

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

7th Report of Session 2009–10

Children, Schools and Families Bill **Constitutional Reform and Governance Bill**

Government response:

Flood and Water Management Bill

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The Delegated Powers and Regulatory Reform Committee

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Historical Note

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

Seventh Report

CHILDRENS, SCHOOLS AND FAMILIES BILL

Introduction

1. This Bill had its Second Reading on Monday 8 March. Part 1 is concerned with education (including provision about pupil and parent guarantees, teachers' qualifications and the education of children at home); Part 2 with the publication of information about family proceedings in the courts. The Department for Children, Schools and Families ("DCSF") have prepared a memorandum, printed at Appendix 1, explaining the delegated powers conferred in the Bill.

Clause 1 — pupil and parent guarantees

2. Clauses 1 to 3 make provision about a "pupil guarantee" and a "parent guarantee", documents to be issued by the Secretary of State and which set out what pupils and parents are entitled to expect from the pupil's school. There is a Henry VIII power in clause 1(10), which enables the Secretary of State to amend by order the persons who, or bodies which, are to be subject to requirements imposed under the guarantees, and the categories of school in subsection (9) to which the guarantees may apply. The exercise of this power could affect significantly the scope of clauses 1 to 3 of the Bill: for instance, it is unclear whether subsections (2) and (9) could be amended to include an independent school. While we do not necessarily regard the power as inappropriate, particularly as it is subject to the affirmative procedure, **paragraph 15 of the memorandum does not explain why the power is thought necessary. The House may wish to invite the Minister to explain the reason for the delegation, and – in particular – whether it may enable the extension of guarantees to independent schools.**

Clauses 23 & 24 — School teachers' qualifications

3. Clause 23 inserts new sections 4B and 4C into the Teaching and Higher Education Act 1998 to enable the introduction, by regulations subject to negative procedure, of a licensing regime for teachers. The entire arrangements are to be set out in the subordinate legislation: apart from the definitions in subsections (1) and (6) of the new section 4B, the provision in the Bill itself is merely enabling.
4. In paragraph 58 of their memorandum, DCSF explain that the negative procedure is thought appropriate because the regulations "are essentially about administration of a licensing system". But the regulations may include provision for such matters as the considerations that must be taken into account when determining an application for a licence, and the conditions that may be imposed when one is granted (new section 4B(3)(d) and (e)). They may also sub-delegate the formulation of the standards by reference to which the determination may be made (subsections (3)(c) and (4)(b), and (7)); and they must provide for a right of appeal to a committee of the

General Teaching Council (which will itself have made the decision which is appealed against) (new section 4C).¹ As respects appeals, paragraph 59 of the memorandum describes the regulations as providing for what are “essentially technical operational issues”.

5. Similarly, for clause 24, which amends the Education Act 2002 to insert new section 134A, enabling regulations to provide that only a teacher who has a licence to practise may do specified kinds of work, paragraph 60 of the memorandum describes the provision that may be made as “administrative detail” for which the negative procedure affords an adequate level of scrutiny.
6. In light of the novelty of the powers, the extent to which the scheme is dependent on delegated legislation, and the fact that regulations directly relate to the extent of a teacher’s right to practise his or her profession, we are unpersuaded by the explanation given in the memorandum about why the negative procedure should apply to regulations under clauses 23 and 24. **The Committee recommends that any regulations made under the new sections inserted by clauses 23 and 24 should be subject to the affirmative procedure on the first exercise of the powers; and that any regulations making provision under new sections 4B(3)(c), (d) or (e) or (7), 4C or 134A, should always be subject to the affirmative procedure.**

Schedule 1 — Home education

7. Schedule 1 introduces statutory arrangements for registering and monitoring the provision of education for children at home. In contrast with clauses 23 and 24, much of the provision is set out in the new sections inserted in the Education Act 1996 by Schedule 1. Many of the delegated powers conferred are confined to procedural matters such as the maintenance of the register (new section 19A(2) and (3)), the manner in which applications for inclusion in the register are to be made (new section 19B(1)(a)), and the kind of information that must be supplied about the nature of the home education provided (new section 19H). But some of the powers are significant – for instance, those conferred by new section 19C(2), about the matters to be taken into account when determining an application; by new section 19F(5) and (6), about decisions to revoke registration; and by new section 19G, which requires regulations to make provision about appeals. The Committee notes in particular that the identity of the appellate body is to be designated in the regulations, as are its powers when dealing with an appeal.
8. All of these regulations are to be subject only to the negative procedure. The reason advanced for this by DCSF is set out in paragraph 72: “the registration scheme will be too detailed to be on the face of the legislation and will contain extensive administrative provision”. The Committee does not find this convincing, particularly in view of the character of some of the provision which may be made by regulations. **The Committee recommends that the affirmative procedure should apply on first**

¹ The Committee notes the conclusion of the Joint Committee on Human Rights in respect of this provision, that “We recommend that the Bill be amended either to provide a right of appeal to a genuinely independent appellate body (not a committee of the GTCE) or to provide a full right of appeal to a court of full jurisdiction.” (8th Report, Session 2009-10, HL Paper 57, paragraph 1.65).

exercise to each of the powers conferred by new sections 19C, 19F and 19G.

CONSTITUTIONAL REFORM AND GOVERNANCE BILL

Introduction

9. This Bill is scheduled to have its Second Reading on Wednesday 24 March. A number of its provisions – about the civil service (Part 1), the ratification of treaties (Part 2), and courts and tribunals (Part 9) – reflect earlier provisions included in a Draft Bill which the Committee considered in May 2008, and about which the chairman submitted a memorandum to the chairman of the joint committee appointed by both Houses to consider the Draft Bill.² But the present Bill contains a great deal of provision (Parts 3 to 8 and 10 to 12, and much of Part 13) which is entirely new. The Ministry of Justice (“MoJ”) have prepared a memorandum for the Committee identifying the delegated powers in the Bill, and explaining the reasons for the delegations and any associated scrutiny procedure (Appendix 2).

Clause 17 — Civil Service Commission additional functions

10. Clause 17(1) enables the Minister and the Commission to agree that the latter is to carry out functions in relation to the civil service in addition to those conferred elsewhere in Chapter 1 of Part 1. In response to the Committee’s suggestion about the similar provision in the Draft Bill, paragraph 19 of the memorandum now includes an explanation of the government’s intentions – in particular, that the kind of agreement envisaged under clause 17 might be (for instance) to enable the Commission to undertake a particular inquiry or to be involved in certain categories of senior civil service appointments. **The House may wish to seek confirmation from the Minister that the power could not be used to confer functions on the Commission that are already conferred by statute on some other person or body.**

Part 4 — Parliamentary standards

11. Part 4 of the Bill (which includes Schedules 4 to 7) makes extensive amendments in the Parliamentary Standards Act 2009 (“the PSA”) to revise and supplement the new arrangements enacted last Session for the determination of the salaries, allowances and pensions to be payable to Members of the House of Commons. When it considered the Parliamentary Standards Bill in July 2009, the Committee acknowledged in its Report that the Bill was concerned primarily with the House of Commons and affected principally matters which had previously been left to that House itself to determine. The same is true of much of the additional provision now made by this Bill. MoJ deal at some length, on pages 15 to 27 of their memorandum, with the new arrangements for matters relating to salaries, pensions etc of MPs to be dealt with by way of determinations or schemes made by the Independent Parliamentary Standards Authority (“IPSA”) and subsequently laid before the House of Commons. As is made clear in

² Joint Committee on the Draft Constitutional Renewal Bill – Evidence volume, Session 2007-08, HL 166-II, page 375.

paragraph 46 of the memorandum, the omission of a scrutiny procedure which might enable that House to veto a scheme etc. is deliberate.

12. Schedule 5 inserts a new Schedule 4 into the PSA which includes at paragraph 6 provision enabling the Compliance Officer to require a MP to pay a civil penalty of not more than £1,000 in the event of failure to comply with a requirement to provide information. Paragraph 7 of new Schedule 4 provides that a Minister may by order increase the maximum penalty, subject to approval in both Houses. **As the penalty can apply only to a MP, the Committee invites the House to consider whether an order under paragraph 7 of new Schedule 4 should be laid before and subject to the approval of the House of Commons only.**
13. A similar point appears to apply in relation to paragraph 21 of Schedule 7, a power to make by order amendments consequential on the provisions of any scheme made by IPSA or the Minister for the Civil Service, subject to the negative procedure in both Houses. **If such a scheme relates solely to the House of Commons, the House may consider that an order under paragraph 21 making provision consequential on the scheme should be subject to laying before, and the negative procedure in, the House of Commons only.**
14. Paragraph 16(1) of Schedule 7 enables the Minister for the Civil Service to make a scheme about the application of assets of the Parliamentary Contributory Pension Fund to persons mentioned in sub-paragraph (2), who include three office-holders in this House; yet the scheme is, by virtue of paragraph 18(2)(b) to be laid before the House of Commons only. **As it is relevant to both Houses, the Committee recommends that the scheme should be laid before both Houses (as are the regulations under section 2 of the Parliamentary and Other Pensions Act 1987 which the scheme is to replace).**

Schedule 9 — Demonstrations in the vicinity of Parliament

15. Clause 61 and Schedule 9 repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (which are concerned with the regulation of demonstrations within 1km of Parliament Square) and insert new sections 14ZA to 14ZC into the Public Order Act 1986. Rather than expressly referring to demonstrations, the new provisions are aimed at a “public procession” or “public assembly” and the steps to be taken to maintain access to the Palace of Westminster and to other buildings where a House or one of its committees may be meeting. At present, the Secretary of State may designate an area by negative order under section 138 of the 2005 Act as the area within which demonstrations may be regulated under that Act. There is similar provision under new sections 14ZB(1) and 14ZC(1) for areas around an entrance to the Palace, or around the relevant other building, to be designated by negative order.
16. New sections 14ZA(3) and 14ZC(5) also enable the Secretary of State to specify in a negative order the requirements that must be met in relation to the maintaining of access to and from the Palace, or to and from the relevant building, and sections 14ZA(5) and 14ZC(8) enable the orders to confer discretions on the senior police officer responsible for giving directions to those taking part in processions. These delegated powers are new. The extent of the statutory powers of the Commissioner of Police for the purposes of sections 132 to 138 of the 2005 Act are set out in the Act itself: only the

designation of the area is delegated to subordinate legislation. In paragraphs 93 and 98 of their memorandum, MoJ explain why the negative procedure is thought appropriate for these new powers, on the basis that they are now limited to the purposes of maintaining access to and from parliamentary buildings.

17. Because these new powers are, as MoJ appear to recognise at paragraph 93 of the memorandum, concerned with imposing limitations on the freedom of assembly (and may affect *how*, rather than simply *where*, a procession or assembly is to be controlled), and because the provisions in the 2005 Act which are now being replaced by new sections 14ZA and 14ZC have themselves not been uncontroversial, **the Committee considers that the affirmative procedure should apply to them, and recommends accordingly. If there is a concern that Orders of this kind might need to be made quickly, the ‘made affirmative’ procedure could be used. Under this, an instrument can be made and have immediate effect but cannot continue in force for more than 28 days unless both Houses approve it, could be used.**

FLOOD AND WATER MANAGEMENT BILL — GOVERNMENT RESPONSE

18. We reported on this bill in our Sixth Report (HL Paper 77) and the Government have now responded by way of a letter to the Chairman from Lord Davies of Oldham, Parliamentary Under-Secretary of State at the Department for Environment, Food and Rural Affairs, printed at Appendix 3.

APPENDIX 1: CHILDREN, SCHOOLS AND FAMILIES BILL

Memorandum by the Department for Children, Schools and Families

Introduction

1. This Memorandum sets out the provisions in the Children, Schools and Families Bill which confer powers on the Secretary of State to make delegated legislation. Annex A contains a summary of the clauses where it is proposed that powers to make secondary legislation are taken. The section 'Provisions for Delegated Legislation' explains in each case the purpose of the power; the reason why delegated legislation is appropriate; and the nature and reason for the Parliamentary procedure that apply.

2. The Bill seeks to reform the schools and wider children's service system following the recent White Paper "*Your child your schools your future: building a 21st century schools system*" and other reviews and publications. A full list of these is available at the end of this memorandum. It also introduces a licensing regime for teachers, for registration of home educated pupils and reforms to the family courts.

