the Treasury ('the Departments').

'Material deprivation, 'persistent poverty' and 'qualifying household'

2. Significant features of the four income targets under Part 1 are left to subordinate legislation. For instance, the 'combined low income and material deprivation target' (clause 3) requires that "less than 5% of children who live in qualifying households ... experience material deprivation". There is no definition in the Bill of 'material deprivation', but the circumstances in which a child is to be regarded as experiencing such deprivation must be specified in regulations under clause 3(3). Similarly, the 'persistent poverty target' (clause 5) requires that "less than the target percentage of children who have lived in qualifying households ... have lived in households that have been within the relevant income group...". The target percentage is not set out in the Bill but must be specified before 2015 in regulations under clause 5(3). The catchment population for both of those targets, and the other two targets (in clauses 2 and 4), is set by reference to a 'qualifying household', an expression which is not defined in the Bill, but is to be the subject of regulations under clause 6(1)(a) and (b). Finally, clause 5(5) contains a Henry VIII power which enables the Secretary of State to substitute by regulations entirely different provision for the 'persistent poverty target'. All of the relevant powers (in clauses 3(3), 5(3) and (5) and 6(1)) are subject to the affirmative procedure.
3. In support of these delegations, the Departments explain that in some cases data are not yet available to allow the relevant provision to be set out in the Bill. This is in particular the case as respects the target percentage, and the power to substitute new provision, under clause 5 (paragraphs 18 and 19 of the memorandum), and the matters which may be the subject of regulations, including the definition of 'qualifying household' under clause 6(1) (paragraphs 22 to 30 of the memorandum). In relation to the meaning of 'material deprivation' for the purposes of clause 3, the Departments explain that the definition is likely to need periodic adjustment (paragraph 14 of the memorandum).
4. We are surprised that the definition of a key expression like 'material deprivation' should be left to subordinate legislation. We are nevertheless influenced by the consideration that it is only future government policy that

will be directly affected by these targets rather than the rights and obligations of individuals; nor does the Bill provide for any sanction to apply where a target is not met. In the light of that, we do not feel bound to conclude that any of these delegations is inappropriate. **But we draw to the attention of the House the extent to which many essential elements of the four targets depend for their definitions entirely on provision to be made by regulations, so that the House may invite the Minister to explain why (for instance) ‘material deprivation’ cannot be defined in clause 3, with a power to adjust the definition by regulations should that prove necessary.**

Clause 19 – partner authorities

5. Clause 19(6) confers a Henry VIII power, exercisable by negative regulations. Clause 20 requires local authorities and ‘partner authorities’ to co-operate in making arrangements to promote co-operation between them, with a view to reducing, and mitigating, the effects of child poverty in their areas. The ‘partner authorities’ are listed in clause 19(2), and clause 19(3) sets out the functions in relation to which the Secretary of State may be a ‘partner authority’. Clause 19(6) enables the Secretary of State by order to amend subsection (2) to add or remove persons, and to amend subsection (3) to add or remove functions of the Secretary of State, and to make consequential changes in clause 19.
6. The Departments explain in paragraphs 39 and 40 of their memorandum that the power is required in order to allow the flexibility necessary for keeping the list in subsection (2) and the functions in subsection (3) up to date. In support of the choice of negative procedure, the Departments refer to the obligation in clause 19(7) that there must be consultation with representatives of local government, and other persons as the Secretary of State thinks fit, before the power is exercised. **We do not consider that an obligation to consult is a substitute for an adequate level of Parliamentary oversight. Unless the Minister can satisfy the House that there are other reasons why the negative procedure should apply in this case, we recommend that the power in clause 19(6) should be subject to the affirmative procedure.**

EQUALITY BILL – PARTS 6 TO 15

Introduction

7. We reported on Parts 1 to 5 of this Bill in our second report (HL Paper 24). This report deals with the remaining parts of the Bill (6 to 15). There is a memorandum from the Government Equalities Office, printed in appendix 2 to our second report, explaining most of the delegated powers in the Bill.

Clause 106 – associations

8. The power in clause 106 is described in paragraphs 85 and 86 of the Government memorandum as being subject to the negative procedure. It seems to us that clause 200(2) provides for the affirmative procedure, which is appropriate for this Henry VIII power.

Clause 150 – public authorities

9. Clause 148(1) requires a public authority, in the exercise of its functions, to have due regard to the need to eliminate discrimination, to advance equality of opportunity and to “foster good relations between persons who share a relevant protected characteristic and those who do not share it”. Clause 148(2) places a similar duty on those who are not public authorities but who exercise public functions, when they are exercising those functions. The authorities that are public authorities are set out in Schedule 19. “Public function” is defined in clause 149(5) as a function of a public nature for the purposes of the Human Rights Act 1998.
10. Clause 150(1) enables a Minister of the Crown to amend Schedule 19, by order. (There are similar powers for Welsh and Scottish Ministers relating only to Parts 2 and 3 of Schedule 19 respectively.) The orders are intended to be subject to negative procedure. The application of clause 148 may not be extended unless the extension is considered to relate to a person by whom a public function is exercisable. There is a precedent for this power, and for the negative procedure, in section 71(5) of the Race Relations Act 1976. (That power is much narrower as it applies only to race, not other types of discrimination.)
11. Paragraph 99 of the memorandum indicates that the power will be used “to update the Schedule further as necessary to reflect the emergence, disappearance or change of name of public authorities”. However, the power is wider than is suggested in the memorandum and could be used, for example, to add to Schedule 19 courts and tribunals and either House of Parliament. **The position in the Bill is that the duty in clause 148(1) does not apply to those bodies (see paragraph 12 below). We doubt that a power being taken for the purpose of updating Schedule 19 should be capable of use to list the judicial and parliamentary bodies currently excluded from the scope of the duty, and recommend that the power in clause 150 should be limited accordingly. We also recommend that this more limited power should be subject to the affirmative procedure.**

