

HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

First Report of Session 2009-10

Bribery Bill [HL]

Building Regulations (Amendment) Bill [HL]

Cluster Munitions (Prohibitions) Bill [HL]

**Co-operative and Community Benefit Societies and Credit
Unions Bill [HL]**

Northern Ireland Assembly Members Bill [HL]

Legislative reform
**Draft Legislative Reform (Insolvency) (Miscellaneous
Provisions) Order 2009**

Ordered to be printed 2 December and published 3 December 2009

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 9

The Delegated Powers and Regulatory Reform Committee

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

Current membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Lord Armstrong of Ilminster GCB CVO
Lord Blackwell
Rt Hon. the Lord Boyd of Duncansby PC QC
Rt Hon. the Lord Butler of Brockwell
Viscount Eccles CBE
Lord Goodhart QC (*Chairman*)
Lord Haskel
Rt Hon. the Lord Mayhew of Twysden QC DL
Lord Razzall CBE
Lord Soley

Registered Interests

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

Publications

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

General Information

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

Contacts for the Delegated Powers and Regulatory Reform Committee

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

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. Following the passage of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act and the Committee became the Select Committee on Delegated Powers and Deregulation. In April 2001, the Regulatory Reform Act 2001 expanded the order-making power to include regulatory reform and the Committee, renamed the Delegated Powers and Regulatory Reform Committee, took on the scrutiny of regulatory reform proposals under that Act. The Committee will scrutinise regulatory reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.

First Report

BRIBERY BILL [HL]

1. This bill creates four new offences concerned with bribery (clauses 1, 2, 6 and 7), and makes associated provision; it also abolishes existing common law offences relating to bribery, and repeals a number of statutory provisions about corruption. The Ministry of Justice submitted a memorandum, printed at Appendix 1, explaining the delegated powers conferred in the bill.
2. Clause 16(4) and (5) confer power to make supplementary, incidental and consequential provision by order. If the order amends or repeals an Act for the purpose of making such provision, it will attract the affirmative procedure, as the House would expect; otherwise, the order is to be subject to negative procedure. The power to amend Acts does not extend to this Act or to Acts passed after the end of the present Session.
3. There is nothing in the bill which we need to draw to the attention of the House.

BUILDING REGULATIONS (AMENDMENT) BILL [HL]

4. Clause 1 of this bill requires the Secretary of State, by regulations subject to negative procedure, to amend the Building Regulations 2000 in a particular way. The subject-matter and procedure are consistent with those set out in section 1 of, and Schedule 1 to, the Building Act 1984 under which the 2000 regulations are made. We consider this to be appropriate.

CLUSTER MUNITIONS (PROHIBITIONS) BILL [HL]

5. This Government bill contains three delegated powers, including a Henry VIII power (subject to affirmative procedure) at clause 29. The powers are all explained in a memorandum, printed at Appendix 2, from the Foreign and Commonwealth Office, which in particular draws attention to the relevant precedents. There is nothing in the bill which we wish to draw to the attention of the House.

CO-OPERATIVE AND COMMUNITY BENEFIT SOCIETIES AND CREDIT UNIONS BILL [HL]

6. This bill is substantially the same as that on which we reported in our 11th Report of the last session [HL paper 110] and there is a memorandum from HM Treasury, printed at Appendix 3, on the delegated powers in the bill, as the bill has Government support.
7. In our earlier report, we drew attention to the fact that powers to create offences were not limited to creating offences comparable to those under the legislation relating to companies or building societies, nor need the penalties be equivalent (paras 6 and 9 of the report). This is addressed, in our view satisfactorily, in the new bill (page 5, line 14 to 17 and page 6, line 2 to 5). There is nothing we wish to draw to the attention of the House.

NORTHERN IRELAND ASSEMBLY MEMBERS BILL [HL]

8. This bill amends section 47 of the Northern Ireland Act 1998 to enable the Northern Ireland Assembly to confer on another person the function of setting salaries and allowances for its Members. There is nothing in the bill which we wish to draw to the attention of the House.

DIGITAL ECONOMY BILL [HL]

9. The Committee has given preliminary consideration to this bill. We decided however to defer our report until after the House has had an opportunity to debate the bill at second reading. We shall publish our report after our next meeting on 16 December.

**DRAFT LEGISLATIVE REFORM
(INSOLVENCY)(MISCELLANEOUS PROVISIONS) ORDER 2009**

10. We are considering this LRO at the second stage of the super-affirmative procedure. The Insolvency Service has provided an Accompanying Statement with the laying of the revised draft.
11. In our 9th Report of the last session [HL Paper 110], we expressed concern that, as it was then drafted, the LRO might fail, in one respect, to meet the precondition that the provision must not remove any necessary protection (section 3(2)(d) of the 2006 Act).
12. In the light of the Department's change to the original Order, we agree that our previous concern has been addressed. The Order now meets the tests in the 2006 Act and is appropriate to proceed as an LRO.