Background

3. This Bill will provide guarantees for parents and pupils setting out what they can expect from a 21st century schools system. These will equip every child, every family and everyone who works with them to meet the challenges ahead, and so help secure this country's success now and in the future.

4. It covers six main themes:

Guarantees – through new pupil and parent guarantees the Government is committing for the first time a series of specific entitlements for all, and providing a means of redress if expectations are not met.

21st century schools – building on over a decade of increasing school standards, this Bill will deliver the building blocks for a world class 21st century schooling system that meets the needs of every pupil so they can achieve their full potential.

Curriculum reforms – learning from wide ranging consultation and international evidence, the Bill will introduce reforms to the school curriculum so children and young people are equipped with the knowledge and skills they, and future employers, want and need.

Licence to practise – improving teaching underpins every effort to deliver the best possible education for all pupils, and through a new licensing system this Bill will professionalise the workforce and provide teachers with the status they deserve.

Safeguarding the vulnerable – strengthening the powers of local authorities and others with regards to registration, monitoring and intervention will mean effective systems are in place to protect those that most need it.

Increasing public confidence in family courts – opening up proceedings to increase transparency and introduce greater professional accountability while also protecting the welfare of children.

Territorial coverage

5. With one exception, the Bill extends to England and Wales only. One provision resulting from Part 2 extends also to Northern Ireland, but the amendment made is technical, and intended to maintain the current position in Northern Ireland.

Rationale and overview of delegated powers

6. In considering whether matters should be specified on the face of the Bill or left to delegated legislation, the Department has taken account of the inquiry undertaken by the House of Lords Select Committee on the Merits of Statutory Instruments, into the cumulative impact of SIs on schools and other public sector organisations³. The Rt Hon Jim Knight, then Schools Minister, set out the Government's response to the Committee report in a letter of 7 May 2009 and this has been published as an appendix to that report⁴.

7. We are mindful of the commitments that we made at that stage and will be planning on the basis of them. In particular, we are mindful of the need to reduce burdens on schools and other public bodies wherever possible. We are committed to ensuring that schools and other public bodies who may be affected by secondary legislation are given as much notice as possible to prepare for any necessary changes; and common commencement dates for implementation of any secondary legislation resulting from the Bill will be considered wherever this is possible and makes practical sense.

8. Furthermore, the specific provisions for secondary legislation being sought in this Bill have been developed on the basis of the following considerations:

- a) The overall legislative framework and the substantive policy provision must clearly be presented on the face of the Bill. The Bill, therefore, sets out the overall framework with secondary legislation used for subordinate provisions;
- b) Within that overall framework, the provisions of the Bill must also support effective implementation and contain sufficient flexibility to respond to changing circumstances as the schools and children's service system evolves and matures;
- c) The power to make regulations or orders must clearly be linked to the primary provision from which it stems. This results in quite a few regulation making powers but in so doing also provides greater clarity of intention than seeking more general secondary legislation making powers;
- d) Operational, administrative and technical details are not normally set out in primary legislation. Too much detail on the face of the Bill risks obscuring the headline duties and powers from Parliamentary scrutiny. Use of secondary legislation not only ensures appropriate flexibility but also provides additional opportunities to consult with those that will be affected by the provisions.

Parliamentary scrutiny

9. All powers of the Secretary of State or Lord Chancellor to make orders or regulations under the Bill are exercisable by Statutory Instrument.

³ HL Paper 45 (13 March 2009)

⁴ HL Paper 100 (21 May 2009).

10. In the majority of cases, Statutory Instruments are to be subject to the negative resolution procedure. In the case of commencement orders under clause 49 no Parliamentary procedure is required, in line with standard practice. There is one exception to this, which is the commencement of the “Part 2 amending provisions” (contained in schedule 2 and defined in clause 40). Commencement of Schedule 2 requires the affirmative resolution procedure for reasons explained below. In one other case, that of making an order specifying assessment arrangements for Personal, Social, Health and Economic education (PSHE) (see schedule 4 paragraph 14(3)), there will also be no scrutiny by Parliament. That is however, consistent with the current position for all other assessment arrangements for National Curriculum subjects (see s. 87(3)(c) and s. 210(5)(b) Education Act 2002 (“EA 2002”). There will also be no additional scrutiny of an order under clause 2(5)(b) but such an Order under that subsection can only follow an affirmative resolution of both Houses in any event.

11. In seven cases, the Department has determined that the affirmative resolution procedure is more appropriate. This is because the nature of the orders / regulations are significant and fundamental and either impose significant additional legal requirements or make changes to existing primary legislation such that it is also appropriate that Parliament scrutinises them further. These cases are:

- a) Issuing the Parent and Pupil Guarantee documents themselves;
- b) Orders to amend the areas of learning, or provisions regarding the teaching of languages, in the primary curriculum;
- c) Amendments to the ambit of pupil and parent guarantees to include other schools;
- d) To add or remove topics from PSHE;
- e) In the Family proceedings provisions, the powers to amend the definition of “professional witness” and to alter the list of sensitive personal information at schedule 3; and
- f) Commencement of the “Part 2 amending provisions” in schedule 2.
- g) The power to take certain types of proceedings out of, or bring them within, the reporting regime.

PROVISIONS FOR DELEGATED LEGISLATION

PART 1- CHILDREN AND SCHOOLS

Clause 1 - Pupil and parent guarantees

12. Clause 1 introduces the new Parent and Pupil Guarantees This provides for the Secretary of State to publish documents which will set out entitlements that parents and pupils can expect from their school and schooling experience. The guarantees will indicate whether these entitlements are mandatory, should ordinarily be provided or are a matter of good practice. To the extent that the guarantees impose requirements on local authorities, governing bodies or head teachers, these new duties will be enforceable and the documents will be able to set the parameters of the duty by reference to the fulfilment of the ‘ambitions’ in subsections (4) and (5).

13. There will be a large number of detailed elements to the guarantees, some of which may change over time, and it is not therefore appropriate for all of these matters to be set out on the face of the legislation. The status of their various

components will vary depending on whether they are mandatory or not and it is the Department's intention that the expectations of schools would increase over time.

14. Given the ability to impose significant additional requirements, the Department intends that the power to issue and revise the documents will be subject to the affirmative resolution procedure, detailed in clause 2 and merits this heightened scrutiny. The Secretary of State will also be under an obligation to consult on the contents of the document prior to laying before Parliament, so there will be ample opportunity for interested parties, or those affected by it, to give their own views on the proposals before they are laid before Parliament. A draft of the Guarantees was issued in January 2010 to allow the House to consider it alongside the Bill.

15. Subsection (9) of clause 1 permits the Secretary of State to make an order which alters the ambit of the parent and pupil guarantees by adding or removing a body or person upon whom requirements can be imposed by the guarantees (paragraph (a)) or by amending the types of school to which the guarantees themselves apply (paragraph (b)). Again, as an Order under this subsection would allow the ambit of the guarantees to be altered, it is right that this is subject to the heightened scrutiny of Parliament, through the use of the affirmative resolution procedure (subsection (10)).

Clause 2 - Procedure for issuing and revising pupil and parent guarantees

16. Clause 2 sets out the procedure by which the parent and pupil guarantees will be issued. Subsection (5)(b) of the clause provides that a guarantee (or the revisions of a guarantee) comes into force on whatever date the Secretary of State appoints by order. No parliamentary scrutiny of this order is specified. Given that no such order can be made by the Secretary of State until a draft of the document has already been approved by both Houses, any further Parliamentary scrutiny of the actual date would seem superfluous.

Clause 6 - Parental satisfaction surveys

17. Clause 6 inserts 7 new sections into Chapter 3 of Part 1 of the Education Act 1996 ("EA 1996").

18. Section 19J will introduce a new duty on local authorities to survey parents of each "prescribed description" about the provision of "relevant schools" in their area (subsection (1)). Subsection (6) specifies that descriptions of parents may be prescribed, for the purposes of this duty, by reference to the age of their child or by reference to children in a specified age group. "Relevant schools" for the purposes of this duty are those providing education of a prescribed description: so this power could, for instance, be used to prescribe secondary education and so require an authority to survey parents about the provision of secondary schools. Regulations under subsection (3) may make provision about arrangements to be made by an authority for the purpose of the new duty. In particular they may prescribe the particular matters on which parents' views must be sought and the form in which these views must be obtained. Regulations under section 19J(7) may prescribe circumstances where a local authority will be exempt from the requirement to carry out a survey. Such circumstances might include where an authority has produced a response plan in the previous year that has been referred to, and then approved by, the Schools Adjudicator.

19. On the basis that the regulations made pursuant to these new powers will be used to set out matters mainly in relation to the **operational detail of the**

survey, and that flexibility is needed in order to reflect any future changes in circumstances, these powers are considered to be appropriate for delegated legislation.

20. Section 19K requires a local authority to assess and publish a summary of the results of their parental satisfaction survey. If these results demonstrate “material parental dissatisfaction” with the provision of relevant schools in their area the authority will be under a duty to produce a response plan. We will prescribe in Regulations under section 19K(3) **how this material parental dissatisfaction is to be determined**. Section 19K(4) specifies that in preparing a response plan an authority shall consult parents of a prescribed description in their area. Regulations under subsection (6) may make provision about the consultation arrangements to be made by an authority in connection with this duty. This may include the arrangements an authority must make to ensure parents in the area of another authority are consulted, if the proposals in the plan are likely to be of interest to them (pursuant to the duty in subsection (5)). Regulations made under section 19K(6) will make provision about an authority’s assessment of the results of a parental satisfaction survey. Further, they will specify when and how a summary of those results should be published. The matters that should be dealt with in the response plan will also be included in Regulations; they could, for example, prescribe that where the results of the survey have shown the majority of parents favour a particular option, if an authority decides not intend to consult further on this, they must explain their rationale in the plan.

21. It is appropriate that this level of detail (which will need to be refined and agreed following consultation) is contained in Regulations, so as to give the requisite level of flexibility.

22. Section 19L(1) provides that where a local authority have prepared a response plan, they shall give “eligible parents” in their area the opportunity to make representations. Subsection (6) then provides that “eligible parents” will be prescribed for the purpose of this duty. Section 19L(3) gives a power for further regulations to prescribe the **trigger level at which the local authority will be required to refer a plan to the Schools Adjudicator**. It is appropriate that this level of detail, which may alter depending on the results of pilot surveys and changing circumstances, is contained in delegated legislation.

23. Regulations made under section 19L(4) will make provision about the arrangements to be made by an authority to enable parents to make representations to them about the plan. The Regulations will also specify the steps to be taken by an authority when a plan must be referred to the adjudicator. Such steps might include the timeframe within which a copy of the plan must be sent. On the basis that these are procedural and administrative details it is appropriate that they are dealt with in delegated legislation.

24. Section 19M provides that Regulations may make provision about the **procedures that must be followed by the adjudicator and the persons that must be consulted**, where a plan has been referred. They may specify the criteria that the adjudicator must take into account when making a determination about an improvement plan. New section 19N provides that regulations may prescribe the steps that must be taken by an authority where they have to modify or produce a revised response plan. These are procedural matters that would be too detailed for primary legislation.

25. All of the delegated powers sought here are to enable us to prescribe elements of administrative and technical detail so as to ensure that the overarching duty (on

the face of the legislation) will operate in practice. It is for these reasons that the Department proposes the negative resolution procedure is appropriate.

Clause 9 - Exceptional provision of education in short stay schools or elsewhere

26. Clause 9 (4) amends the new current subsection (3B) of section 19 of the EA 1996 (exceptional provision of education in short stay schools or elsewhere).

27. The main effect of the new provisions is to require local authorities to ensure the provision of full-time education for all children falling within the scope of section 19(1) and not only pupils excluded from maintained schools as is currently the case. This new duty to arrange full-time education is subject to the exception that it does not apply in the case of a child within subsection (3AA). That subsection refers to a child for whom a local authority considers that, for reasons which relate to their physical or mental health, it would not be in the child's best interests for full-time education to be provided. If full-time education is not appropriate, the local authority will be under a duty to arrange such part-time education as the authority considers to be in the child's best interests.