Schedule 18 – excepted public authorities

12. There is an equally significant power at paragraph 5 of Schedule 18. Schedule 18 lists exceptions from clause 148. Paragraphs 1 to 3 contain exceptions common to the whole of clause 148, while paragraph 4 contains exceptions specific to clause 148(2) (authorities that are not listed in Schedule 19 but which exercise public functions). The exception in paragraph 1 relates to children and that in paragraph 2 to immigration. The exception in paragraph 3 is for judicial functions. The exception in paragraph 4 is for both Houses of Parliament, the Scottish Parliament, the National Assembly for Wales, the General Synod of the Church of England, and the security services.
13. Paragraph 5 enables a Minister by order to amend Schedule 18 so as to “add, vary or omit an exception to section 148”. The very brief explanation in the memorandum of this power says that the orders are subject to negative procedure and reflect section 71 of the Race Relations Act 1976. But clause 200(2) of the Bill makes them subject to affirmative procedure; and section 71 of the 1976 Act contains no equivalent to this power (though it does

contain a power equivalent to that in clause 150). **We doubt that it could be appropriate for an exception relating to judicial functions (paragraph 3) or those relating to Parliament, the Scottish Parliament, the National Assembly for Wales and the General Synod (paragraph 4) to be removed or limited by statutory instrument, even one subject to affirmative procedure. If Parliament ever wishes to remove or limit these exceptions, it should do so only through primary legislation. We recommend that the power in paragraph 5 of Schedule 18 should be limited accordingly. We also invite the House to consider very carefully whether it is appropriate that a Minister of the Crown should be enabled to remove or limit any of the other exceptions in Schedule 18.**

Clause 195 – age

14. There is a very significant power at clause 195 which is not mentioned in the Government memorandum. The background to the power is however explained in paragraph 632 of the Explanatory Notes as being to allow exceptions from the new prohibitions on age discrimination in the provision of services and the exercise of public functions.
15. Clause 195(1) enables a Minister, by order subject to affirmative procedure, to amend the Bill to provide that specified conduct does not contravene the Bill in so far as it relates to age. The power is not expressly limited to the new prohibitions on age discrimination in the provision of services and the exercise of public functions, though there is an exclusion for work and education in subsection (8). Examples are given in paragraph 633 of the Explanatory Notes of how the power might be exercised, such as to permit concessionary travel for older and younger people, or holidays for particular age groups. We note that such exceptions will only be made if the Minister decides to bring forward an order (and that the order could subsequently be revoked). If the House wished to *ensure* that there are appropriate age-based exceptions, it would include them on the face of the Bill.
16. The orders may make provision, including provision imposing requirements, by reference to guidance or documents specified in guidance (which need not be subject to a parliamentary procedure). This provision for sub-delegation would require strong justification, as it is a mechanism capable of being used to bypass the affirmative procedure and therefore removing Parliamentary control over the extent and nature of the exception, but no justification has been offered. **We recommend that the provisions for sub-delegation in clause 195(3) and (6) be removed from the Bill.**

Clause 196 – harmonisation

17. Clause 196 contains an exceptionally significant Henry VIII power, subject to affirmative procedure. It enables the Government, when implementing a Community obligation, to extend the substance of the implementing provision beyond what is required by the obligation itself. This is, in effect, the process known colloquially as “gold plating”.
18. The Government do not point to a precedent for a power of this breadth and the Committee is unaware of one, though it has on occasions considered specific powers which enable a Minister to go further than is required by specific Community obligations. The extent of the power is far wider than is suggested by the example given in paragraph 636 of the Explanatory Notes.

19. If a Minister is implementing under section 2(2) of the European Communities Act 1972 a Community obligation which he thinks relates to the subject matter of the Equality Acts, and the Minister thinks it appropriate to make “harmonising provision” in those Acts, clause 196 enables him to do so. The Equality Acts are this Bill and the Equality Act 2006, excluding clause 196 itself and certain other provisions listed in Schedule 24.
20. Subsection (7) describes the harmonising provision which may be made. It is, in particular, provision in relation to so much of the subject matter of the Equality Acts as does not implement a Community obligation and which:
 - (a) corresponds to the implementing provision; or
 - (b) the Minister thinks is necessary or expedient in consequence of, or related to, the implementing provision or that corresponding provision.
21. It seems to us that this power could, for example, be used to copy over to other types of discrimination the implementing provisions of a Community obligation which was specifically restricted to one type of discrimination only, whatever the source of that Community obligation. Thus the provisions implementing a Directive could be extended beyond the scope of the Directive itself. This represents a very significant extension of the power given to government by the 1972 Act to implement Community obligations by subordinate legislation. It operates across the whole subject-matter of the Equality Acts.
22. We have considered whether there are any exceptional circumstances which would justify the conferring of such powers in this Bill. The issue is touched on in paragraphs 180 and 181 of the Government memorandum. “It makes it possible to retain the unitary approach to discrimination law where that is the appropriate way to proceed” (paragraph 180). “It enables Ministers to decide to ensure that the purely domestic concepts proceed in harmony with the EC law concepts, if after consultation they consider that is the right way to go” (paragraph 181). Yet it seems to us that the inevitable consequence, and indeed purpose, of the limitations imposed by Parliament in the 1972 Act, is that in many circumstances a Bill will be required to produce uniformity, if that is what is wanted. We are not persuaded that there are special reasons justifying different arrangements in respect of equality than apply in other areas of the law. **We consider the powers conferred by clause 196 to be inappropriate.**

Clause 199 – exercise of subordinate legislation powers

23. Clause 199 contains a standard provision enabling any orders or regulations under the Bill to include consequential, incidental, supplementary, transitional, transitory or saving provision. This applies to commencement orders under the Bill as to other orders. So, a commencement order subject to no procedure can, as a result of commencing a provision of the Bill, consequentially amend other subordinate legislation which has undergone the negative or affirmative procedure. But this is very well precedented and can be regarded as something of an anomaly. Clause 199(7) contains something seen less often. It specifically enables provision consequential upon the commencement of a provision of the Bill to be contained in a separate order (whether before, after or at the same time as the commencement order) whilst, it seems to us, retaining the lack of Parliamentary procedure for that consequential provision. **We consider**

that any such separate orders should be subject to the negative procedure.

Other matters

24. Many provisions in the Bill, including several of the delegated powers, are repeated from existing legislation. In some cases, if these had been new delegated powers we might well have questioned them. However, in recognition of the fact that the Equality Bill pulls together a number of existing strands of equality legislation, we simply draw them to the attention of the House.