APPENDIX 1: BRIBERY BILL [HL]

Memorandum by the Ministry of Justice

Introduction

1. This Memorandum describes the purpose and content of the Bribery Bill; identifies the provisions of the Bill which confer powers to make delegated legislation; and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.
2. The Bill reforms the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in this country and abroad. The Bill replaces the offences at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 with two general offences covering the offering, promising and giving of an advantage or the requesting, agreeing to receive or accepting of an advantage (clauses 1 to 5). The Bill also creates a discrete offence of bribery of a foreign public official (clause 6) and a new offence of failure by a commercial organisation to prevent bribery (clauses 7 and 8).
3. The other main provisions of the Bill:
 - provide for prosecution for any of the new offences in England and Wales, or Northern Ireland to be subject to the consent of the Director of the relevant prosecution authority, rather than the Attorney General (clause 9);
 - provide a maximum penalty of 10 years imprisonment for all new offences, save the offence relating to commercial organisations, which will carry an unlimited fine (clause 10);
 - establish extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK (as well as UK nationals, and UK corporate bodies) (clause 11);
 - provide a statutory defence in respect of conduct which may amount to bribery where the conduct was necessary for the prevention, detection or investigation of serious crime by or on behalf of a law enforcement agency, or for the proper exercise of any function of the intelligence services or the armed forces engaged on active service (clause 12).

Clause 16(4): Power to make supplementary, incidental or consequential provisions for the purposes of the Bill or in consequence of it

Power conferred on: Secretary of State; the Scottish Ministers in relation to provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament.

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution where primary legislation is amended or repealed; otherwise negative resolution

4. Clause 16(4) confers power on the Secretary of State, or as the case may be the Scottish Ministers in relation to provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, to make such supplementary, incidental or consequential provision as

the Secretary of State or Scottish Ministers consider appropriate for the purposes of the Bill or in consequence of it. The power includes power to make transitional, transitory or saving provision and to amend, repeal, revoke or otherwise modify any provision made by or under an enactment which includes Acts of the Scottish Parliament and Northern Ireland legislation (clause 16(5) and (10)).

5. The powers conferred by clause 16 are wide. They are though tied directly to the purposes of the Bill or in consequence of it. There are numerous precedents for such provisions including section 333 of the Criminal Justice Act 2003, section 173 of the Serious Organised Crime and Police Act 2005, section 51 of the Police and Justice Act 2006 and section 148 of the Criminal Justice and Immigration Act 2008. The Bill makes significant changes to existing primary legislation (derived from a number of historical enactments) and it is possible that not all of the consequences of them have been identified in the Bill's preparation. To the extent that an order under this clause amends or repeals primary legislation (including Scottish, Welsh and Northern Ireland primary legislation), it will be subject to the affirmative resolution procedure (clause 16(6) and (8)). Otherwise, the order will be subject to the negative resolution procedure (clause 16(7) and (9)). It is submitted that this provides the appropriate level of Parliamentary scrutiny for the powers conferred by this clause.

Clause 18(1): Commencement power

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary Procedure: None

6. Clause 18(1), read with clause 18(3), contains standard powers to bring provisions of the Bill into force by commencement order. They include the power to make such provisions as the Secretary of State considers appropriate for transitory, transitional or saving purposes in connection with the coming into force of the provisions in the Bill (subsection (3)). The powers are conferred on the Secretary of State (subsection (1)). However, where the Secretary of State proposes to commence provisions in connection with any provision of the Bill which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, the Secretary of State must consult the Scottish Ministers (subsection (4)). As 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.

Ministry of Justice

November 2009

APPENDIX 2: CLUSTER MUNITIONS (PROHIBITIONS) BILL [HL]

Memorandum by the Foreign and Commonwealth Office

1. The Cluster Munitions (Prohibitions) Bill contains three types of delegated powers. The first is a power to provide that section 2 can apply to bodies incorporated under the law of any of the Channel Islands, the Isle of Man or any British overseas territory as well as to the list of persons in clause 4(3). The second is a power to modify the Act. The third is a power to extend the Act to any Crown dependencies and any British overseas territory. Each power will be discussed in turn. A copy of the Bill in its current form is attached.