28. Clause 9 (4) amends the existing regulation making power in subsection (3B) to allow the Secretary of State to make regulations which provide the date from which the arrangements made by a local authority under section 19(1) are to take effect. The only difference between the existing and the proposed power is that the existing power is limited to arrangements for the provision of full-time education for excluded pupils made in pursuance of the existing subsection (3A), whereas the power in subsection (3B) as amended applies to arrangements generally made under section 19(1). This reflects the change made by new subsections (3A) and (3AA).

29. We consider that it is appropriate to use delegated legislation for this purpose to allow flexibility in prescribing the day from which a local authority has a duty to arrange education. It is proposed to make the regulation making power subject to the negative resolution procedure. The existing regulation making power under section (3B) is subject to the negative resolution procedure. Despite the power being extended, it is still primarily an administrative power to set a date from which education is to be provided. As there is presently no intention to change the date from which education is provided, this level of Parliamentary scrutiny continues to be appropriate.

Clause 10 - Areas of learning

30. **Clause 10** reforms the primary curriculum to introduce six new "areas of learning" within which teaching at primary level will be structured. The clause includes three Order making powers. Clause 10(2) inserts a new subsection (2A) into s. 87 EA 2002, to permit the Secretary of State to specify by Order, in relation to each area of **learning attainment targets, programmes of study and assessment arrangements**.

31. Subsection (2A) itself permits the Secretary of State to specify these for matters which range across more than one area of learning, and the inserted subsection (2B) also permits the Secretary of State to specify these for only a part of an area of learning (for example, for English only). Consistently, with what is presently contained in s. 87 in relation to key stages 1 and 2, and consistently with what will remain the position for key stages 3 and 4 the making of Orders under new subsection (2A) of section 87 which specify attainment targets and programmes of study will be subject to the negative resolution procedure, and

orders under subsection (2A) which specify assessment arrangements will not be subject to any parliamentary scrutiny (see Schedule 2 paragraph 14(3)). Clearly, Parliament will have an interest in the content of programmes of study and the standards set for these, but these will obviously be too detailed for primary legislation and will need to retain flexibility to change over time. Any proposal to make an order under the new section 87(2A) in relation to programmes of study or attainment targets would also have to be referred to the Qualification and Curriculum Development Agency (QCDA) for them to undertake a consultation under section 96 EA 2002 with bodies specified in section 96(3). Section 96 subsequently requires the Secretary of State to consult on a draft order prior to laying before Parliament.

32. Assessment arrangements are, on the whole, administrative, and therefore unlikely to be of interest to Parliament. Orders will also, consistently with the current provision for key stages 3 and 4, allow the content of the programmes or attainment targets to be specified in a document referred to by the Order (see section 87(5) of the EA 2002).

33. The Secretary of State will, however, have to consult the Office of the Qualifications and Examinations Regulator (Ofqual) and any other person considered appropriate by the Secretary of State (pursuant to s. 87(6A) EA 2002), before making any provision for assessment arrangements (which take effect by virtue of an Order by the Secretary of State under new subsection (2A)).

34. Subsection (6) of new section 83A (which is inserted by clause 10) permits the Secretary of State to **amend the areas of learning** and the powers relating to **designation of languages** for the purpose of the area of learning ‘understanding English, Communication and Languages’ by Order. Any such Order under subsection (6) will be subject to the affirmative resolution procedure (see Schedule 4 paragraph 14(2)(a), amending s. 210 EA 2002) which is appropriate given that it is a power to amend primary legislation by Order, and given that the areas of learning are fundamental to the primary curriculum.

35. In addition to requiring an affirmative resolution procedure, any proposal to make an order under the new section 83A(6) (to amend the areas of learning or the modern foreign languages which can be studied) must first be referred to QCDA under s. 96(2) EA 2002 and the QCDA must apply the consultation procedure set out in section 96. Section 96 also requires the Secretary of State to publish a draft order and consult on that prior to laying the final order before Parliament.

36. Subsection (4) of new section 83A permits the Secretary of State by order to **specify modern foreign languages** for the purposes of teaching within ‘understanding English, Communication and Languages’, or to specify all modern foreign languages. Such an order may also specify a mechanism for determining in any case whether a language is, in fact, a modern foreign language. Such orders are subject to the negative resolution procedure (by virtue of s. 210(4) EA 2002) which is appropriate given that there may need to be flexibility to change this over time, and there is no need to be over prescriptive in the legislation. This is consistent with the procedure for modern foreign languages at key stage 3 and 4.

Clauses 11 to 14 - Personal, Social Health and Economic education (PSHE)

37. Clauses 11 to 14 introduce Personal, Social, Health and Economic education as a new statutory National Curriculum subject in Key Stages 3 and 4, and provide for a duty to issue a programme of study for each stage and a power to

specify assessment arrangements and attainment targets. These are extensions to existing powers from the EA 2002. The clauses also revise and re-enact provisions relating to sex education in the EA 1996.

38. The high-level **content of the curriculum** for PSHE is listed in a new s. 85B EA 2002 (which is inserted by clause 11(4)) - for example, 'personal finance', 'emotional health and well-being' etc. Subsection (2) of new section 85B permits the Secretary of State to amend this list by Order. This is subject to the affirmative resolution procedure because such changes amount, in practice, to an amendment of the curriculum. This is achieved through a minor amendment in schedule 4, paragraph 14(2)(b) adding the power at section 85B(2) to the list of orders requiring affirmative resolutions in section 210(3) of the EA 2002.

39. The amendments made by clause 11(1), (2) and (3) to the provisions of section 84(3) and 85(4) of the EA 2002 and section 74(1)(d) of the Education and Inspections Act 2006 ("EIA 2006") respectively, permit the Secretary of State to make Orders setting out **programmes of study**, attainment targets and assessment arrangements for PSHE, as is possible in relation to all other National Curriculum subjects. Accordingly, the same Parliamentary procedure will apply to them- as noted above, negative resolution procedure for programmes of study and attainment targets and no Parliamentary scrutiny for assessment arrangements. However, new section 85B(3) specifically dis-applies any obligation on the Secretary of State to make orders setting out attainment targets or assessment arrangements for PSHE. This is because the nature of the subject and its content is such that it is not considered appropriate to treat it like any other academic subject, and to recognise that many of its elements are not intended to be tested upon. The legislation retains a flexibility for the Secretary of State to specify attainment targets and assessment arrangements by order if he so wishes, however, to maintain this possibility and to provide flexibility for the future. There is no intention to use these powers at present.

40. Clause 12 extends the ambit of the Secretary of State's order making powers in relation to PSHE as a subject by allowing it **to extend to Academies, City Technology Colleges or City Colleges for the Technology of the Arts (together 'Academies')** in key stages 3 and 4. It provides that attainment targets, programmes of study and assessment arrangements have effect in those schools as they have effect in maintained schools. Although clause 12 does not, itself, therefore include any delegated powers, as such, it does act to expand the scope of those powers delegated in clause 11 and it is described here on that basis.

Clause 15 - Power to provide community facilities, etc

41. Clause 15(3) removes the restriction in section 50(4) Schools, Standards and Framework Act 1998 ("SSFA 1998") that prevents governing bodies of maintained schools in England from using their delegated budgets for certain purposes, including the provision of community facilities and services under section 27 Education Act 2002. Clause 15 also inserts a new regulation making power in a new section 50(3A) of the SSFA 1998 to allow the Secretary of State to impose restrictions on the use by governing bodies of their delegated budgets.

42. Clause 15 will allow governing bodies **more freedom in the use of their delegated budgets** but the new regulation making power will allow the Secretary of State to impose specific restrictions if such restrictions are deemed to be required.

43. It is appropriate to use subordinate legislation to impose restrictions on the use by governing bodies of their delegated budgets because any restrictions that are

deemed necessary may need to be altered over time in response to changing circumstances and sufficient flexibility will be required. The negative resolution procedure is considered appropriate for the same reasons.

Clause 19 - School improvement partners

44. Clause 19 inserts into section 5(1) of the EIA 2006 a new power to prescribe additional services that a School Improvement Partner (“SIP”), appointed by the Local Education Authority is to provide to the governing body and head teacher of a school.

45. This will allow the Secretary of State a new power to make regulations which prescribe **services that SIPs are appointed to provide to governing bodies and head teachers of school, in addition to advice**. It is intended that the regulations will set out more detail about the role that SIPs are appointed to provide.

46. On the basis that any regulations made pursuant to the new power will be used to set out further details in relation to the role of the SIP and that flexibility is needed in order to reflect any future changes to the role, the power is considered to be appropriate for delegated legislation.

47. The negative resolution procedure is most appropriate, as the new power does not alter the fundamental duty on local authorities to appoint a SIP to provide services to assist schools, and it is consistent with the existing regulation making powers under sections 5(3), 5(4) and 5(5).

Clause 20 - Provision of information about schools, etc

48. Clause 20 covers the provision of information about schools and alternative provision. Section 537 of the EA 1996 currently gives the Secretary of State and the Welsh Ministers power to make regulations requiring the governing body or proprietor of a school to supply information about the school. Clause 20(1) expands this by providing that, for the purpose of this power, information about the views of prescribed persons about a school is to be taken to be information about the school. The clause also amends section 537 to provide that if regulations require information about the views of a “prescribed person” to be supplied, they may also make provision about how those views will be obtained. This will enable the **views of people such as parents and pupils** to be obtained in the same way in relation to all schools, such as by survey, to ensure that they can be used to compile a national dataset for use in performance measurement and to produce the School Report Card.

49. These powers are an extension of the existing powers to make regulations in s. 537 EA 1996, and those powers are exercised by the negative resolution procedure. Clause 20(1)(a) expands the Secretary of State’s ability to make regulations under s. 537(1) to amend subsection (2) of the EA 1996 to treat the views of prescribed people as information about the school; and introduces a new subsection (8A) into s. 537 which permits regulations to be made which govern also how governing bodies or proprietors of schools are to obtain information as to the views of prescribed persons.

50. Clause 20(2) and 20(3) introduces a new power for the Secretary of State and the Welsh Ministers to make regulations requiring the supply of information about **education funded by a local authority under section 19 of the EA 1996 (i.e. Alternative Provision)**. The regulations may impose a requirement to supply information on either the provider of the education, or a local authority. This

power mirrors that for schools in s. 537 (as amended by subsection (1) of clause 20). The negative resolution procedure is used to reflect the power in section 537.

Clause 21 – Schools eligible for intervention: powers of local authority

51. Clause 21 and paragraph 15 of Schedule 4 will allow the Secretary of State to make regulations under section 21 of the EIA 2006 which require a governing body which has published proposals for a school to acquire a foundation pursuant to a notice under new section 63(1)(e) EIA 2006 to refer the proposals to the adjudicator for determination.

52. Clause 21 provides a new power for local authorities to require a governing body of a maintained school that is eligible for intervention to take specified steps to acquire a particular type of foundation. The acquisition of this type of foundation is a ‘prescribed alteration’ under Part 2 of the EIA 2006 and the proposals are known as “foundation proposals”. Section 22 EIA 2006 applies to foundation proposals and subsection (5) of that section states that if the governing body of the school does not determine the foundation proposals itself, only the local authority can require the proposals to be referred to the adjudicator for determination. Paragraph 15 of Schedule 4 provides that section 22(5) EIA 2006 does not apply to foundation proposals in these particular circumstances, which will allow the Secretary of State to make regulations under section 21(2)(g) EIA 2006 requiring the **governing body to refer the proposals to the adjudicator for determination**.

53. This is an extension of the regulation making power in section 21(2)(g) EIA 2006 Act. Since the power already exists in primary legislation to allow regulations to require that proposals for a ‘prescribed alteration’ (except for foundation proposals) are referred to the adjudicator by the Secretary of State, it is appropriate to extend that power by disapplying section 22(5) EIA 2006 Act so that foundation proposals are included in that power, rather than providing a completely new power. Regulations made under section 21 EIA 2006 are subject to the negative resolution procedure so it is appropriate for the extended regulation making power in section 21(2)(g) EIA 2006 to be subject to that procedure.