Clause 182

25. Under clause 181(1) the Secretary of State can authorise, by order, the use of rail vehicles that do not meet the requirements of rail vehicle accessibility regulations. Surprisingly, under clause 182, the choice of Parliamentary procedure for such orders (affirmative or negative) is left to the Government (repeating the existing position under the Disability Discrimination Act 1995). We would not normally consider it appropriate for the executive to be left to select the appropriate level of Parliamentary scrutiny for a statutory instrument.

Schedule 21

26. Schedule 21 makes supplementary provision about reasonable adjustments to be made to accommodation by reason of a person's disability. Under paragraph 6 regulations subject to the negative procedure may make provision as to circumstances in which a landlord is taken to have acted "reasonably" or "unreasonably" (repeating the existing provision in the Disability Discrimination Act 1995). As such regulations would create a framework within which the courts would exercise their normal function of determining what is 'reasonable' or 'unreasonable', there is a case that regulations under paragraph 6 of schedule 21 ought to be subject to the affirmative procedure.

Schedule 22

27. Paragraph 5 of Schedule 22 excepts from the provisions of the Bill rules restricting employment by a public body to persons of particular birth, nationality, descent or residence. "Public bodies" are to be defined by regulations under paragraph 5(3), to be made by the Minister for the Civil Service, and subject to the negative procedure (repeating existing provision in section 75(5)(a) of the Race Relations Act 1976). In view of the range of public bodies covered by the power (widely defined in paragraph 5(4) of Schedule 22), there is a case for the power to be subject to affirmative procedure.

Clause 200 – hybrid procedure

28. Subsection (10) of clause 200 disappplies the hybrid instrument procedure for affirmative instruments under the Bill (powers subject to the affirmative procedure are listed in subsection (5)). **We draw this to the attention of the House, so that the House can satisfy itself that the disapplication is appropriate for all relevant powers conferred by the Bill.**

EQUALITY BILL – PARTS 1 TO 5: GOVERNMENT RESPONSE

29. As noted in paragraph 7 above, we reported on Parts 1 to 5 of the Bill in our second report (HL Paper 24). The Government have now responded by way of a memorandum from the Government Equalities Office. This is printed in Appendix 2.

CONSUMER EMISSIONS (CLIMATE CHANGE) BILL [HL]

30. This Private Member's Bill is to have its Second Reading on 15 January. It amends the Climate Change Act 2008 ('the 2008 Act') to include provision for setting a target in relation to "UK consumer emissions" (to be defined by virtue of clause 2(4) of the Bill as "emissions [of greenhouse gas] from the production, supply and use of all goods and services consumed by UK residents ...").

Clause 1 - consumer emissions target

31. The Bill contains only one delegated power, in the new section 3A inserted into the 2008 Act by clause 1(2). Subsection (1) requires the Secretary of State to set, by order subject to the affirmative procedure, a target for net UK consumer emissions for the year 2050. The duty to make an order will arise as soon as the Bill is enacted. Subsections (2) and (3) of new section 3A require the Secretary of State to ensure that the target is met by 2050, and to take account of it when setting the carbon budget under section 4 of the Act; and the steps required by new section 3B before an order may be made are identical to those required under section 3 of the 2008 Act before an Order may be made under section 2.
32. Whereas the essential features of the existing carbon account target – a percentage reduction by reference to a 'baseline' year – are set out in section 1(1) of the 2008 Act (albeit that both the percentage and the year can be altered by order), the structure of the target under new section 3A is left entirely to subordinate legislation. So, while the target will require the approval of both Houses, neither House will have the opportunity to amend its main features. **We draw to the attention of the House the absence of provision about the target on the face of the Bill, so that the House may seek more details about the nature of the provision likely to be made under new section 3A(1).**

DAMAGES (ASBESTOS-RELATED CONDITIONS) BILL [HL]**LIVE MUSIC BILL [HL]****REHABILITATION OF OFFENDERS (AMENDMENT) BILL [HL]**

33. These three Private Member's Bills each contain only one delegated power – to make a commencement order. As is customary, the orders are subject to no Parliamentary procedure. There is nothing in the Bills to which we wish to draw the attention of the House.

**DRAFT LEGISLATIVE REFORM (DANGEROUS WILD ANIMALS)
(LICENSING) ORDER 2010**

34. The Committee is considering this LRO at the second stage of the super-affirmative procedure set out in the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”). The Department for Environment, Food and Rural Affairs (“DEFRA”) has produced an accompanying statement along with the revised LRO. The purpose of the LRO is to amend the licensing regime for the keeping of wild animals.
35. We reported on the original version of the LRO in our 11th report of Session 2008-09 (HL Paper 135). In this report, we expressed concern that one of the proposals (to remove the mandatory requirement for inspections to be carried out in respect of certain licence applications) might remove a necessary protection – one of the preconditions that LROs must satisfy under section 3(2)(d) of the 2006 Act. In the accompanying statement DEFRA explains that a further consultation has now been carried out, which revealed little enthusiasm for that proposal. DEFRA has therefore removed this proposal from the LRO.
36. **This revision to the LRO meets the Committee's earlier concern. We are now content that the Order meets the tests in the 2006 Act and is appropriate to proceed as an LRO.**

APPENDIX 1: CHILD POVERTY BILL

Memorandum by the Child Poverty Unit (joint unit of the Department for Children, Schools and Families (DCSF), the Department for Work and Pensions (DWP) and Her Majesty's Treasury (HMT))

Introduction

1. This Memorandum identifies the provisions in the Child Poverty Bill which confer powers to make delegated legislation. For each power, or where appropriate, group of powers, the memorandum explains:
 - the purpose of the delegated power;
 - why matters are to be left to delegated legislation;
 - the way in which the power is expected to be used; and
 - the nature of, and justification for, the Parliamentary procedures which apply.
2. The descriptions of the powers are arranged in the order that the powers appear in the Bill.

The Delegation of Powers

3. In deciding whether subordinate legislation is the appropriate vehicle for any particular provision, the Government has had regard to the following considerations:
 - the need to present substantive policy clearly in primary legislation;
 - the need to ensure flexibility to respond to changing circumstances; and
 - the difficulties associated with including detailed and technical provision on the face of the Bill.