The power to extend the list of persons in clause 4(3)

2. Clause 4(3) provides that in their application to conduct, and to assistance, encouragement and inducements outside the United Kingdom, subsections (1) and (2) of section 2 apply only to United Kingdom nationals, Scottish partnerships and bodies incorporated under the law of any part of the United Kingdom. Under clause 4(5), however, Her Majesty may by Order in Council provide that the section which is currently clause 4 is to have effect as if the persons listed in clause 4(3) included bodies incorporated under the law of any of the Channel Islands, the Isle of Man or any British overseas territory.
3. The exercise of the power in clause 4(5) would affect the law of the United Kingdom. It is not connected with the power in clause 35(3). The Order making power is not subject to any parliamentary procedure. There are precedents which are also not subject to any parliamentary procedure, in the Landmines Act 1998, section 3(4), the Chemical Weapons Act 1996, section 3(3) and the Outer Space Act 1986, section 2(3).

The power to modify the Act

4. This power is set out at clause 29 (1). The provision confers a power whereby the Secretary of State may by order made by statutory instrument make such modifications of the Act as the Secretary of State considers necessary or desirable to give effect to any amendment of the Convention. The purpose of the power is to avoid the necessity of a new Act of Parliament each time the Convention is amended. The Convention, Article 13, envisages that at any time after the entry into force of the Convention, any State Party may propose amendments to the Convention. The term “modification” is defined as including any addition, repeal or revocation.
5. The power provides at clause 29(2) that any such order may also make modifications of any other enactment that the Secretary of State considers necessary or desirable in consequence of the modifications of this Act made by that order. “Enactment” is defined as a provision contained in an Act of Parliament, an Act of the Scottish Parliament, a Measure or Act of the National Assembly for Wales, or Northern Ireland legislation or in any instrument made under them.
6. A statutory instrument containing the Order is to be made by affirmative resolution. There is a precedent in section 24 of the Landmines Act 1998, which implemented the Ottawa Convention 1977. This provides:
 - “(1) The Secretary of State may by order make such additions to, omissions from or other modifications of this Act as he considers necessary or desirable to give effect to any amendment of the Ottawa Convention made in pursuance of its provisions.

(2) The power to make an order under this section shall be exercisable by statutory instrument, and no such order shall be made unless a draft of it has been laid before and approved by resolution of each House of Parliament.”

The power to extend the Act to the Channel Islands, the Isle of Man or any British overseas territory

7. This power is set out at clause 33(3). The power simply provides for any of the provisions of the Act to extend with modifications (including additions or omissions) or without modifications to any of the Channel Islands, the Isle of Man or to any British overseas territory. There is no parliamentary procedure. This is because the Crown dependencies consider that the use of an Order in Council power without any Parliamentary procedure is the appropriate way to reflect their constitutional status. There are a number of relevant precedents which likewise contain no parliamentary procedure. Examples include the Landmines Act, section 29(4) and the Chemical Weapons Act, section 39(3) and the Biological Weapons Act 1974, section 6(2).

Foreign and Commonwealth Office

November 2009

APPENDIX 3: CO-OPERATIVE AND COMMUNITY BENEFIT SOCIETIES AND CREDIT UNIONS BILL [HL]

Memorandum by HM Treasury

1. This memorandum relates to the Co-operative and Community Benefit Societies and Credit Unions Bill, which was introduced in the House of Lords on 15 June 2009. It identifies the provisions in the Bill for delegated legislation, and explains their purpose and the particular form of Parliamentary control of delegated legislation selected.

Background and purpose of the Bill

2. The Bill is a private member's Bill and it has Government support. The Bill was originally introduced in the House of Commons on 21 January 2009 by Malcolm Wicks MP and went through the Commons stages with no amendments. The Bill was introduced in the Lords on 15 June 2009 and received its second reading on 10 July 2009. The Bill was not able to complete its passage through Parliament before Parliament was prorogued on 12 November 2009. The Bill is now being re-introduced as a Private Members' Bill in the Lords and has Government support. The Bill as re-introduced has minor amendments in clause 4(7)(b) and (8) and clause 5(1) (inserted section 23A(3)(b)) which have been made to address certain concerns that were raised by this Committee in its 11th Report published on 9 July 2009 and by the Constitution Committee in its reports dated 15 October 2009.
3. On 4 November the Financial Secretary to the Treasury wrote to the Chairman of this Committee and the Chairman of the Constitution Committee to address the concerns raised and to explain the proposed amendments to the Bill. Some of comments contained in those letters are repeated in this report.
4. The Bill is concerned with cooperatives, community benefit societies and credit unions, which are all types of industrial and provident societies governed by the Industrial and Provident Societies Act 1965 (the "1965 Act"), the main statute governing industrial and provident societies ("I&PSs"). The 1965 Act was supplemented by further Industrial and Provident Societies Acts in 1967, 1975, 1978 and 2002, by the Friendly and Industrial and Provident Societies Act 1968, by the Credit Unions Act 1979 and by the Co-operatives and Community Benefit Societies Act 2003¹.
5. There are two types of I&PSs under the 1965 Act:
 - a) Cooperatives run by their members for their members; and
 - b) Community Benefit Societies or "Bencoms", which are run by their members for the benefit of the community.
6. Credit unions are financial cooperative societies offering their members loans out of the pool of savings built up by the members themselves. The Credit Unions Act