54. Clause 21 and paragraph 16 of Schedule 4 will allow the Secretary of State to make regulations which require a governing body which has published proposals for a school to remove a foundation pursuant to a notice under new section 63(1)(f) EIA 2006 to refer the proposals to the adjudicator for determination.

55. Clause 21 provides a new power for local authorities to **require a maintained school that is a foundation school** with a foundation that has either been established or has acquired its foundation under EIA 2006, and that is eligible for intervention, to publish proposals **to remove the foundation**. The removal of a foundation is a ‘prescribed alteration’ under Part 2 of EIA 2006. Paragraph 16 of Schedule 4 inserts a new subsection in section 26(2) of the EIA 2006 to extend the regulation making power under section 26 to allow regulations to require that proposals published pursuant to section 63(1)(f) are referred to the adjudicator for determination.

56. This is an extension of the existing regulation making power in section 26 EIA 2006. Since the power already exists in primary legislation to make regulations about the publication and determination of proposals for the removal of a foundation, it is appropriate to extend the existing power rather than providing a completely new power. Regulations made under section 26 of the EIA 2006 are subject to the negative resolution procedure so it is appropriate that any extension

to the regulation making power in section 26 is also subject to the negative procedure.

Clauses 23 to 25 - Licence to practise

57. Clauses 23 to 25 introduce the new Licence to Practise and these clauses include three regulation making powers. Clause 23 providing for a new s. 4B of the Teaching and Higher Education Act 1998 (“THEA 1998”) includes a power for the Secretary of State to make regulations to authorise the General Teaching Council for England to **issue registered teachers with a licence**. The regulations will be required to make provision about the grant and refusal of a licence, the renewal of a licence and the withdrawal of a licence. The issue of a licence will be on the basis of periodical renewal and teachers continuing to demonstrate they meet certain professional standards. The licensing system will be new so this is clearly a new power.

58. Including these principles in primary legislation and the details in secondary legislation will allow for the system to mature and evolve following its launch and initial implementation. The regulations will follow the broad principles set out in the primary legislation and go into the technical detail needed to operate such a system. The Department proposes these regulations be subject to the negative resolution procedure on the basis that they are essentially about administration of a licensing system, not the principle of it. The regulations will cover, inter alia, the procedures that are to apply for granting, withdrawing, refusing and renewing licences including the evidence and information that applicants must provide. They will provide for different categories of licence for people in different circumstances, and for their duration. Regulations under new section 4B(3)(h) THEA 1998 will impose an obligation on employers to provide information regarding certain categories of teacher to the GTCe, for example to enable those who have had a break from teaching (“returners”) to be identified. Regulations under new section 4(B) (7) may allow the GTCe to make provision in the same way as is possible regarding the current registration system.

59. The new s. 4C THEA 1998 introduced by clause 23 requires the Secretary of State to make regulations conferring on a registered teacher a right of appeal against a refusal to grant or renew a licence; the withdrawal of a licence; a decision to grant or renew a licence conditionally; or a decision as to the duration of a licence. This too is a new regulation making power but it builds upon other appeals processes (including the existing system for teachers appealing in relation to decisions on registration) and is more appropriately set out in regulations to allow it to be altered over time. Furthermore the Department considers this appropriate for the negative resolution procedure as these are essentially technical operational issues.

60. The final regulation making power in relation to the Licence to Practise is conferred by Clause 24. Clause 24 inserts a new section 134A into the EA 2002 which states that regulations may provide that specified work may be carried out in a school in England by a qualified teacher only if the teacher has a license to practise. This regulation making power will be used to ensure that all qualified teachers (including supply teachers and teachers from overseas) in maintained schools, non-maintained special schools, pupil referral units, academies, city technology colleges and city colleges for the technology of the arts will be required to hold a ‘licence to practise’ from a date or dates to be specified. This is also, of course, a new power and is modelled on existing powers in relation to Qualified Teacher Status (section 133 of the EA 2002) and registration of teachers (section 134 of the EA 2002). As before, the Department considers this administrative

detail to implement the overall system to be appropriately taken forward through regulations subject to the negative resolution procedure.

61. Clause 25 extends the existing regulation making powers of the Secretary of State under sections 133 and 134 of the EA 2002 to cover Academies, city technology colleges and city colleges for the technology of the arts. As with the existing powers in section 133 and 134, the regulations are subject to the negative resolution procedure.

Clauses 26 and 27 - Home education

62. Clauses 26, 27 and schedule 1 cover home education. Clause 26 and schedule 1 will introduce a new **requirement for local authorities in England to keep a register** of all children of compulsory school age in their area who are home educated, and to monitor those children to ensure that they are receiving a suitable education and are safe and well.

63. Clause 26 inserts new sections 19A to 19I EA 1996. There are new regulation making powers under schedule 1 in sections 19A, 19B, 19C, 19F, 19G and 19H. These will allow for the procedural detail of the new registration scheme and how it will operate to be set out in regulations. Requirements of the scheme will be set out on the face of the Bill.

64. There is a power to make regulations under section 19A(2) about how local authorities should maintain (and amend) their home education register.

65. Section 19B(1)(a) gives a general power to make regulations about the manner in which **an application** for a child's details to be entered on a local authority's home education register is to be made. Section 19C (4) specifies that regulations made in the exercise of this power may make provision about how an application is to be made, and about information that is to be included in it, including a statement about the education that it is intended to provide to the child, and about the provision of an undertaking to provide required information. Subsection 19C(5) specifies that regulations made in the exercise of this power may allow an authority to provide for a period within which a repeat application may not be made in respect of a child whose previous registration has been revoked, or whose previous application for registration was not successful, unless there has been a change of circumstances.

66. The Regulations in relation to applications will contain detailed provisions not suitable for the face of the Bill. The Department is also concerned to have flexibility over time making these powers appropriate for delegated legislation.

67. Section 19C(1) gives a general power to make regulations about steps to be taken by a local authority in connection with an application for a **child's details to be entered on the register**. This may cover, for example, how a local authority may want to populate and maintain the register - on-line, in writing or in person; at the local authority's offices, at a school or at a library or other public building. Guidance will say that in doing so local authorities should take into account the views of home educators locally about how the process might work and operate on the principle that registration should be convenient for home educators. Section 19C(2) further provides that the regulations may make provision about matters that are and are not to be taken into account by an authority in deciding whether to register a child. Section 19B(2) gives a power to make regulations about what details in relation to a child should be entered on the home education register. Regulations will specify the information to be held on the register which may include, for example, the child's name and address, gender,

date of birth, race, religion, details of disability or special educational needs, names and addresses of those with parental responsibility and details of where most education is taking place.

68. New section 19E obliges a local authority to make arrangements to monitor the provision of education to a home educated child.

69. Section 19F deals with revocation of registration. Subsection (5) provides a general power to make regulations about steps to be taken by an authority in relation to revocation or proposed revocation. It is intended that these regulations will specify what **steps a local authority should take in connection with a proposed decision to revoke a home education registration**. We would expect local authorities to make comprehensive enquiries before revoking registration and to give home educating parents ample time to make representations if they believe the grounds for revocation are unreasonable. Section 19F(6) provides that the regulations may also specify matters which an authority are or are not to take into account when considering revocation. We envisage that local authorities will have flexibility around their discretion and their duties are clear on the face of the Bill. The regulations will assist them only by providing a procedural framework within which their decisions are made.

70. Section 19G(1) provides that regulations will provide for a right of appeal against an authority's decision to refuse or revoke registration. Subsection (2) gives an indication of the procedural provision that will be needed. The regulations will be accompanied by guidance with the aim of ensuring that appeals are informal and impartial along similar lines to school admissions appeals. At present, we envisage that the appeals panel will be independent from the local authority and will be comprised of three people: at least one person who has a professional educational background, at least one person who has experience of home educating and a lay member.

71. There is a general power at Section 19H(1) to make regulations requiring a local authority in England, or the proprietor of a school in England, from which a home educated child has been withdrawn, to supply information about the child, in certain circumstances, to a local authority. This is intended to cover the situation where a child has been withdrawn from school to be home educated. Regulations may provide for example that if a school knows the identity of the local authority with whom the child will be registered for home education then it must notify its own local authority of this and pass on certain information about the child to the new local authority.

72. All of the above powers will be subject to the negative resolution procedure under s. 569 EA 1996, which is appropriate as the registration scheme will be too detailed to be on the face of the legislation and will contain extensive administrative provision.

73. Clause 27 provides for a framework power for the National Assembly for Wales ("NAW") to enable it to make provision, within **an Assembly Measure**, about the regulation of home education and the inspection of services provided by local authorities to persons involved in the provision of home education. This new power is conferred by amending field 5 of Schedule 5 to the Government of Wales Act 2006. This will enable the NAW, within an Assembly Measure, to make provision about the inspection and regulation of home education.

74. The framework power will set the scope of the legislative competence of the NAW in order to pass a Measure. Following a period of consultation on its detailed proposals for a Measure on home education by the Welsh Ministers, the

NAW will then be able to pass a Measure making provision about home education. Such a future Measure, as with all other Measures passed by the NAW, will be subject to the scrutiny and procedures of the NAW as laid down in its Standing Orders.

Clause 30 - Review by Chief Inspector of performance of Local Safeguarding Children Boards in England

75. Clause 30 confers power on the Secretary of State to make regulations providing for Her Majesty's Chief Inspector of Education, Children's Services and Skills ('the Chief Inspector') to undertake **a review of a LSCB's performance of specified functions.**

76. The regulation making power in clause 30 allows for regulations to specify which functions are to be reviewed by the Chief Inspector. It also allows for regulations to allow or require the Chief Inspector to carry out a review, or to require the Chief Inspector to carry out a review in specified circumstances. The regulations may also deal with the making of a report by the Chief Inspector once a review has been completed, and make provision about sharing information for the purposes of a review.

77. The Department wishes to retain some flexibility as to which specific functions are reviewed. Some LSCB functions may be more appropriately reviewed under other arrangements, for example, as part of Joint Area Reviews undertaken under section 20 of the Children Act 2004. The Department also considers that the detail as to when and how a review is required to be carried out is best set out in secondary legislation, given that this might vary depending on which functions are being reviewed. The Department considers it is appropriate for these procedural details to be taken forward through the negative procedure.

PART 2: FAMILY PROCEEDINGS

Clauses 32-41

78. Part 2 of the Bill includes powers to make secondary legislation on the reforms to **increase transparency of family proceedings** with the aim of improving public confidence. There are four powers in clauses 32, 39, 40 and 41. The first of these is a power to amend the definition of "relevant family proceedings", which are the proceedings subject to the new reporting regime. This power is intended to ensure that the regime continues to apply to the appropriate range of proceedings should the definition of "family proceedings" more widely change. The second power at clause 39(1) is intended to ensure that rules of court will make any necessary provision for appeals in the event that they are not already provided for by wider existing rules on appeals, so that appropriate provision for appeals against decisions on reporting is made.

79. The third and fourth powers are found in clause 41(3). Clause 41(3)(a) permits amendments to the definition of "professional witness" (those categories of witness who may, by way of exception to the general rules against identifying persons involved in family proceedings, be identified in reports of such proceedings) also found in clause 41, if appropriate in the light of experience of operation of the new reporting regime. Clause 41(3)(b) permits amendment of the list of "sensitive personal information" at schedule 3 specifying certain categories of information publication of which is prohibited unless the court otherwise directs.

80. The first power is exercisable by statutory instrument subject to affirmative resolution procedure, and the second by statutory instrument subject to negative resolution. Both powers are intended to ensure technical amendments may be made to ensure the scheme operates effectively over time; but affirmative resolution procedure is adopted for the first because the power could be used in ways which could take certain types of proceedings out of, or bring them within, the reporting regime. For the third and fourth powers, it is considered appropriate to secure changes to the definition or list through secondary legislation on the basis that it may well be important to change them from time to time in light of other operational experience and/or to take account of other legislation. Changes would follow discussions with stakeholders including the judiciary. However, given that the nature of the changes would be central to how the primary legislation itself can be implemented, the Department proposes that orders under the third and fourth powers are subject to the affirmative resolution procedure.