Background

4. An account of the policy initiatives introduced to tackle child poverty can be found in *Ending Child Poverty: Everybody's Business*¹, which was published in March 2008. In December 2003, the Government published *Measuring Child Poverty*² which set out a framework for measuring child poverty based on three measures: relative low income; absolute low income; and combined low income and material deprivation. The Government currently monitors child poverty against these three measures with a target attached to the relative low income measure of halving the number of children in poverty by 2010-11, on the way to eradicating child poverty by 2020 (Public Service Agreement 9). Public Service Agreements detail the aims and objectives of UK government departments for a three-year period. There is, however, no statutory basis for this target and no statutory duty on the Government to make progress against any of the child poverty measures.
5. In January 2009, the Government published the consultation document *Ending Child Poverty: Making It Happen*.³ A summary of the consultation responses is

¹ *Ending Child Poverty: Everybody's Business*, HM Treasury, DWP, DCSF, March 2008

² *Measuring Child Poverty*, DWP, December 2003

³ *Ending Child Poverty: Making it Happen*, HM Treasury, DWP, DCSF, January 2009

being published.

Overview of the Bill

6. The purpose of the Bill is to define success in eradicating child poverty and create a framework to drive and monitor progress at a national and local level. The Bill is in three Parts which are summarised below:

Part 1 (clauses 1 - 17)

- Part 1 of the Bill sets out the duties of the Secretary of State to ensure that four UK-wide income targets relating to child poverty are met in relation to the target year (currently the financial year beginning 1 April 2020). Clauses 2 to 5 describe these targets and clause 6 provides definitions of the terms used in these clauses. Clause 16 introduces Schedule 2, which requires the Government to ensure that the targets, once met, are met in later financial years, or to make provision about how to meet them if the targets have not been met by the target year or any later year.
- Clause 7 establishes the Child Poverty Commission and outlines its functions. Details about the Commission are set out in Schedule 1.
- Clause 8 places a duty on the Secretary of State to prepare a UK-wide child poverty strategy and to update this strategy within a three year period. Clauses 8 and 9 specify the content of that strategy, the parties that must be consulted when the strategy is being prepared and requires the Secretary of State to have regard to any advice provided by the Commission relating to the strategy.
- Under clause 13, the Secretary of State is also required to report annually to Parliament on progress toward meeting the targets in clauses 2 to 5 and in the implementation of the strategy. Clause 14 requires that the final report must contain a statement as to whether or not the targets have been met.
- Clauses 10 and 11 also require the Scottish Ministers and the relevant Northern Ireland department to prepare child poverty strategies, which must also be revised at three year intervals. Clause 12 specifies who the devolved administrations must consult and provides that they must have regard to the advice of the Commission in preparing their respective strategies.

Part 2 (clauses 18 - 24)

- Part 2 makes provision requiring co-operation at a local level to tackle child poverty. Clause 20 imposes a duty on each responsible local authority to make arrangements to promote co-operation between itself and its partner authorities for the purpose of reducing, and mitigating the effects of, child poverty in its area. As part of these arrangements, clause 21 requires the local authority to prepare and publish an assessment of the needs of children living in poverty in its area.
- The responsible local authority is also required in clause 22 to prepare a joint child poverty strategy, setting out the measures that it and each of its partner authorities propose to take to tackle child poverty in its area. In each case, local authorities

and their partners are required to have regard to guidance issued by the Secretary of State.

- Clause 23 amends section 4 of the Local Government Act 2000 to require responsible local authorities to take account of their local child poverty needs assessment, their joint child poverty strategy and other arrangements they have made to tackle child poverty when preparing their Sustainable Community Strategy.

Part 3 (clauses 25 - 30)

- Part 3 contains general provisions.

Schedules

- Schedule 1 concerns the structure and functions of the Commission.
- Schedule 2 contains provision regarding the continuing effect of the targets after the target year.

Provisions for Delegated Legislation

7. This section covers the provisions that contain powers to make regulations and orders. It is intended that all of the delegated powers are to be exercised by the Secretary of State by way of statutory instrument. The Government has considered on a case by case basis the most appropriate procedure to be followed when exercising delegated powers.
8. The Bill includes three delegated powers that will be subject to the negative resolution procedure:
 - a power in clause 4(3) to make regulations prescribing the manner in which the absolute poverty indicator is to be adjusted to reflect changes in the Retail Price Index;
 - a power in clause 19(6) to amend by order the list of bodies considered partner authorities in relation to a responsible local authority; and
 - a power in clause 21(2) to make regulations about local child poverty needs assessments.
9. The Government considers that the remaining powers in the Bill to make delegated legislation are of sufficient importance that they should be made subject to the affirmative resolution procedure.

Part 1: National Targets, Strategies and Reports

10. Part 1 sets four child poverty targets that must be achieved by 2020 and establishes an accountability framework to drive progress at a national level towards this aim. It provides powers for delegated legislation to be made on the following matters:
 - Clause 3: a power to specify in regulations the circumstances in which a child would be regarded as experiencing material deprivation in a particular financial year, for the purposes of the combined low income and material deprivation target (affirmative resolution procedure);
 - Clause 4: a power to prescribe the manner in which the absolute low income target is adjusted to reflect changes in the Retail Price Index (negative resolution

procedure);

- Clause 5: a power to set in regulations a target percentage relating to persistent poverty (affirmative resolution procedure); a power to substitute a different persistent poverty target (affirmative resolution procedure);
 - Clause 6: a power to enable provision to be made in regulations about a number of technical definitions underpinning the child poverty targets in clauses 2 to 5 (affirmative resolution procedure);
 - Clause 7: a power to abolish the Commission by order, at any point after the end of the target year (affirmative resolution procedure).
11. The provisions which include delegated powers are described in detail below.

Clause 3: The combined low income and material deprivation target

Powers conferred on: Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary procedure: affirmative resolution procedure

12. Clause 3 sets the combined low income and material deprivation target. The target is that, by the end of the financial year beginning 1 April 2020, less than 5% of children who live in qualifying households live in households which have an equivalised net income below 70% of median equivalised household income and experience material deprivation. This target focuses on those children who live in households that experience both a low income and a low standard of living, meaning that they are experiencing the effects of living in poverty.
13. Subsection (3) imposes a duty to make regulations setting out the circumstances in which a child would be regarded as experiencing material deprivation in a particular year. These circumstances might include the household in which the child lives being unable to afford particular goods or services.
14. The regulation-making power will enable the Government to establish what is meant by ‘material deprivation’ and to update this definition over time to ensure that the combined low income and material deprivation target continues to reflect contemporary living standards. Experts consulted by the Child Poverty Unit have advised that such adjustments may be needed. The Government believes that because of the sensitivity around the setting and amending of the measurement details of this child poverty measure, exercise of these powers should be subject to the affirmative resolution procedure.