¹ Industrial and Provident Societies Act 1965 (c.12)
Industrial and Provident Societies Act 1967 (c. 48)
Friendly and Industrial and Provident Societies Act 1968 (c.55)
Industrial and Provident Societies Act 1975 (c.41)
Industrial and Provident Societies Act 1978 (c.34)
Credit Unions Act 1979 (c.34)
Industrial and Provident Societies Act 2002 (c.20)
Co-operatives and Community Benefit Societies Act 2003 (c.15)

1979 is the main Act governing credit unions in Great Britain. However, credit unions are registered under the 1965 Act and are subject to most of its requirements.

7. The Financial Services Authority (FSA) is the registrar for I&PSs, including credit unions. It also regulates those I&PSs which provide financial services, under the Financial Services and Markets Act 2000. Treasury has policy responsibility for this sector and its legislation.
8. The purpose of the Bill is to modernise and update the law of I&PSs by changing their name, improving their corporate governance, and giving Treasury the power to modify certain aspects of their law in line with company law and building societies law. This follows extensive consultations with the industry, detailed below. In summary the Bill will:
 - a) require new I&PSs (other than credit unions) to be registered as co-operative or community benefit societies;
 - b) re-name the Industrial and Provident Societies Acts;
 - c) apply the Company Directors Disqualification Act 1986 to I&PSs;
 - d) give the Treasury powers to apply to I&PSs, with appropriate modifications, company law on investigation of companies, company names and dissolution and restoration to the register; and
 - e) give the Treasury powers to make provisions for credit unions corresponding to any provisions applying to building societies.
9. Although the aims and principles are clearly set out in the Bill, many of the changes to the relevant legislation to give full effect to the policy will be made by the Treasury in secondary legislation. This approach will allow the Treasury to deal with the detail of the changes, many of which apply legislation already approved by Parliament in one context (companies law) to I&PSs or deal with producing detailed tables of previous enactments. As an additional safeguard all the secondary legislation envisaged by the Bill will be subject to the affirmative resolution procedure, thus allowing further scrutiny of the detail by the legislature.
10. A number of the reforms were consulted upon in a public consultation “Review of the GB cooperative and credit union legislation”, carried out by the Government from 21 June to 12 September 2007. The proposals received the support of the sector. The consultation, together with a summary of responses and the Government’s response, are published on HM Treasury’s website (www.hm-treasury.gov.uk). While considerable consultation has been undertaken in relation to the overarching proposals contained in the Bill, the Government will wish to consult further in relation to the finer detail when it comes to producing secondary legislation. Indeed clauses 4(8) and 5(1) (inserting new Section 23A (6) of the Credit Unions Act) contain a requirement that the Treasury consult before making any regulations under the powers proposed. This is a Private Member’s Bill, albeit produced with Government support, and so there has been no pre-legislative consultation as to detailed provisions of the Bill itself.
11. The powers in clauses 4, 5 and 6 include “Henry VIII” powers to amend primary legislation. As the consequences of those amendments will be quite significant, the Government considers that Parliament should have a further say before the powers are exercised. So the order-making powers in the Bill are exercisable under the affirmative resolution procedure.

Clause 1: Registration of societies as co-operative or community benefit societies

Powers conferred on: N/A

12. It is intended that any I&PSs registering after the commencement of this clause will be registered by the FSA as a co-operative society, a community benefit society or a credit union. This would not be a substantive change in relation to credit unions, but it would be in relation to the other two types of society. In principle, the FSA would be able to register any new societies as co-operatives or community benefit societies; there is to be no requirement for existing societies to be registered. Thus existing societies registered, or deemed to be registered, under the 1965 Act, should not be subject to the requirement to be registered as a co-operative or community benefit society.
13. Subsection (1) replaces section 1 of the 1965 Act with revised provisions requiring all new societies registered under the Act, other than credit unions, to be registered by the FSA as co-operatives or community benefit societies. The FSA is the registrar for I&PSs. It also sets out the basis on which societies may be registered, re-enacting the existing section 1 of the 1965 Act.
14. Subsection (2) inserts into the 1965 Act a new section 4A, which deals with the treatment of those societies registered, or treated as registered, under the “old” section 1 of the 1965 Act (section 1 as it stands at present). These societies did not have to register as a particular type of society.
15. Subsections (3) and (4) amend section 16 of the 1965 Act, which deals with circumstances in which a society’s registration may be cancelled, so that it will reflect the registration provisions inserted into the 1965 Act by subsection (1). Subsection (4) inserts into Section 16 of the Act a new subsection (1A), permitting the FSA, as registrar, to cancel the registration of a society where it does not meet the statutory definitions set out in new 1(2) and new 1(3). Again the status of societies registered, or treated as registered, under the “old” section 1 of the 1965 Act is dealt with, at new 16 (1A)(c). Pre-2009 Act societies are not to be tested against the definitions of “co-operative society” or “community benefit society” inserted by subsection (1) of this bill.
16. Subsection (5) makes an additional amendment to the 1965 Act, ensuring that the definition of a “pre-2009 Act” society” reflects that inserted into the Act by clause 1(2).
17. Subsections (6) and (7) make additional amendments to section 20(1)(b) of the Credit Unions Act 1979 and section 1(9) of the Co-operatives and Community Benefit Societies Act 2003, again in order to reflect the amendments made to the 1965 Act by subsection (1).