81. The order making powers in clauses 32, 40 and 41 are conferred on the Lord Chancellor. The power to make rules of court in clause 39 is one conferred on the Family Proceedings Rules Committee (such rules being allowed by the Lord Chancellor and contained in a statutory instrument subject to the negative resolution procedure (for which see section 40A(5) of the Matrimonial and Family Proceedings Act 1984 and section 79(6) of the Courts Act 2003)).

82. There is no separate, specific power to commence the “Part 2 amending provisions” in Schedule 2 distinct from the normal commencement power at clause 49. However, commencement of Schedule 2 and related repeals in Schedule 5 cannot occur unless the requirements of clause 40 are satisfied. Schedule 2 will change sensitive personal information from being a category of information which may not be published unless the court gives permission, to being information which may be published unless the court prohibits or restricts publication. These provisions also repeal the fourth power (which will not be needed once the approach to this category of information is changed), Schedule 2 also includes changes in the test which is to apply when the court is considering whether to restrict or prohibit the publication of information to reflect the fact that information which is more sensitive will be more frequently in issue.

83. The preconditions for the exercise of this commencement power are stringent, to reflect the fact that the changes made by Schedule 2 are significant. The Lord Chancellor must first allow for a period of 18 months to elapse from commencement of clause 32 (for any purposes, so that if it is commenced in relation to certain kinds of court for limited purposes, for example, that will start the time period running), and can then (and only then) arrange for an independent review of the operation of the reporting regime, and must then set out the conclusions of the review in a report and lay the report before Parliament. Only when all three preconditions have been fulfilled may the Lord Chancellor make the commencement order bringing the Part 2 amending provisions into force. The commencement order itself is subject to the affirmative resolution procedure. The Lord Chancellor does not have to carry out a review or lay a report before Parliament; but may not commence the Part 2 amending provisions without having done so.

84. These reforms are part of a longer journey towards greater transparency, not just within family courts but across government. Much of the sensitive personal information restricted in the initial stage of the reforms (the unamended version of Part 2) is essential for understanding the complexity of family cases and allowing the public to see how and why the courts come to their decisions. The

Government believes that the media will be responsible when using this information and that the guarantee of anonymity afforded by the treatment of identification information (which will not change) protects the welfare of children and their families. The Government does, however, also understand the concerns surrounding privacy and will accordingly review the effect of the initial stage of the reforms before proceeding further. The approach adopted in the Bill allows for Parliament to debate, amend if necessary and approve the detail of both the starting point and the final destination by including the latter on the face of the Bill. It is for this reason that it operates by way of a commencement power, not a power to alter the treatment of the information as such: the actual alteration will have been agreed by Parliament on the face of the Bill.

PART 3: MISCELLANEOUS AND FINAL PROVISIONS

Clause 43 - Fees for pre-registration inspections of independent educational institutions

85. This clause amends section 111 of the Education and Skills Act 2008 (“the ESA 2008”). The amendment provides power for the Secretary of State to make regulations to require the **payment of a fee in relation to an inspection of an independent educational institution** that has applied to be registered under section 98 of the Act. Such inspections are carried out under section 99 of the ESA 2008.

86. The aim of this power is to limit the burden of inspections of independent educational institutions on the public purse, and to encourage institutions to meet the required standards at the earliest opportunity so that they avoid incurring the cost of follow-up inspections. The amount of the fee payable will be prescribed in secondary legislation so as to allow it to be amended in response to changing costs. It is proposed that the new regulations will require a £500 fee for each inspection connected with the institution’s application to be included on the register.

87. This power relates to operational details and, as such, it is proposed it should be subject to the negative resolution procedure. This is consistent with the procedure for regulations made under existing powers in section 111 of the ESA 2008.

Clause 49 - Commencement

88. Clause 49(5) provides for the Secretary of State to commence much of the Bill by order. No parliamentary procedure applies to these orders which need not be laid. Clause 49(3) permits the Welsh Ministers to commence clause 29 also by statutory instrument not subject to any parliamentary procedure. Clause 49(4) permits the provisions of Part 2 and Part 2 of schedules 4 and 5 to be commenced by order of the Lord Chancellor (though in relation to commencement of Schedule 2 and Part 2 of schedules 4 and 5 so far as relating to schedule 2, this can only be commenced in compliance with clause 40 and by affirmative resolution procedure). Clause 49(6) provides that a commencement order under subsection (3) or (4) may make **incidental, consequential, supplemental, transitional or transitory** provisions or savings, and may also make different provision for different purposes or different areas.. This latter provision will permit pilot schemes in relation to some of the provisions, for example, in relation to parental satisfaction surveys.

Department for Children, Schools and Families

February 2010

Annex A

Delegated Powers in the Schools, Children and Families Bill

Clause	title	procedure	New or restatement
PART 1 - CHILDREN AND SCHOOLS			
1(1) and 2(3) and (4)	Issuing and revising pupil and parent guarantees	Affirmative	New
1(9)	Power to amend the ambit of the guarantees	Affirmative	New
2(5)(b)	Commencement dates of guarantees or revisions	None	New
6	Parental Satisfaction Surveys:		
	New section 19J(1), (3) and (7) EA 1996	Negative	New
	New section 19K(3) and (6) EA 1996	Negative	New
	New section 19L(1), (3) and (4) EA 1996	Negative	New
	New section 19M EA 1996	Negative	New
	New section 19N EA 1996	Negative	New
9(4)	Duty on local authorities to ensure the provision of full-time education for all children falling within the scope of section 19(1) EA 1996	Negative	Extension
10	Areas of learning:		
	New subsection 87 (2A)(a) or (b) EA 2002	Negative	New
	New subsection 87(2A)(c)	None	New
	New subsection 83A (4) EA 2002	Negative	New
	New subsection 83A (6) EA 2002	Affirmative	New
11	Personal, Social, Health and Economic Education (PSHE) in maintained schools:		
	New subsection 85B(2) EA 2002 (maintained schools)	Affirmative	New
	New subsection 84(3)(i) EA 2002	Negative	Extension
	New subsection 85(4)(d) EA 2002	Negative	Extension
	New subsection 74(1)(d) EIA 2006	Negative	Extension
12	PSHE in Academies etc: extension of Part 6 EA 2002 relating to PSHE in Academies: new 483B (2)	Negative	Extension
15	Power of governing bodies to provide community facilities etc. (school spending powers)	Negative	New
19	Power to prescribe additional services that	Negative	New

Clause	title	procedure	New or restatement
	School Improvement Partners are to provide		
20 (1)	Provision of information about schools: clarifies existing power to collect information and data in a consistent manner.	Negative	Extension
20 (2)	Provision of information about schools: to obtain and publish information about LA alternative provision.	Negative	New
21 and Schedule 2	Schools eligible for intervention- powers of local authorities:		
	Extension of section 21(2)(g) EIA 2006	Negative	Extension
	Extension of section 26(2) EIA 2006	Negative	Extension
23	Licensing of teachers:		
	New section 4B THEA 1998	Negative	New
	New section 4C THEA 1998	Negative	New
24	Requirement to be licensed: s 134A EA 2002	Negative	New
25	Requirement to be qualified, registered and licensed: Academies	Negative	Extension
26 and Schedule 1	Requirement for Local Authorities to keep a register of all home educated children and monitor those children (inserts new sections 19A to 19I EA 1996)	Negative	New
27	Registration of home educated children (Amending field 5 of Schedule 5 to the Government of Wales Act 2006.)	Negative	New
30	Power for Chief Inspector to inspect Local Safeguarding Children Boards	Negative	New
PART 2 FAMILY PROCEEDINGS			
32	Power to amend definition of “relevant family proceedings”	Affirmative	New
39	Power for rules of court to make provision necessary to deal with appeals concerning publication	Negative	Extension
41(3)(a)	Power to amend definition of “professional witness”	Affirmative	New
41(3)(b)	Power to amend list of sensitive personal information at Schedule 3	Affirmative	New
Schedule 2	Restriction on commencement of this clause and schedule. Commencement Order to be subject to additional requirements and pre-conditions.	Affirmative	New

Clause	title	procedure	New or restatement
PART 3 - MISCELLANEOUS AND FINAL PROVISIONS			
43	Power collect payment of a fee to an inspection of an independent educational institution (section 111 of the Education and Skills Act 2008) ¹	Negative	Extension
49	Commencement (with exception of Schedule 2 and related) Process for Schedule 2 noted separately above.	None	

APPENDIX 2: CONSTITUTIONAL REFORM AND GOVERNANCE BILL

Memorandum by the Ministry of Justice

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (“the Committee”) to assist with its scrutiny of the Constitutional Reform and Governance Bill (“the Bill”). The Bill was introduced in the House of Commons on 20 July 2009. It was carried over from the previous parliamentary session and completed its Commons stages on 2 March 2010. This memorandum discusses the Bill as introduced in the Lords.

2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation or where there is a requirement to publish a code or prepare other documents. It explains in each case why the power has been taken or the requirement created. It also explains the nature of, and the reason for, the procedure selected.

3. In outline, the Bill makes provision concerning the civil service, the ratification of treaties, a referendum on voting systems, parliamentary standards, the House of Lords, the tax status of MPs and members of the House of Lords, public order, the time limits for bringing claims based on Convention rights under the devolution settlements, courts and tribunals, national audit, the transparency of Government financial reporting to Parliament and public records and freedom of information. The Committee is referred to the explanatory notes accompanying the Bill for further background.

4. The Bill was published in draft on 25 March 2008, accompanied by the White Paper, *The Governance of Britain – Constitutional Renewal*.⁵ The draft Bill covered the same subject matter as the present Bill, but did not include provisions on a referendum on voting systems, parliamentary standards, the House of Lords, tax status of MPs and members of the House of Lords, time limits for Convention rights cases under the devolution settlements, national audit, transparency of Government financial reporting to Parliament and public records and freedom of information. However, it did include provisions on the Attorney General and prosecutions. A Joint Committee of both Houses of Parliament was set up to scrutinise the draft Bill (“the Joint Committee”). It published its report on 31 July 2008.⁶ Two other parliamentary committees contributed to the scrutiny process. The Commons Public Administration Select Committee examined the provisions on the civil service and treaties, reporting on 22 May 2008.⁷ The Commons Justice Committee examined the provisions on the Attorney General, reporting on 24 June 2008.⁸ The Government responded to these reports in July 2009 when the Bill was introduced.⁹

⁵ Cm 7342-I.

⁶ Draft Constitutional Renewal Bill, 2007-08, HL Paper 166-I, HC Paper 551-I.

⁷ Constitutional Renewal: Draft Bill and White Paper, Tenth Report 2007-08, HC 499.

⁸ Draft Constitutional Renewal (provision relating to the Attorney General), Fourth Report 2007-08, HC 698.

⁹ See The Government response to the report of the Public Administration Select Committee on the Draft Constitutional Renewal Bill (2009) Cm 7688; The Government’s response to the Justice Committee Report on the Draft Constitutional Renewal Bill (provisions relating to the Attorney General) (2009) Cm 7689; Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill (2009) Cm 7690.

5. The Committee supplied a memorandum to the Joint Committee on the draft of the Bill.¹⁰ In that memorandum, the Committee commented that four provisions which require certain documents to be laid before Parliament did not appear to amount to a delegation of legislative power. Three of those provisions remain in the Bill and are now clauses 5 (civil service code), 6 (diplomatic service code) and 8 (special advisers code). The memorandum however noted that if, by time of introduction, the Government intended more than this, the Committee would welcome that clarification, see paragraph 3. The Ministry of Justice responded, agreeing with the Committee that these provisions did not amount to a delegation of legislative power.¹¹ Although the Government's intention behind these provisions has not changed, this memorandum nevertheless deals with those provisions given that the Committee stated that its opinion in its memorandum to the Joint Committee should not be taken to prejudge its opinion on introduction of the Bill, see paragraph 2. The other comments in the Committee's memorandum are dealt with in connection with the provisions they concern, save where those powers no longer appear in the Bill.¹²

6. This memorandum discusses the delegated powers and related provisions in the order in which their corresponding Parts of the Bill appear.