Clause 4: The absolute low income target

Powers conferred on: Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary procedure: affirmative resolution procedure and negative resolution procedure

15. Clause 4 sets the absolute low income target. The target is that less than 5% of children living in qualifying households live in households that have an equivalised net income for the financial year below 60% of median income in the financial year beginning 1 April 2010, uprated annually in line with inflation. Many respondents to the consultation *Ending Child Poverty: Making it Happen* indicated that it was important for the Bill to include an absolute low income target.

16. Subsection (3) provides a regulation-making power to set the calculation for uprating the base amount annually, taking into account changes in prices, as measured by the Retail Price Index. The provisions of these regulations involve a level of technical detail that the Government believes is not appropriate to set out in the Bill. As this power is uncontroversial, the intention is that it should be subject to the negative resolution procedure.

Clause 5: The persistent poverty target

Powers conferred on: Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary procedure: affirmative resolution procedure

17. Clause 5 sets the persistent poverty target. This target relates to the percentage of children living in households whose equivalised net income has been less than 60% of median equivalised net household income for at least three out of the past four years. The target is included because longer periods in poverty can have a significant detrimental impact on children's experiences and life chances. Research shows that children who live in persistent poverty are likely to be at risk of worse outcomes than those who live in temporary poverty, for example, being suspended or expelled from school (11% compared to 6%) or living in bad housing (48% compared to 33%).⁴
18. Subsection (3) provides for the target percentage to be set by regulations which must be made before 2015. The target level cannot be set in primary legislation because the required data is not yet available.⁵ The Government expects that sufficient data will be available before 2015.
19. Subsection (5) provides that instead of exercising the regulation-making power provided in subsection (3), to set a target percentage relating to persistent poverty, the Secretary of State may instead substitute a different persistent poverty target. This power may be necessary if, for example, evidence emerges that a new target would be a more reliable measure of persistent poverty. Regulations made under this power may only be made before 2015 and with the consent of the Commission (subsection (6)).
20. Recognising the sensitivities of setting the target percentage, or amending the persistent poverty target, the Government considers it appropriate that these powers should be subject to the affirmative resolution procedure.

Clause 6: Interpretation of terms used in relation to targets

Powers conferred on: Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary procedure: affirmative resolution procedure

21. Clause 6 enables provision to be made for a number of technical terms

⁴ *The Circumstances of Persistently Poor Children: Evidence from the Families and Children Study*, DWP Research Report 487, 2008

⁵ Data relating to the persistent poverty target will be derived from a new survey Understanding Society to be undertaken by the University of Essex on behalf of the Economic and Social Research Council. This survey will work on a similar basis to the current survey used to measure persistent poverty, the British Household Panel Survey, which follows the same households over a number of years.

underpinning the child poverty targets in clauses 2 to 5 to be defined in regulations.

22. The child poverty targets are defined in the Bill in such a way that success can be measured by Government analysis of statistical surveys. Currently, data for the relative low income, combined low income and material deprivation, and absolute poverty targets is taken from the Households Below Average Income dataset that is derived from the Department for Work and Pensions' Family Resources Survey. The Family Resources Survey collects income data from a representative sample of UK households each year. Data relating to the persistent poverty target will be derived from a new survey Understanding Society to be undertaken by the University of Essex on behalf of the Economic and Social Research Council. This survey will work on a similar basis to the current survey used to measure persistent poverty, the British Household Panel Survey, which follows the same households over a number of years.
23. If survey methodologies improve with regard to measuring income and poverty for children, and these improvements are incorporated into these surveys, then it may be necessary to amend the definitions used for the child poverty targets in the Bill so that they match the definitions used in the survey. This would ensure that the survey is still able to measure success against the targets as defined in the Bill. If no such regulation-making powers were conferred, and the survey methodology changed, then it is possible that the survey could not be used to measure success against the targets.
24. These powers will also ensure that if the way in which income is defined for the relevant survey statistics changes in response to research or methodological evidence, these changes can be reflected in the definitions used in the Bill.
25. Subsection (1)(a) provides a power to set out in regulations the definition of a 'qualifying household' for the purposes of the child poverty targets. Qualifying households are likely to be defined according to the rules the surveys use to sample households.
26. Subsection (1)(b) provides a power to define the circumstances in which a child is or is not to be regarded as living in a qualifying household. This would cover, for example, situations where a child spends part of the week with one parent and part of the week with another.
27. Subsection (1)(c) provides a power to set out in regulations what is to be regarded as the income for a household for the financial year, for the purposes of the targets. This is likely to set out how different types of income from different family members is to be treated, and how the income data collected is to relate to a financial year.
28. Subsection (1)(d) provides a power to make provision about what deductions are to be made from a household's income in calculating its net income. Subsection (2) provides that any deductions prescribed under regulations made under subsection (1)(d) must not include housing costs, but regulations made under that subsection may provide that specified expenses are not to be treated as housing costs.
29. Subsection (1)(e) provides a power to set out in regulations how household income is to be equivalised. Income is equivalised using equivalence scales, which reflect the extent to which households of different size and composition require a different level of income to achieve the same standard of living. There are a number of different scales that could be used and the intention is that regulations under this power will set out the equivalence scale to be used for the purpose of calculating household income under the Bill.

30. It is also the Government's intention to ensure that as many children are covered by the child poverty targets as is practicable, having regard to the statistical surveys that are being or can reasonably be expected to be undertaken. This safeguard is reflected in subsection (4) which the Secretary of State must have regard to when making regulations under subsection (1)(a). The Government believes it is appropriate that scrutiny of any regulations made under these powers should be by the affirmative resolution procedure.