Clause 2: Re-naming of Industrial and Provident Societies Acts

Powers conferred on: N/A

18. This clause permits existing legislation to be referred to by way of either its original title or by a new title as set out in the clause. This reflects a wish to replace the term “industrial and provident society” with terms which are more modern and are in more general use. The terms “co-operative society”, “community benefit society” and “credit union” are in common and widespread use; but the term “industrial and provident society” is not. The term “industrial and provident society” is anachronistic and its use makes the law less accessible to societies, their members and those who do business with them.
19. Titles of existing statutory instruments may also be changed in line with primary legislation by way of the consequential amendment power in clause 6. Having made

provision to amend primary legislation, the Treasury may consider it to be logical that similar provisions are made for subordinate legislation.

20. The Government considers that delegated legislation is a suitable vehicle for the essentially clerical exercise in listing and providing alternative titles for any existing secondary legislation touching on I&PSs. It would also allow the Treasury sufficient time to undertake a review of both primary and secondary legislation which would have to be included in the exercise and to identify references to the Acts the short titles of which have been changed by Clause 2 of Bill and amend the references accordingly. As such it would not be appropriate to make such changes by way of primary legislation.
21. The power to make changes by way of regulation is explicitly provided for at subsection (4) of clause 6 of the Bill.
22. All regulations under this Bill are to be made by way of affirmative resolution procedure, as set out in Clause 7. The Government considers that, since titles of legislation will be affected it is appropriate for Parliament to have the final word before any substantive changes are made.

Clause 3: Application of provisions relating to directors disqualification

Powers conferred on: N/A

23. The purpose of this clause is to extend the effects of the Company Directors Disqualification Act 1986 to societies registered under the 1965 Act. The 1986 Act provides for the disqualification, automatic or on application, of persons who seriously mismanage companies. Disqualification prohibits a person for being a company director or engaging generally in the management of a company (without seeking the prior approval of the court) or from acting as an insolvency practitioner (an absolute prohibition). It would be intended to extend this prohibition to involvement in societies.
24. This is achieved by inserting into the Company Directors Disqualification Act 1986 a new section 22E, set out at clause 3 of this Bill, extending the regime under the 1986 Act to I&PSs, including Credit Unions.

Clause 4: Power to apply certain other provisions relating to companies

Powers conferred on: HM Treasury

Powers exercised by: Order made by statutory instrument

Parliamentary procedure: affirmative resolution

Henry VIII powers: 4(3), (4) and (5)

25. Subsection (1) provides that the Treasury can make secondary legislation (regulations) either applying, or making provisions equivalent to, certain provisions relating to companies, in either case with appropriate modifications.
26. Subsection (1) also gives the Treasury the flexibility to decide whether to apply existing provisions or to make new, equivalent provisions and, in either case, to make appropriate modifications. The provisions made must correspond with the underlying companies provisions. These powers will enable the Treasury to choose the most appropriate legislative technique to apply relevant provisions of company law to I&PSs and to make modifications so as to adapt company law to the potentially different requirements of I&PSs. For example, it is envisaged possible that the FSA, which is the registrar for I&PSs, will take for I&PSs some of the

responsibilities that the Secretary of State for Business, Innovation and Skills has for companies in respect of investigations and ordering a change of name.