THE CIVIL SERVICE

Clause 5: civil service code

Power conferred on: *the Minister for the Civil Service*

Power exercised by: *code of conduct*

Parliamentary procedure: *the Minister must lay any code before Parliament*

7. This clause requires the Minister for the Civil Service to publish a code of conduct for the civil service (excluding the diplomatic service). The Minister may publish separate codes for the Scottish Executive or the Welsh Assembly Government. As set out in clause 7, central to the code is the requirement on civil servants to carry out their duties in accordance with the core values of the civil service: integrity, honesty, objectivity and impartiality.

8. The Bill itself also ensures that the code is binding on civil servants by providing, at clause 5(8), that it forms part of their terms and conditions of service.

9. In order to maintain transparency and the accountability of the Minister in exercising this function, clause 5(5) requires the code to be laid before Parliament. This is in line with the usual practice of ensuring that the House is informed of the publication of key civil service documents. Given that the core values are enshrined in the Bill itself, a higher level of parliamentary scrutiny on the detail of the code is not considered to be necessary. Where separate codes are made for civil servants who serve the Scottish Executive or the Welsh Assembly Government, those codes are to be laid before the Scottish Parliament or the National Assembly for Wales (as the case requires).

¹⁰ See HL Paper 166-II, HC Paper 551-II, p 375.

¹¹ See HL Paper 166-II, HC Paper 551-II, p 321.

¹² The powers contained in clause 8 of, and paragraphs 18 and 70 of Schedule 3 to, the Draft Bill do not appear in the Bill.

Clause 6: diplomatic service code

Power conferred on: *the Secretary of State*

Power exercised by: *code of conduct*

Parliamentary procedure: *the Secretary of State must lay the code before Parliament*

10. This clause requires the Secretary of State (in practice it will be the Foreign Secretary who exercises this power in relation to the diplomatic service) to publish a code of conduct for the diplomatic service. As is the case in relation to the code of conduct made under clause 5, the diplomatic service code must require civil servants to carry out their duties in accordance with the core values of the civil service: integrity, honesty, objectivity and impartiality (see clause 7).

11. Again the Bill itself enshrines the binding nature of the code by requiring, in clause 6(4) that it forms part of the terms and conditions of service in the diplomatic service.

12. Again, the Bill requires the diplomatic service code to be laid before Parliament in order to ensure transparency and the accountability of the Minister in exercising this function. Given that the core values are enshrined in the Bill itself, a higher level of parliamentary scrutiny on the detail of the code is not considered to be necessary.

Clause 8: special advisers code

Power conferred on: *the Minister for the Civil Service*

Power exercised by: *code of conduct*

Parliamentary procedure: *the Minister must lay the code before Parliament*

13. Clause 8 requires the Minister for the Civil Service to publish a code of conduct for special advisers. The Minister may publish separate codes for the Scottish Executive or the Welsh Assembly Government. The minimum requirements for this code are also set out in clause 7, with certain exceptions. In particular, the code must require special advisers to carry out their duties with integrity and honesty. But, given the nature of their role, the core values of objectivity and impartiality will not apply to them. In addition, the code of conduct for special advisers must also provide that special advisers may not authorise the expenditure of public funds, exercise any power in relation to the management of any part of the civil service (except other special advisers) or otherwise exercise any statutory or prerogative power.

14. Again the binding nature of the code is reflected in clause 8(11) of the Bill itself, which requires the code to form part of the terms and conditions of service of a special adviser.

15. The Bill requires the code to be laid before Parliament. Where separate codes are made for civil servants who serve the Scottish Executive or the Welsh Assembly Government, those codes are to be laid before the Scottish Parliament or the National Assembly for Wales (as the case requires). Again, given that the core values applicable to special advisers are enshrined in the Bill itself, a higher level of parliamentary scrutiny on the detail of the code is not considered to be necessary.

Clause 11: recruitment principles

Power conferred on: *the Civil Service Commission*

Power exercised by: *publication of recruitment principles*

Parliamentary procedure: *none*

16. Clause 11 requires the Civil Service Commission to publish recruitment principles. The principles are to apply for the purpose of the requirement that people must be selected for appointment into the civil service on merit following a fair and open competition. For example, the principles will contain an explanation of the Commission's understanding on what constitutes a "fair" competition. The Commission have the discretion to include in the principles exceptions to the requirement that civil servants must be selected on merit following fair and open competition, but that discretion is circumscribed by clause 12(4) which sets a threshold that the Commission must be satisfied is passed in relation to any exception that they permit. The principles may specify whether a person appointed under an exception is to be considered as part of the civil service of the State for the purposes of the Bill. Finally, the principles may include a requirement that the Commission's approval is obtained for certain appointments – in practice this will relate to the appointment of non-civil servants to the Top 200 civil service posts. The Commission already publish recruitment principles under the existing regime and this gives further detail of what is likely to be covered in the recruitment principles under the Bill.

17. The Commission is the independent body with oversight of recruitment into the civil service of the State. As such, it is appropriate that the Commission have the power to publish a document that can apply for the purposes described above. The Commission's power to publish the recruitment principles is circumscribed in that they must consult with the Minister for the Civil Service before the principles are published and, in the case of any exceptions to the requirement that a person's selection for appointment be on merit following fair and open competition, the Bill contains a mandatory threshold that the Commission must be satisfied is passed before they grant any exception.

18. The recruitment principles will apply to authorities who make appointments into the civil service of the State. As such they are most relevant to those authorities and for applicants to the civil service. The recruitment principles will reach this audience as a result of the requirement that the Commission publish the recruitment principles. Further, matters relating to the application of the requirement for selection on merit following fair and open competition and the recruitment principles can be brought to the attention of Parliament through the accountability of the Minister for the Civil Service, in particular through the Commission reports that the Minister for the Civil Service must lay before Parliament. This is considered to be the appropriate level of scrutiny for the recruitment principles.

Clause 17: agreements for the Commission to carry out additional functions

Power conferred on: *the Minister for the Civil Service and the Civil Service Commission (by agreement)*

Power exercised by: *not applicable*

Parliamentary procedure: *none*

19. In its memorandum to the Joint Committee, the Committee asked that, should this clause be included in the Bill on introduction, it be addressed in the Government's memorandum to the Committee. This clause provides that the Minister for the Civil Service and the Civil Service Commission may make arrangements for the Commission to carry out functions in relation to the civil service in addition to those set out in Part 1 of the Bill. The power would permit the Minister for the Civil Service and the Commission to agree that the Commission undertake an investigation or inquiry concerning the civil service, in the circumstances where the Commission otherwise lacks the power to undertake such an investigation or inquiry. The power could also be used to enable the Commission to continue its existing role in relation to appointments to the most senior levels of the civil service (the "Top 200") or, for example, the promotion of the civil service code within departments. The Commission will report on the carrying out of these functions and the report will be laid before Parliament as provided for in paragraph 17 of Schedule 1 to the Bill. No additional parliamentary procedure is considered necessary or appropriate.

Clause 22: Crown employment: power to impose new nationality requirements

Power conferred on: *a Minister of the Crown*

Power exercised by: *rules made by statutory instrument*

Parliamentary procedure: *negative*

20. Clause 22 appears in Chapter 4 which makes provision concerning the nationality requirements for those employed or holding an office in a civil capacity under the Crown. Clause 21 in that Chapter removes existing nationality restrictions in relation to employment or holding an office in a civil capacity under the Crown contained in the Act of Settlement and the Aliens Restriction (Amendment) Act 1919. Subsection (1) of clause 22 sets out a power for a Minister of the Crown to make rules imposing nationality requirements that must be satisfied by persons employed or holding office in a civil capacity under the Crown in a reserved post.

21. Subsections (2) to (6) reflect the criteria set out in the European Communities (Employment in the Civil Service) Order 2007 (which provides criteria for determining reserved posts in relation to the civil employment under the Crown of "a relevant European") in terms of what kind of posts can be reserved and therefore how the power to reserve posts can be exercised. Subsection (7) provides that the rules may also include nationality provisions in relation to persons "connected" with the person who is subject to the limits imposed by rules made under subsection (1). Subsection (8) sets out who are "connected" persons for this purpose. The Government envisages that such additional nationality requirements

will only apply in relation to a small number of very sensitive posts, in particular those involving access to security and intelligence information. Subsection (10) allows the rules to exempt persons who were first employed or holding office before a specified date from the nationality requirements and allows the granting of exemptions to the rules by “the appropriate person”. This would enable a person already in post, to which rules made under subsection (1) subsequently apply, to remain in post. Subsection (11) sets out what “the appropriate person” means, broadly the head of the relevant security and intelligence service (or nominee) or a Minister of the Crown.

22. Clause 22 was tabled as a new clause to the Bill by Andrew Dismore MP. The Government accepted this amendment in committee of the whole House in the House of Commons on 3 November 2009. The Government considers that it is necessary for the matters to be set out in the rules to be left to secondary legislation rather than set out on the face of the Bill. This is because posts will only be reserved where this is operationally necessary and what is necessary may change over time, for example, if there is a change in the assessment as to which posts should be reserved to ensure national security is not compromised. In addition, rules will be able to specify with greater precision the posts which are to have certain nationality requirements, something which could not easily be done in primary legislation without the risk of having to update that legislation for relevant organisational changes. The fact that these matters would be set out in rules laid before Parliament is likely to result in greater transparency than exists at present, where certain categories of reserved posts are identified by determination without a related rule-making power (see the European Communities (Employment in the Civil Service) Order 2007). In any event, clause 22 sets out in detail on the face of the legislation the types of posts which may have nationality requirements applied to them. This means that significant limits on the power to impose nationality requirements are set out in primary legislation.

23. Given the level of detail which is on the face of the legislation – in particular, that reserved posts are defined on the face of the legislation – the negative procedure is thought to provide an appropriate level of parliamentary scrutiny for the exercise of this power.

REFERENDUM ON VOTING SYSTEMS

Clause 29(2)(b): referendum on voting systems

Powers conferred on: *the Secretary of State*

Powers exercisable by: *order made by statutory instrument*

Parliamentary procedure: *affirmative*

24. Clause 29(2)(b) empowers the Secretary of State to specify by order both the question to be asked in the referendum poll (and any statement that is to precede the question) and the date of the poll. Any order made under this subsection will be subject to the affirmative resolution procedure.

25. It is considered that setting both the question and date in secondary legislation is the most appropriate means of achieving the purposes of these clauses.

26. For the date, the concern is that if primary legislation specified a precise day, it would be possible that subsequent events would result in that date not being

appropriate and further primary legislation being required to alter the date of the poll. It is the Government's view that the obligation to hold a referendum no later than 31 October 2011 provides the necessary certainty without being undesirably prescriptive about the date. Consequently, allowing the date to be fixed by secondary legislation subject to the 31 October 2011 long-stop balances the need for certainty about when the referendum must take place with flexibility to ensure that the date of the poll can be fixed by reference to relevant factors pertaining at the time.

27. In relation to the question to be posed in the referendum poll, it is considered that a similar degree of flexibility, as given by secondary legislation, would be desirable. The Government expects that there will be considerable debate about the subject matter of the referendum, particularly as understanding of the detail of the alternative vote system increases. Given that the Government's key concern is to ensure that the question posed is both focussed, neutral and accessible, it is thought desirable that it should have the opportunity to take into account all relevant factors (including the tenor of public debate and the views of academics and interest groups) when setting the question. Setting the question in primary legislation at this stage would deny the Government this valuable flexibility and risks pitching the question in the wrong way. Moreover, the referendum will not be held until after the next parliamentary general election, and it is deemed more appropriate to provide that the question itself will be set in the next Parliament – allowing Parliament to consider the specific question proposed within reasonable proximity to the poll itself. This approach has been modelled on the Regional Assemblies (Preparations) Act 2003 which similarly provided for the referendum question to be set by order.

28. It is important to note that the power to set the question is closely circumscribed by safeguards contained both in the clause and in previously enacted legislation. Subsection (2)(a) requires a Command Paper to be presented to Parliament describing the alternative vote system in detail for the purposes of ensuring that it is capable of being fully understood. The referendum question is capable of referring to this Paper if it is thought desirable for it to do so. Additionally, subsection (3) stipulates that the referendum question must ask voters to express a preference for either a specified form of alternative vote system or the existing first-past-the-post system. A concise but detailed description of the relevant alternative vote system is already provided for in subsection (4) – the Command Paper would expand on, but could not replace, this description. In addition, under section 104 of the Political Parties, Elections and Referendums Act 2000, the Electoral Commission is required to publish a statement recording their view about the intelligibility of a referendum question. In the case of an order setting the referendum question, the Government is required to consult the Commission on the matter of intelligibility prior to the laying of the order.