Clause 7: The Child Poverty Commission

Powers conferred on: Secretary of State

Powers exercised by: order

Parliamentary procedure: affirmative resolution procedure

31. Clause 7 establishes the Child Poverty Commission. Details about this body are set out in Schedule 1.
32. Subsection (4) provides that the Secretary of State may make an order abolishing the Commission at any point after the end of the target year. This power will be used if the Government considers that there is no longer any role for the Commission.
33. Subsections (5) and (6) allow an order abolishing the Commission to include any necessary transitional arrangements and to repeal the various provisions of the Bill relating to the Commission, as well as any other statutory references to this body
34. The Government believes that because of the sensitivities involved in abolishing the Commission, scrutiny should be subject to the affirmative resolution procedure.

Part 2: Duties of Local Authorities and other Bodies in England

35. Part 2 makes provision requiring cooperation at a local level to tackle child poverty. It includes powers to make delegated legislation on the following matters:
- Clause 19: a power to amend by order the list of bodies considered 'partner authorities' in relation to a responsible local authority (negative resolution procedure); and
 - Clause 21: a power to make regulations about local child poverty needs assessments (negative resolution procedure).
36. In addition, it is intended that in exercising their functions under this Part, responsible local authorities and their partners should have regard to guidance issued by the Secretary of State on the following matters:
- Clause 20: co-operating to reduce child poverty in a local area;
 - Clause 21: local child poverty needs assessment; and
 - Clause 22: preparing a joint child poverty strategy for local area.
37. The provisions containing powers to make delegated legislation and to issue guidance are described in detail below.

Clause 19: Partner authorities

Powers conferred on: Secretary of State

Powers exercised by: order

Parliamentary procedure: negative resolution procedure

38. Clause 19 lists the public bodies and persons who will be ‘partner authorities’ in relation to responsible local authorities (as listed in clause 20) for the purposes of Part 2. Respondents to the consultation for *Ending Child Poverty: Making It Happen*⁶ indicated that it was important to name the key partners for a responsible local authority in the Bill.⁷
39. Subsection (6) provides that the Secretary of State may, by order, amend the list of partner authorities by adding any person with functions of a public nature, removing any person, or by adding or removing references to the Secretary of State’s functions under subsection (3). The intention of this power is to allow flexibility to add or remove partners or persons with functions of a public nature, and references to the Secretary of State’s functions. This will ensure that the legislation can be kept up to date with future changes to the structure of delivery agencies.
40. Before exercising this order-making power, subsection (7) requires the Secretary of State to consult representatives of local government and any other persons he thinks fit. With this statutory consultation requirement in place, the Government considers it appropriate for the order to be subject to the negative resolution procedure.

Clause 20: Co-operation to reduce child poverty in local area*Powers conferred on: Secretary of State**Powers exercised by: power to issue guidance*

41. Clause 20 imposes a duty on each responsible local authority to make arrangements to promote co-operation between the authority, each of its partner authorities, and such other persons or bodies as the authority considers appropriate, in order to reduce, and mitigate the effects of, child poverty in the local authority’s area. Subsection (4) provides that the responsible local authority and its partner authorities must have regard to guidance issued by the Secretary of State. This guidance is intended to cover the arrangements that responsible local authorities should put in place. It is expected that responsible local authorities and partner authorities will use existing partnerships, such as Local Strategic Partnerships, rather than setting up new arrangements.

Clause 21: Local child poverty needs assessment*Powers conferred on: Secretary of State**Powers exercised by: regulations made by statutory instrument and power to issue guidance**Parliamentary procedure: negative resolution procedure*

42. Clause 21 requires a responsible local authority, as part of the arrangements to co-operate made under clause 20, to prepare and publish an assessment of the needs of children living in poverty its area. Because of their duty to co-operate in the making of arrangements under clause 20(3), partner authorities are required

⁶ Ibid.

⁷ These bodies comprise some of the ‘partner authorities’ listed for the purposes of Chapter 1 of Part 5 of the Local Government and Public Involvement of Health Act 2007.

to co-operate with the responsible local authority in the preparation of a local child poverty needs assessment.

43. Subsection (2) gives the Secretary of State the power to make regulations about local child poverty needs assessments. Subsection (3) sets out the things that the regulations can make provision about. The intention is that the regulations will set out those matters which a responsible local authority must consider in its child poverty needs assessment, while giving the authority flexibility to consider other matters that it considers appropriate. As these regulations are procedural the Government considers it appropriate that they be subject to the negative resolution procedure.
44. Subsection (4) provides a power to issue guidance, which the responsible local authority and each of its partner authorities must have regard to when exercising their functions under this clause.

Clause 22: Joint child poverty strategy for local area

Powers conferred on: Secretary of State

Powers exercised by: power to issue guidance

45. Clause 22 requires the arrangements to co-operate made by a responsible local authority under clause 20 to include arrangements to prepare a joint child poverty strategy in relation to the authority's area and to modify it in accordance with the provisions in this clause. The strategy must set out the measures that the authority and each partner authority propose to take for the purpose of reducing, and mitigating the effects of, child poverty in the responsible local authority's area.
46. Subsection (7) provides a power for the Secretary of State to issue guidance, which the responsible local authority and each of its partner authorities must have regard to when exercising the functions under this clause.

Schedule 2: Continuing effect of targets after target year

Powers conferred on: Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary procedure: affirmative resolution procedure

47. Schedule 2 places a duty on the Secretary of State to ensure that the targets, once met, are met in later financial years, and confers powers on the Secretary of State to make regulations about how the targets will continue to apply after the target year if they are not met in that year or any later ('renewed') target year. Recognising the sensitivities involved in making these regulations, the Government believes that scrutiny should be subject to the affirmative resolution procedure, ensuring a high level of parliamentary scrutiny.
48. Paragraph 3 imposes a duty on the Secretary of State to make regulations about how the targets will continue to be met after the end of the target year if the targets are not met in relation to the target year or any renewed target year. The regulations must be made as soon as is reasonably practicable after the final report (under clause 13(3)) or statement (under paragraph 8 of Schedule 2) is laid before Parliament (paragraph 4). These regulations must: set a new target year; require the Secretary of State, the Scottish Ministers and relevant Northern Ireland department to publish further strategies; require the Secretary of State,