27. Subsection (2) specifies the provisions. The first set are Parts 14 and 15 of the Companies Act 1985 (subsection (2)(a)). These will apply existing company law on investigation of companies to societies. This includes powers to appoint inspectors, undertake investigations into the operation and membership of a society, requisition documents, require disclosure of information and powers to direct inspectors during their investigations. The power, once taken, will be exercisable by the FSA.
28. The second set of provisions are in Part 5 of the Companies Act 2006, relating to company names. The Treasury power would allow it to make regulations giving the FSA powers to direct I&PSs to change their name equivalent to those of the Secretary of State in respect of companies (those powers are currently exercised by the Secretary of State for Business, Innovation and Skills), as well as applying to I&PSs other provisions contained in Part 5 concerning company names. The result will be to bring the law of I&PSs closer to company law and to improve the FSA's ability to prevent the use by I&PSs of undesirable names.
29. Sections 66-68 in Part 5 Companies Act 2006 concern the power to order a name change if the company's name is similar to a name appearing, or which should have appeared, in the "Registrar's index of company names". Pursuant to section 1099(3)(e) Companies Act 2006, the Registrar's index of companies includes names not just of actual companies but also of various other bodies, including industrial and provident societies. Section 1101 Companies Act 2006 gives the Secretary of State a power to apply to bodies whose names appear in the Registrar's index of company names (including therefore industrial and provident societies) provisions corresponding to sections 66-68. If the Treasury takes the power to apply Part 5 of the Companies Act 2006 to industrial and provident societies it will have, among other powers, a power similar to that of the Secretary of State to apply sections 66-68. This appears appropriate in view of the fact that (i) the power to apply Part 5 of the Companies Act 2006 to industrial and provident societies is sought by the Treasury in order to implement reforms in the law of industrial and provident societies, for which the Treasury is responsible and is part of a wider power to apply the whole of Part 5 Companies Act 2006 to industrial and provident societies; and (ii) the Secretary of State's power concerns a number of different bodies, whilst the power the Treasury would be taking is specifically focused on industrial and provident societies.
30. The third set of provisions are in Part 31 of the Companies Act 2006 (subsection (2)(c)), setting out the basis (and procedure) by which companies can be dissolved and removed from the register. This will create a new regime giving the FSA wider powers to cancel the registration of societies. The regime also includes procedural requirements, makes provision for applications by others to remove a society from the register, sets out in detail how the property of a society should be treated and how a society may be restored to the register.
31. Subsections (3) to (5) explicitly list those sections of existing legislation which may be amended or repealed by regulations made under this clause. These are the existing provisions that may be superseded, or affected by the new provisions. This therefore confers a Henry VIII power in respect of the listed provisions. Henry VIII powers are justified in this instance because it is possible that during implementation amendments made to existing legislation will not be entirely consequential and these therefore permit a degree of flexibility when implementing the new regimes, ensuring that the new powers will fit into the existing statutory framework. The powers are strictly limited to the listed provisions within these three sub-sections.

32. Subsection (6) explicitly states that the Henry VIII powers granted in subsections (3) – (5) should not be taken as limiting the power to make consequential amendments set out in clause 6 of the Bill.
33. Subsection (7) gives the Treasury power to make regulations conferring power to the Treasury or the Secretary of State to: make orders, regulations and other subordinate legislation; create criminal offences; and charge fees.
34. The reason for this provision is that in order to apply certain provisions relating to companies as described above, the Treasury may need to confer powers to make secondary legislation, create criminal offences or charge fees.
35. In order to address comments by this Committee and the Constitution Committee concerning the powers to create criminal offences, subsection (7)(b) has been amended to the effect that the Treasury can only create criminal offences in circumstances corresponding to an offence in the legislation being applied and subject to a maximum penalty no greater than is provided in the corresponding offence.
36. As an example of the potential need to confer powers to make secondary legislation, some of the provisions in Part 14 of the Companies Act 1985 concerning investigations of companies confer on the Secretary of State powers to make regulations in respect of various matters. It is possible that, in applying the provisions of Part 14 to I&PSs, the Treasury will want to confer powers to make such regulation on themselves or the Secretary of State.
37. With regard to the potential need to create criminal offences, a number of the provisions in the underlying legislation contain offences and it may be that these are carried over when the companies' legislation is transposed to cover I&PSs. Part 14 of the Companies Act 1985, for example, provides for a number of criminal offences in connection with investigations of companies. The Treasury may want to create similar offences in connection with investigations of I&PSs. Further, Part 31 of the Companies Act creates a number of offences relating to the required procedures for voluntary striking off of companies (e.g. sections 1004 to 1007 of Part 31 of the Companies Act 2006). The Treasury may wish to include these offences in any regulations it makes applying those provisions to I&PSs.
38. As to the charging of fees, for example, pursuant to section 437 of the Companies Act 1985, the Secretary of State may furnish a copy of a report of the investigation to various persons "on payment of the prescribed fee". The Treasury may want to be able to prescribe such fee if this provision is applied in relation to I&PSs, or give the Secretary of State the power to do so in relation to societies.
39. The Government considers that delegated legislation is appropriate here because it will give time to ensure that appropriate detailed modifications to the company law provisions being adapted can be identified and made, ensuring that adjustments can be made to reflect the different nature of I&PSs to companies. Given the complexity of some of the underlying companies legislation, the Government will wish to consult further in relation to the finer detail of how that legislation should apply to I&PSs. Delegated legislation will also make possible further modifications and adjustment that may be required in the future, should circumstances change (e.g. to keep pace with corresponding amendments to companies legislation or if the provisions do not fulfil policy objectives) without the need of a further Bill.
40. All regulations under this Bill are to be made by way of affirmative resolution procedure, as set out in Clause 7. The Government considers that the provisions to be adapted from company law amount to significant changes such that scrutiny from Parliament is appropriate.