29. Notwithstanding these safeguards, it is considered that the significance of the matters dealt with by these enabling powers requires an order (or orders) setting either the date or question to be subject to the affirmative resolution procedure. It is considered that this will provide an appropriate level of parliamentary scrutiny.

Clause 34(1)(b) : Payments to counting officers

Powers conferred on: *the Secretary of State*

Powers exercisable by: *order made by statutory instrument with the consent of Treasury*

Parliamentary procedure: *none*

30. Clause 34(1)(b) empowers the Secretary of State to make an order (“the charges order”) specifying the overall maximum amount which a counting officer is entitled to recover in respect of services rendered, or expenses incurred, for or in connection with the referendum. The order may also specify, or make provision for determining, the maximum amount which a counting officer may recover for services or expenses of a specified description (subsection (2)).

31. An order under this clause may make different provision for different cases (subsection (9)). This is necessary so that, for example, the charges order can specify different amounts for different areas if that is considered appropriate, or to set different amounts for payments to Regional Counting Officers (the effect of clause 33(7) is to include Regional Counting Officers within a reference to a counting officer in clause 34).

32. These provisions are modelled on section 29 of the Representation of the People Act 1983 (“the RPA”), which provides the Secretary of State with an equivalent power in the context of parliamentary elections and returning officers. Consistent with the power in section 29(3) of the RPA, the powers given by this clause are exercisable by statutory instrument. In addition, the powers may only be exercised with the consent of the Treasury (subsection (1)(b)). This is appropriate as the order will set the framework for reimbursing the cost of the referendum, payments under which will be made from the Consolidated Fund (subsection (10)).

33. Since the order is administrative, specifying what expenses are allowable and the maximum amounts payable, no parliamentary procedure was considered necessary. This is consistent with the position in respect of orders made under section 29(3) of the RPA in relation to parliamentary elections.

Clause 34(8): Payments to counting officers

Powers conferred on: *the Electoral Commission*

Powers exercisable by: *regulations in accordance with the requirements in paragraphs 21 to 23 of Schedule 1 to the Political Parties, Elections and Referendums Act 2000*

Parliamentary procedure: *none*

34. Clause 34(5) provides that the Electoral Commission must pay the amount of a counting officer’s recoverable charges upon submission of an account to them (as above, a reference here to a “counting officer” also includes a reference to a Regional Counting Officer by virtue of clause 33(7)). The Commission is given a power in subsection (8) to make regulations about the time, manner and form in which counting officers’ accounts are to be submitted. Subsection (9) provides that the regulations may make different provision for different cases.

35. The power in subsection (8) is modelled on section 29(8) of the RPA, under which the Secretary of State is empowered to make regulations regarding the submission of returning officers' accounts in the context of parliamentary elections. Paragraph 6 of Schedule 21 to the Political Parties, Elections and Referendums Act 2000 amends this provision to transfer the regulation-making power to the Electoral Commission, although those amendments have not yet been commenced. The approach in subsection (8) is the same as in those amendments.

36. Regulations made under subsection (8) will be purely administrative and relate to the arrangements which the Electoral Commission will wish to put in place to enable them to process counting officers' accounts in a proper and timely fashion and in accordance with accounting guidelines. As with the equivalent power relating to accounts in connection with parliamentary elections contained in section 29(8) of the RPA, the regulations are not statutory instruments and are not subject to any parliamentary procedure. The Commission's exercise of the power under subsection (8) will, however, be subject to the requirements set out in paragraphs 21 to 23 of Schedule 1 to the Political Parties, Elections and Referendums Act 2000. These include a requirement to exercise any power of the Commission to make regulations in writing, to specify the provision under which the regulations are made when doing so, and to print the instrument and make it publicly available. These are considered to constitute appropriate safeguards which will ensure that the Commission's regulations are accessible to those affected by them as well as to the general public.

Clause 37(1)(a) and (b): Conduct etc of referendum

Powers conferred on: *the Secretary of State*

Powers exercisable by: *order made by statutory instrument*

Parliamentary procedure: *affirmative*

37. Clause 37(1) empowers the Secretary of State to make by order further provision that he considers expedient for and in connection with the referendum (paragraph (a)) and the combination of the referendum with the poll at an election, other referendum or both (paragraph (b)). In particular, provision made in an order under either paragraph may be made to apply or incorporate (with appropriate modifications where necessary) any relevant primary or secondary legislation relating to referendums. Additionally, provision made using the powers may include provision about criminal offences, supplementary, incidental, consequential, transitory, transitional or saving provision and different provision for different purposes.

38. It is envisaged that a power to make an order of this nature is required given the need to make substantial additional provision than is contained in the Bill relating to the procedure for running the referendum. The power will be used to make a number of provisions with regard to the conduct of the poll, potentially to include provision about the prescription of forms required for the referendum, the equipment of polling stations for the referendum; the verification and counting of votes, including provision as to who can attend the count at a referendum, how the count should be conducted, the declaration of results at local, regional and national levels and the provision of a power for the Chief Counting Officer to direct both Regional and Local Counting Officers. It is also envisaged that an

order made using this power may need to deal with the position of those who apply to register to vote in parliamentary elections so close to the poll that there is a question about their eligibility to vote in the referendum. The latter issue arises because the franchise for the referendum is based on the franchise for parliamentary elections (see clause 30 of the Bill). In addition to the above, the power will enable provision to be made for presently unforeseen circumstances that might have to be dealt with in order to facilitate the smooth running of the election.

39. Importantly, the type of provision that will be necessary in relation to any of the above matters will vary depending on whether the date chosen for the referendum causes it to be combined with another election or referendum.

40. For all of these reasons, and given the likely complexity of the ensuing provisions in both policy and legal terms, a power is required to make appropriate provision relating to practical matters on the referendum in secondary legislation. This approach follows recent precedents regarding procedural matters relating to referendums, for example, the power given by paragraph 2 of Schedule 6 to the Government of Wales Act 2006.

41. It is acknowledged that powers of this potential breadth must be accompanied by appropriate safeguards on its use. Accordingly the clause provides that any order using these powers may only be made after the Secretary of State has consulted the Electoral Commission (clause 37(5)). Further, it is considered axiomatic that an order made using this power should be subject to the affirmative resolution procedure (clause 37(6)).

PARLIAMENTARY STANDARDS

Clause 41: new section 4 and 4A of the Parliamentary Standards Act 2009 - Determination of MPs' salaries

Power conferred on: *the IPSA*

Power exercised by: *determination*

Parliamentary procedure: *the IPSA must lay the determination before the House of Commons*

42. Clause 41 substitutes new sections 4 and 4A for section 4 of the Parliamentary Standards Act 2009 (“the 2009 Act”). New section 4(4) will provide that the IPSA is to determine the amount of salaries paid to MPs as well as actually paying those salaries. New section 4A(2) will provide that IPSA may determine that higher salaries are to be paid to MPs while they hold an office or position specified for that purpose in a resolution of the House of Commons. This could allow, for example, for a higher salary to be paid to an MP whilst serving as a Chairman of a Select Committee. New section 4A(7) lists the persons and bodies – which include the Minister for the Civil Service and Treasury – that must be consulted when the IPSA reviews a determination and before it makes its first determination.

43. New section 4A(5) will provide that a determination, other than a first determination, may have retrospective effect. This is to allow determinations made by the IPSA to have effect in relation to a period before they were made so that pay can be backdated.

44. The IPSA must also review the determination in the first year of each Parliament and at any other time it considers appropriate. As above, when reviewing a determination the IPSA must consult those listed in new section 4A(7).

45. Clause 41(2) provides that the IPSA's first determination need not come into effect before 1 April 2012. Clause 41(3) provides that until the first determination under new section 4(4) of the 2009 Act comes into effect the amount of salaries to be paid by the IPSA will be determined in accordance with the relevant resolution of the House of Commons.

46. The only parliamentary procedure is that the determination, a statement of how the determination was arrived at, and any subsequent determination and statement, must be laid before the House of Commons. No other parliamentary procedure is thought to be appropriate. This is because the policy intention is that the determination of MPs' salaries is to be placed out of the hands of Parliament. It would therefore be inappropriate for Parliament to be able to veto the determination.

**Clause 47: new section 10A of the Parliamentary Standards Act 2009 -
Relationship with other bodies etc**

Power conferred on: *the IPSA and Compliance Officer jointly*

Power exercised by: *statement*

Parliamentary procedure: *none*

47. Clause 47 amends the 2009 Act by providing for new section 10A. Subsection (1) requires the IPSA and the Compliance Officer to prepare a joint statement detailing how they will work with the Parliamentary Commissioner for Standards, the Director of Public Prosecutions, the Metropolitan Police and other such persons as they consider appropriate. Subsection (2) states that IPSA and the Compliance Officers must consult with the same persons before preparing the joint statement.

48. New Schedule 4 to the 2009 Act confers enforcement powers on the Compliance Officer to ensure compliance by MPs with the MPs' allowances scheme. This includes powers to impose penalties. In this respect, there will be an overlap between the work of the Compliance Officer and other persons and bodies responsible for investigating the conduct of MPs. These include the Parliamentary Commissioner for Standards who is an office holder established under Standing Orders of the House of Commons to investigate the conduct of MPs and to report to the House of Commons Committee on Standards and Privileges. MPs are also subject to criminal law, including the offence contained in section 10 of the 2009 Act. Allegations that an MP has committed a criminal offence will be investigated by the police, most likely the Metropolitan Police, and prosecutions dealt with by the Director of Public Prosecutions.

49. The nature of the relationship between those investigating the conduct of MPs will need to be flexible on a day-to-day basis and is likely to change over time. A statement will thus be used to foster understanding between those covered by the statement, but because of its changing nature, these matters should not be set out in primary legislation. The statement would not be binding on those covered by the statement. Rather the document is something to which they would have to

have regard. This is another reason why it is appropriate not to set the subject matter out in primary legislation.

50. Because the statement is about the relationship between those covered by the statement rather than a set of rules for them to follow and because of the need for flexibility, no parliamentary procedure is thought necessary.

Clause 51: new section 3(1) to (3) of the European Parliament (Pay and Pensions) Act 1979 – Resettlement grants for MEPs

Power conferred on: *the IPSA*

Power exercised by: *scheme*

Parliamentary procedure: *the IPSA must lay the determination before both Houses of Parliament*

51. Clause 51 amends section 3 of the European Parliament (Pay and Pensions) Act 1979 (“the 1979 Act”). New section 3(1) of the 1979 Act confers on the IPSA the power to make a scheme providing for allowances payable to MEPs who cease to be an MEP (but only in relation to those who have opted-out of the arrangements under the single Statute for MEPs that came into effect on 14 July 2009, “opted-out MEPs”). The power is only exercisable if the IPSA has made provision in the MPs’ allowances scheme for such allowances in respect of those ceasing to be MPs. The scheme made under new section 3 of the 1979 Act must make provision which is as equivalent to the MPs’ allowances scheme as the IPSA considers practicable.

52. Section 3 of the 1979 Act currently provides for resettlement grants for opted-out MEPs and section 3A provides that the Leader of the House of Commons may, by order, amend the amount of resettlement grant paid so that it is as equivalent as practicable to that paid to MPs under resolutions of the House of Commons.

53. The powers have been conferred on the IPSA because the IPSA determines the resettlement grants for MPs and, given that resettlement grants for MEPs are intended to be equivalent to those paid to MPs, it is considered appropriate that IPSA also makes the scheme in relation to resettlement grants for MEPs.

54. The only parliamentary procedure is that the scheme, the reasons for making the scheme, and any subsequent scheme and reasons, must be laid before both Houses of Parliament. No other parliamentary procedure is thought to be appropriate as it is the same level of parliamentary procedure which applies to the MPs’ allowances scheme which must also be laid before the House of Commons under section 5(5) of the 2009 Act.