- the Scottish Ministers and relevant Northern Ireland department, when preparing strategies, to consult the persons and bodies with whom they are required to consult under clauses 9 and 12; and require the Secretary of State to publish annual reports on the implementation of the strategies.
49. Paragraph 5 provides that regulations made under paragraph 3 may include provision conferring or imposing functions on the Commission after the target year.
 50. Paragraph 6(a) to (d) provides that regulations made under paragraph 3(b) may include provision relating to: UK, Scottish and Northern Ireland strategies, and consultation on the strategies; reports; and the Commission providing further advice to the Secretary of State, the Scottish Ministers or the relevant Northern Ireland department.
 51. Paragraph 7 provides that the matters listed in clause 15(2) must be taken into account by the Secretary of State, and the matters listed in clause 15(3) must be taken into account by the devolved administrations, when preparing any strategy under regulations made under paragraph 3. The matters listed in clause 15(2) must also be taken into account by the Commission when considering any advice to be given under such regulations.
 52. Paragraph 8 requires the Secretary of State to publish a statement in relation to each renewed target year, stating whether the targets have been met in relation to that year and, if not, explaining why not.
 53. Paragraph 9(1)(a) provides that regulations may amend the target percentage and base year of the absolute low income target, in its application to any financial year later than the target date. This provision is required for the purposes of measuring absolute low income because in order for it to remain an accurate measure, it will be necessary to reset the current baseline of 2010-2011 at regular intervals. It is intended that this regulation making power will be subject to the affirmative resolution procedure.
 54. Alternatively, paragraph 9(1)(b) provides that regulations may make provision to repeal clause 4 (the absolute low income target), and the reference to this target in clause 24(3)(a). This is a power to amend primary legislation through a statutory instrument; however, it will be subject to the affirmative resolution procedure. Meeting the absolute low income target level by the target year will require sufficient real terms growth in household incomes. If the necessary growth in incomes has been secured by 2020, it may be decided that it is not necessary to establish a new absolute low income target. This is the rationale for including this power
 55. Paragraph 9(2) makes it clear that paragraph 9(1)(b) is not intended to have effect in relation to financial years before the regulations are made.

Child Poverty Unit

January 2010

APPENDIX 2: EQUALITY BILL – PARTS 1 TO 5: GOVERNMENT RESPONSE

Memorandum by Vera Baird, Solicitor General

1. The Delegated Powers and Regulatory Reform Committee reported on the Equality Bill, among others, in its Second Report of session 2009-10 (paragraphs 33-44). This considered Parts 1 to 5 of the Bill.
2. The Committee's comments and recommendations on particular powers are set out below, together with the Government's response.

Clause 2 – Amending Public Sector Duty Authorities

3. The Committee noted that clause 2(1) (which enables a Minister of the Crown to amend section 1 so as to add or remove public authorities or add or remove restrictions, with similar powers for Scottish Ministers and Welsh Ministers in relation to authorities exercising devolved functions) is a Henry VIII power and was not persuaded that the negative procedure provided in the Bill is appropriate. The Committee recommended that the affirmative procedure should apply to regulations under clause 2.
4. The Government will carefully consider the Committee's recommendation.

Clause 29 and Schedule 3

5. The Committee noted that paragraph 32 of Schedule 3 enables a Minister of the Crown by order subject to affirmative procedure to amend Schedule 3 to add, vary or omit exceptions to clause 29; and that the excepted "constitutional matters" in paragraphs 1 to 3 of Schedule 3 cover fundamental issues such as the functions of Parliament; the preparation, making or approval of legislation; and functions of the courts; paragraph 4 makes exceptions relating to the armed forces; and paragraph 5 the security services. The Committee commented that the exceptions provided for in paragraphs 1 to 3 have a particular constitutional significance and should be diminished only by Parliament. The Committee recommended that a limitation be imposed on the power in paragraph 32 of Schedule 3 whereby it may not be used to omit or reduce in scope any of the exceptions in paragraphs 1 to 3 of Schedule 3. It also recommended that the House may also wish to consider whether similar considerations apply to the armed forces and the security services.
6. The Government will carefully consider the Committee's recommendation in relation to the exceptions in paragraphs 1 to 3 of Schedule 3.
7. In relation to the armed forces and security services, the Government considers it important to retain the power to amend these exceptions through secondary legislation using an affirmative procedure. This is because circumstances may arise which requires us to have the flexibility to amend the scope of these exceptions quickly, given the nature of these organisations. This need was recognised in previous legislation which currently gives Ministers the power to amend these exceptions by affirmative procedure. For example, on the 26th of May 2009 the Ministry of Defence announced they were carrying out a review of women serving in the armed forces. If that review recommends any changes we may in consequence need to amend the armed forces exception.

Clause 37 – Housing, Scotland

8. The Committee noted the broad power conferred by the clause on Scottish Ministers to “by regulations provide that a disabled person is entitled to make relevant adjustments to common parts in relation to premises in Scotland”. The Committee recommended that the House may wish to invite the Government to justify in more detail the delegation to Scottish Ministers of this substantial power.
9. A Department for Work and Pensions note is attached with a detailed justification.

Clause 78 – Gender Pay Gap

10. The Committee considered that the power provided in this clause is not inappropriate in view of the affirmative procedure provided.

Clause 200 – Regulations, etc

11. The Committee noted that there seems to be an omission in respect of the powers in clauses 59 and 82 and that a minor amendment appears necessary.
12. The Government agrees and will bring forward an amendment in due course.

Vera Baird

January 2010

JUSTIFICATION REGARDING CLAUSE 37 POWER FOR SCOTTISH MINISTERS**Response to the Report of the Delegated Powers and Regulatory Reform Committee’s comments on Clause 37 – Housing, Scotland**Comments

Clause 37 – Housing, Scotland

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

Response

1. The Equality Bill provides a new right for disabled people to request, and have made, disability-related alterations to common parts of residential premises in England and Wales. This provision, which was consulted on in the Green Paper, arose from a

recommendation of the Review Group on Common Parts. In recognition of the different housing and property legislation in Scotland, the Review Group recommended that separate legislation should be made by the Scottish Executive to provide a similar right in Scotland. In preparation of the Bill (and following consultation with the Scottish Executive), therefore, it was considered that as the Bill presented a suitable legislative opportunity via which similar provision could be made for Scotland, that opportunity should be taken.

2. Clause 37 is the counterpart provision to Schedule 4, paragraphs 5 – 7 (and related provisions are clauses 20 and 36 and Schedule 21). The principal elements (in relation to common parts in England and Wales) are that the process is for the benefit of disabled persons who use premises as their main residence, a responsible person (either the commonhold association or person by whom the premises are let) is notified of a request for an adjustment, is required to identify and consult affected persons, shall decide whether the adjustment is reasonable, if so, enter into an agreement on the detail of the adjustment and be subject to requirement that consent to the adjustment should survive future disposals by the responsible person of his/her interest. Sch 21 allows for recourse to a court.