41. Furthermore, in order to address a concern raised by the Constitution Committee, a new subsection (8) has been inserted in the Bill. Subsection (8) imposes a requirement on the Treasury to consult when using the regulation-making power conferred by clause 4.

Clause 5: Power to make provision corresponding to provisions applying to building societies

Powers conferred on: *HM Treasury*

Powers exercised by: *Order made by statutory instrument*

Parliamentary procedure: *affirmative resolution*

Henry VIII powers: *New 23A(1) and (4)*

42. This clause gives the Treasury the power to modify credit union law to assimilate existing building societies law, thus bringing credit union law into step with building society law on certain issues common to both types of institution, as deposit-takers. Possible areas include:
- a) giving credit union members a statutory right to vote by proxy;
 - b) requirement to provide a summary financial statement to members and depositors;
 - c) audit and accounts requirements;
 - d) rules on electronic voting;
 - e) issues relating to directors and governance matters e.g. defence of due diligence, duty to disclose interests etc;
 - f) ownership of subsidiaries;
 - g) prohibition on floating charges; and
 - h) restriction on dealing in derivatives and certain other financial instruments.
43. Subsection (1) inserts into the Credit Unions Act 1979 (“the 1979 Act”) a new section 23A. New section 23A(1) gives the Treasury power to amend that Act by regulations so as to make corresponding statutory provisions for credit unions to those applicable to building societies. The new section 23A(1) therefore confers Henry VIII powers in respect of the 1979 Act. The power is widely drawn to allow any provisions of building societies legislation deemed appropriate to be mirrored for credit unions. Any provision applied to credit unions must, however, correspond to the underlying buildings societies legislation.
44. New section 23A(2) restricts the power in new section 23A(1) by providing that sections of the 1979 Act covering registration, use of the name “credit union”, the general prohibition on deposit taking, amalgamations or transfers of engagements and conversion of status between credit union company cannot be modified.
45. New 23A(3) provides that the regulations made by the Treasury to apply provisions of building society law may (a) confer powers to make orders, regulations and other subordinate legislation; (b) create criminal offences; (c) provide for the charging of fees (but not any charge in the nature of taxation). The reason for this provision is that in order to apply certain provisions relating to building societies, the Treasury may need to confer powers to make secondary legislation, create criminal offences or charge fees.
46. In order to address comments by this Committee and the Constitution Committee concerning the powers to create criminal offences, clause 5(1) (inserting new section

23A(3)) has been amended to the effect that the Treasury can only create criminal offences in circumstances corresponding to an offence in the legislation being applied and subject to a maximum penalty no greater than is provided in the corresponding offence.

47. New section 23A(4) provides that the Treasury may by regulations make amendments to any enactment (including to those sections of the 1979 Act explicitly exempted from substantive amendment under new 23A(2)) as set out in new section 23A(4). This is to ensure that existing legislation can be modified to encompass any changes made under the new 23A(1). This too is a Henry VIII power taken to ensure that existing legislation can be modified to encompass any changes made under the new 23A(1).
48. The phrase “enactment” is given its usual definition in sub-section (5) of the new section 23A.
49. New section 23A(6) imposes a requirement on the Treasury to consult when using the regulation-making power conferred by this section. This itself reflects the potential importance of the modifications which could be made using this power.
50. New section 23A(7) provides that changes to credit union law using this power are subject to the affirmative resolution procedure.
51. Henry VIII powers are justified in this instance because the policy cannot be implemented without amending the Credit Unions Act 1979. A Henry VIII power to amend that Act would ensure that statutory law as it affects credit unions will be in one place; a power to make amendments to enactments consequential upon substantive changes to the 1979 Act will avoid having to ask the legislature to approve minor consequential amendments, which would not be an appropriate use of primary legislation.
52. The Government considers that delegated legislation is appropriate here because the result of the proposed changes would confer greater regulation on credit unions, so it would not be possible to make such changes using a legislative reform order. Further, it will allow time for the Treasury to undertake the consultation exercise required under new section 23A(6). It will also allow sufficient time to ensure the appropriate level of detailed legislative changes have been identified and made. It will also make possible further modifications in the future, if circumstances change and adjustment is required to keep pace with corresponding amendments to companies legislation or the provisions do not fulfil policy objectives without the need for a further Bill.
53. Sub-section (2) of the clause amends section 29(2) of the 1979 Act, which deals with parliamentary procedure to expressly differentiate between modifications made under the new section 23A(1), which require the affirmative resolution procedure, and those made under existing powers contained in the 1979 Act (negative resolution procedure).
54. Sub-section (3) of the clause amends section 33(4) of the 1979 Act, which dealt with the application of the 1979 Act to Northern Ireland. The new subsection adds the new section 23A to the exceptions to the general provision that the 1979 Act does not extend to Northern Ireland.
55. All regulations under this Bill are to be made by way of affirmative resolution procedure, as set out in Clause 7. The Government considers that the provisions to be adapted from building society law amount to significant changes such that scrutiny from Parliament is appropriate. Thus in new section 23A it is expressly made clear in new section 23A(7) that changes to credit union law effected using this power will have to be approved under the affirmative resolution procedure. These provisions reflect that fact that modifications of primary legislation made