The Scotland Act 1998

3. It is not considered that the Scottish Parliament could make equivalent provision for Scotland with the same coverage as that achieved for England and Wales. Under the Scotland Act (Schedule 5, L2) "equal opportunities" is a reserved matter. "Equal opportunities" includes but is not restricted to the subject matter of certain enactments including the Disability Discrimination Act 1995 (the 1995 Act). "Equal opportunities" is defined as meaning the prevention, elimination or regulation of discrimination between persons on various grounds including disability.

4. Legislative competence of the Scottish Parliament is defined in s29 of the Scotland Act. By s29(2)(b), a provision is outwith legislative competence if it relates to reserved matters. Under s 29(3) of the Scotland Act, whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to its purpose, having regard (among other things) to its effect in all the circumstances. Having regard to these definitions, it is considered that the purpose underpinning the policy for disability – related adjustments to common parts (i.e. to facilitate access by certain disabled persons to their home) is an equal opportunities one within the meaning of the Scotland Act.

5. In the context of landlord and tenant law, the Scottish Parliament has legislated for disability related adjustments to an extent. Section 52 of the Housing (Scotland) Act 2006 (2006 Act) provides for landlords of certain tenancies not to unreasonably refuse consent to an adjustment - including those in relation to common parts - and in doing so shall have regard to any Code of Practice issued by the Commission for Equality and Human Rights. Similar provision is made in the Housing (S) Act 2001 (s28). It is assumed the Scottish Parliament considered these provisions to be for the non – reserved purpose of landlord and tenant law.

6. In Scotland, ownership of common parts is determined by the title deeds. Typically common parts will be owned in common by the persons who own the individual premises within a larger block. Typically adjustment to those common parts will require consent of all common owners. Provision in the 2001 and 2006 Acts impose duties on the landlords of disabled tenants in relation to adjustments, but not on the other common owners (whose consent will typically be necessary under the title deeds in order for such adjustments to be lawful).

7. Therefore those Acts do not currently provide a complete process for disability related adjustments to common parts. There is scope for doubt as to the extent of the

Scottish Parliament's legislative competence to make provision with comparable coverage to that in the Bill for England and Wales. The 2001 and 2006 Acts relate only to disabled persons who are tenants. No legislation has been made by the Scottish Parliament in relation to adjustments where the disabled person him/herself is one of the common owners or otherwise occupies the premises which utilise the common parts. Given the depth of interaction between the reserved purpose and devolved areas of law, in order to ensure complete provision is made so as to avoid disadvantage to disabled persons in Scotland, it is considered necessary to do so via the Bill

8. Whilst equal opportunities is a reserved matter, the policy in relation to common parts requires to fit into and operate within devolved areas of law in addition to landlord and tenant law - such as property law (including registration/recording of burdens on land), contract and civil justice.

Power to amend Scottish law in respect of common parts

9. Consideration was given to whether the English and Welsh model could be adequately adapted to fit Scottish property and housing law. It is not thought it can be. The principal reasons are – (1) in Scotland, common parts will typically be in multiple ownership and (2) the disabled person will typically be one of those common owners or be the tenant of a landlord who is one of those common owners. Practical considerations specific to Scotland arise – i.e. identifying which of multiple common owners is to be the “responsible person”, what should happen if that person objected to acting in that capacity or was unable to do so or could not be located. Where the disabled person is one of the common owners, that interest is significantly different from that of a comparable disabled person in England and Wales.

10. Additionally, the English and Welsh process enables the “agreement” to survive subsequent disposals by the “responsible person”. In Scotland, an equivalent effect requires to be achieved via recording/registering the interest in the Sasine or Land Register. Distinct provision is also necessary in relation to recourse to the sheriff, in the event of unreasonable refusals of consent or delay, given the distinct legal system in Scotland.

11. A regulation making power was considered necessary due to the complexity and technical nature of provision which would be required in light of the factors referred to above and the need for flexibility. Given the range of law in which the proposed power has to operate and that those areas are within the legislative competence of the Scottish Parliament, it was considered appropriate for practical reasons to confer the power on the Scottish Ministers.

12. The Scotland Act envisages that there will be circumstances where it is appropriate to transfer functions which are conferred on a Minister of the Crown to Scottish Ministers. This can be done by Order in Council under s63 of the Scotland Act and result in functions being exercisable wholly by Scottish Ministers in place of the Minister, concurrently with the Minister or by the Minister subject to agreement or consultation with Scottish Ministers. Many s63 Orders have been made including in relation to equal opportunities. It would have been possible to confer the power on a Minister of the Crown and subsequently transfer it to Scottish Ministers via s63. However it was considered for reasons of transparency preferable to confer the power by primary legislation on the body which is considered for practical reasons best placed to exercise it. And there are no legal restrictions on the competence of Westminster to legislate to do so.

13. As the power is proposed to be exercisable by Scottish Ministers, it is constitutionally appropriate for its exercise to be subject to scrutiny of the Scottish Parliament. As the Committee is aware under Standing Orders of the Scottish Parliament, this power will also be scrutinised by the Subordinate Legislation Committee

of that Parliament. Additionally, as the power would alter executive competence of the Scottish Ministers, it triggers the Legislative Consent Memorandum procedure in the Scottish Parliament. Scottish Ministers have agreed to adjust the LCM which is currently in train before that Parliament to include this power.

14. The purpose of Clause 37 is to allow Scottish Ministers, following consultation with Minister of Crown, to complete implementation of the Review Group's recommendation in Scotland. The power has been developed in consultation with the Scottish Executive. The regulation making power is limited in scope to apply (a) only to common parts and (b) where those common parts are not solely owned by the owner of the premises in which the disabled person resides (i.e. where there are 3rd party common owners whose consent to an adjustment would be required). The various limbs of the power are necessary to ensure that the process for Scotland will contain the same main elements as are provided for in the English and Welsh process.

15. We are happy to provide the Committee with any further information they may require in relation to the reasons underpinning the need for this power.

Department for Work and Pensions

January 2010