under this clause will make significant changes to primary legislation governing credit unions and should be subject to Parliamentary scrutiny.

Clause 6: Consequential amendments

Powers conferred on: *HM Treasury*

Powers exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *affirmative procedure*

Henry VIII powers: *6(1), (2), (3) and (4)*

56. Subsection (1) provides the Treasury with a power to make consequential amendments to enactments in the light of the other provisions of the Bill. The standard definition of “enactments” is given in subsection (3).
57. Subsection (2) permits this power to be used to amend any enactment passed or made before commencement of the relevant clause in the Bill. This ensures that any other legislation enacted before a particular clause comes into force may be amended to ensure that it is compatible with the provisions in this Bill or any legislation made under it (see clause 6(1).) This will ensure that even if implementation dates are delayed, legislation on the statute book as at the date of coming into force will not clash with the new provisions. It is anticipated that the potentially complex secondary legislation which would be introduced under the powers conferred in clauses 4 and 5 will necessitate consequential amendments to legislation, especially those acts currently governing the operation of I&PSs and Credit Unions, referred to at paragraph 3 above.
58. Subsection (4) makes specific provision for the amendment of titles of subordinate legislation should the Treasury so choose (see clause 2 above). The Treasury acknowledges that this is an unusual provision, however for the reasons given above regarding the need to have the ability to amend the titles of all legislation, it is essential.
59. Consequential amendments under this clause are to be made by way of the affirmative resolution procedure as set out in clause 7. The Government considers that it is important that the consequential amendments that may be required are subject to parliamentary scrutiny like the rest of the secondary legislation to be made under this Bill. Primary legislation, on the other hand, would not be appropriate for consequential amendments. The Henry VIII powers taken will ensure that existing legislation can be modified to encompass any changes made under this Bill.

Clause 7: Regulations

Powers conferred on: *N/A*

60. This clause sets out the basis on which regulations made under, or introduced into existing Acts by way of amendment by, clauses (4), (5) and (6) shall be made.
61. Subsection (1) permits such regulations to include any supplementary, incidental and transitional provisions as may be necessary or expedient. This will ensure that there is flexibility to make the changes envisaged under this Bill to existing IPS law with the minimum of disruption to the existing systems in place for I&PSs and to make the transition from the existing system to the new system as smooth as possible; it also obviates the need to return to Parliament when any necessary changes which have not yet been identified need to be made.

62. Subsection (2) states that regulations must be made by way of statutory instrument while subsection (3) requires all regulations made under the Bill to be made by way of the affirmative resolution procedure. For the reasons given in each case above, the Government considers it appropriate for Parliament to be able to consider the detailed changes which the regulations will contain before they are made.

Clause 8: Short title, commencement and extent

Power conferred on: *HM Treasury*

Power exercised by: *Order made by statutory instrument*

Parliamentary procedure: *none*

63. Subsection (2) confers a standard commencement power on the Treasury. It is possible that different provisions will be commenced on different dates – hence clause 6(2) above. Subsection (3) permits any commencement order to contain such transitional provisions as the Treasury deems necessary.
64. Subsection (4) clarifies the position as regards the extent of the Bill to Northern Ireland. While the bill will not directly affect Northern Ireland this provision makes it clear that clauses 5 and 6, together with clauses 7(1) and (3), which relate to powers to make consequential amendments, will extend to Northern Ireland, where the underlying enactments being amended so extend.
65. Subsection (5) permits the Bill to be extended to the Channel Islands by Her Majesty the Queen by way of an Order in Council. Any Order may make modifications to the Bill in its application to the Channel Islands. This type of clause has been used in I&PS legislation before – for example the Industrial and Provident Societies Act 1965, the Friendly and Industrial Societies Act 1968, the Industrial and Provident Societies Act 2002, and the Co-operatives and Community Benefit Societies Act 2003.

HM Treasury

November 2009