Schedule 5: new Schedule 4 to the Parliamentary Standards Act 2009, Part 2, Paragraph 7(3) to (5) – Amount of Penalty

Power conferred on: *a Minister of the Crown*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *affirmative*

55. Part 2 of new Schedule 4 to the Parliamentary Standards Act 2009 provides the Compliance Officer with a power to impose a monetary penalty: (a) where the Compliance Officer has made a finding that an MP has without reasonable excuse failed to comply with a request for information; and (b) where the MP has without reasonable excuse failed to comply with a repayment direction. Paragraph 7(2) provides that the penalty is limited to £1,000.

56. Paragraph 7(3) of new Schedule 4 confers on a Minister of the Crown a power to increase (or further increase) by order the maximum penalty which is payable in the circumstances set out above.

57. This power is needed to ensure that the maximum penalty may be updated from time to time in line with changing circumstances without the need for primary legislation. It would be very unusual for primary legislation to specify on its face an amount of a monetary penalty without a mechanism for altering that amount. The power is limited to increasing the penalty rather than reducing it, however, because it is considered that the maximum penalty should never be lower than £1,000.

58. The affirmative procedure is considered appropriate here because the maximum penalty is a matter that Parliament should have the opportunity to debate. There should be a mechanism in place to ensure that a Minister's decision to increase an amount is scrutinised, in particular, to ensure that the increase is not inappropriately large.

Paragraph 8 of Schedule 7: Administration scheme

Power conferred on: *the IPSA*

Power exercised by: *scheme*

Parliamentary procedure: *the IPSA must lay the scheme before the House of Commons*

59. Paragraph 8 of Schedule 7 confers on the IPSA powers to make a scheme containing provision about the administration and management of the Parliamentary Contributory Pension Fund (“the Fund”). The IPSA will, in particular, have the power to include provision in relation to the matters set out at paragraphs 8(2) of Schedule 7. The IPSA must have the consent of the trustees and consult those listed in paragraph 9(2) before making the scheme. The resulting scheme, or revision to it, and a statement of reasons for making the scheme or any revision to it, must be laid before the House of Commons.

60. The current Parliamentary pension scheme, which covers the matters to be covered in the administration scheme, is contained in regulations made by the Leader of the House of Commons under section 2(1) of the Parliamentary and other Pensions Act 1987 (“the 1987 Act”). The powers to make the

administration scheme have been conferred on the IPSA because it is thought desirable for an independent body to have oversight of the MPs' pension arrangements and so it follows that the IPSA should be responsible for making provision in relation to the administration of the Fund. Although the Minister for the Civil Service will be responsible for making the Ministers' etc pension scheme, also covered by the Fund, it is not thought to be practical to split responsibility for the administration scheme. However, the IPSA must have the agreement of the trustees, and both the Treasury and the Minister for the Civil Service must be consulted, before the IPSA make the administration scheme.

61. The only parliamentary procedure is that the scheme, reasons for making the scheme, and any revision to the scheme, must be laid before the House of Commons. No other parliamentary procedure is thought to be appropriate. This is because the policy intention is that the oversight of MPs' pension arrangements is to be placed out of the hands of Parliament. It would therefore be inappropriate for Parliament to be able to veto the administration scheme. However, as above, the Treasury and the Minister for the Civil Service are to be consulted when the IPSA make, or make any revision to, the administration scheme.

Paragraph 11 of Schedule 7: Power to determine Exchequer contribution

Power conferred on: *the IPSA*

Power exercised by: *provision*

Parliamentary procedure: *the IPSA must lay the provision before the House of Commons*

62. Paragraph 11 of Schedule 7 will confer on the IPSA the power to make provision for determining the Exchequer contribution to the Fund in respect of any financial year, where this is not to be determined in accordance with recommendations for that year contained in a report made by the Government Actuary under paragraph 10.

63. Section 6(1) of the Ministerial and other Pensions and Salaries Act 1991 currently provides that the Leader of the House of Commons, with the consent of the Treasury, may determine the Exchequer contribution where this is not determined in accordance with the recommendations of the Government Actuary.

64. It is considered appropriate for this function to be given to the IPSA given the role it will have in relation to the oversight of the MPs' pension scheme and the administration scheme covering the Fund. However, as it relates to arrangements for determining the Exchequer contribution into the Fund and because the Fund also covers Ministers' etc pensions (which are to be the responsibility of the Minister for the Civil Service), both the Treasury and the Minister for the Civil Service must consent to the provision made by IPSA. In addition, where the result of making the provision is that the amount of the Exchequer contribution in respect of any financial year is less than it otherwise would be, the consent of the trustees is also required.

65. The only parliamentary procedure which applies is that the provision, any representations made by the trustees of the Fund and a statement of reasons for making the provision, must be laid before the House of Commons. This is consistent with the procedure that applies to the administration scheme and no other parliamentary procedure is thought appropriate.

Paragraph 12 of Schedule 7: MPs' pension scheme

Power conferred on: *the IPSA*

Power exercised by: *scheme*

Parliamentary procedure: *the IPSA must lay the scheme before the House of Commons*

66. Paragraph 12 confers on the IPSA the powers to make the MPs' pension scheme. This will cover those with service as a member of the House of Commons, as defined in paragraph 13. The IPSA will, in particular, have the powers to include provision in relation to the matters set out at paragraph 14 of Schedule 7. The IPSA must consult those listed in paragraph 15(1) before making the scheme or any changes to it. The resulting scheme, any representations made by the trustees and a statement of reasons for making the scheme, or revisions to it, must be laid before the House of Commons.

67. The current Parliamentary pension scheme, which covers the matters to be covered in the MPs' scheme, is contained in regulations made by the Leader of the House of Commons under section 2(1) of the 1987 Act. The powers have been conferred on the IPSA because it is thought desirable for an independent body to have oversight of the MPs' pension scheme.

68. The only parliamentary procedure is that the scheme, any representations made by the trustees and a statement of reasons for making the scheme, or any revisions to it, must be laid before the House of Commons. No other parliamentary procedure is thought to be appropriate. This is because the policy intention is that the oversight of MPs' pension arrangements is to be placed out of the hands of Parliament. It would therefore be inappropriate for Parliament to be able to veto the MPs' pension scheme. However, the IPSA must consult various persons and bodies, including the Treasury, the Minister for the Civil Service and persons the IPSA considers to represent those likely to be affected by the scheme, before making the MPs' pension scheme.

Paragraph 16 of Schedule 7: Ministers' etc pension scheme

Power conferred on: *the Minister for the Civil Service*

Power exercised by: *scheme*

Parliamentary procedure: *the Minister for the Civil Service must lay the scheme before the House of Commons*

69. Paragraph 16 confers on the Minister for the Civil Service powers to make the Ministers' etc pension scheme. This will cover those with service listed in paragraph 16(2). In particular, the Minister for the Civil Service will have the power to include provision in relation to the matters set out at paragraph 17 of Schedule 7. The Minister for the Civil Service must consult those listed in paragraph 18(1) before making the scheme. The resulting scheme, any representations made by the trustees and a statement of reasons for making the scheme, or revisions to it, must be laid before the House of Commons.

70. The current Parliamentary pension scheme, which covers the matters to be covered in the MPs' scheme, is contained in regulations made by the Leader of the House of Commons under section 2(1) of the 1987 Act. The powers have been

conferred on the Minister for the Civil Service as the Minister for the Civil Service has responsibility for the policy on Ministerial pay and pensions.

71. The only parliamentary procedure is that the scheme, any representations made by the trustees and a statement of reasons for making the scheme, or any revision to it, must be laid before the House of Commons. This is consistent with the parliamentary procedure for the administration scheme and the MPs' scheme. The Minister for the Civil Service is also responsible for making superannuation schemes under the Superannuation Act 1972 ("1972 Act"). Those schemes made under the 1972 Act are also laid before the House of Commons but are not subject to any further parliamentary procedure. It is therefore thought appropriate that no other parliamentary procedure apply to the Ministers' scheme.

Paragraph 21 of Schedule 7: Power to make consequential amendments

Power conferred on: *the Minister for the Civil Service*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

72. Paragraph 21 provides for a power for the Minister for the Civil Service to make modifications of any enactment or subordinate legislation he or she considers appropriate as a consequence of any provision of a scheme made by the IPSA or the Minister for the Civil Service (but this power cannot be used to amend the administration, MPs' or Ministers' etc schemes). This provision is a necessary corollary of moving from the approach in the 1987 Act to the new scheme-based approach in Schedule 7. The 1987 Act contains a power for the regulations dealing with Parliamentary pensions to include "provision making such modifications of any enactment or subordinate legislation (whether passed or made before or after the passing of this Act) as the Leader of the House of Commons considers appropriate in consequence of any provision of the regulations", paragraph 13 of Schedule 1. Although it would not be appropriate for such a power to be exercisable by the schemes under Schedule 7, it is important that some mechanism be retained for the exercise of this power.

73. The powers under this paragraph are to be exercised by statutory instrument. The order is subject to annulment in pursuance of a resolution of either House of Parliament, that is, the negative procedure. This is thought appropriate because the current power to make modifications of any enactment or subordinate legislation as a consequence of any provision of the current Parliamentary pension scheme, under paragraph 13 of Schedule 1 to the 1987 Act, is exercised by statutory instrument subject to negative procedure (see section 2(7) of the 1987 Act). It is therefore considered appropriate for the same parliamentary procedure to apply to the power under paragraph 21 of Schedule 7.

Paragraph 36 of Schedule 7: Power to designate that provisions of the Ministers' etc pension scheme apply to dependants of the Prime Minister or Speaker

Power conferred on: *the Minister for the Civil Service*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

74. Paragraph 36 amends section 27 of the Parliamentary and other Pensions Act 1972 (“the 1972 Act”) to provide a power for the Minister for the Civil Service to designate that provisions of the Ministers' etc pension scheme apply to dependants of the Prime Minister or Speaker in relation to the matters provided for in section 27(2) of the 1972 Act. The current power to designate that provisions of the current Parliamentary pension scheme apply rests with the Leader of the House of Commons.

75. The powers under this paragraph are to be exercised by statutory instrument. The order is subject to annulment in pursuance of a resolution of either House of Parliament, that is, a negative procedure. This is thought appropriate because the current power for the Leader of House of Commons to designate that provisions of the Parliamentary pension scheme apply is also exercisable by statutory instrument subject to negative procedure, as provided for in section 27(2A) of the 1972 Act.

Paragraph 38 of Schedule 7: Opted-out MEPs' pension scheme

Power conferred on: *the IPSA*

Power exercised by: *scheme*

Parliamentary procedure: *the IPSA must lay the scheme before both Houses of Parliament*

76. Paragraph 38 amends section 4 of the European Parliament (Pay and Pensions) Act 1979 (“the 1979 Act”) to confer on the IPSA the power to make the pension scheme in relation to those MEPs who have opted out of the pension arrangements under the single Statute for MEPs (which came into effect on 14 July 2009). The IPSA must consult those listed in new section 4(4) before making the scheme, including the Treasury and the Minister for the Civil Service. The resulting scheme and a statement of reasons for making the scheme, or revisions to it, must be laid before both Houses of Parliament.

77. The opted-out MEPs' pension scheme is currently made by order, by the Leader of the House of Commons further to section 4(1) of the 1979 Act. The powers have been conferred on the IPSA as this is consistent with their role in relation to the MPs' pension schemes.

78. The only parliamentary procedure is that the scheme, and a statement of reasons for making the scheme, must be laid before both Houses of Parliament. No other parliamentary procedure is thought to be appropriate. However, as above, the IPSA must consult various bodies, including the Treasury, the Minister for the Civil Service and persons it considers to represent those likely to be affected by the scheme, before making the opted-out MEPs' pension scheme.

Paragraph 44 of Schedule 7: Transitional provision in relation to the Parliamentary pension scheme and administration, MPs' and Ministers' etc pension schemes

Power conferred on: a Minister of the Crown

Power exercised by: order made by statutory instrument

Parliamentary procedure: for paragraph 44(8) none, otherwise see paragraphs 0 to 0 below

79. Paragraph 44 contains transitional provision in relation to the 1987 Act. As part of that provision, paragraph 44 refers to matters which may be provided for in an order under clause 94 or 95 of the Bill. Clause 94 is the general power in the Bill to make consequential provision by order. Clause 95 deals with commencement of provisions of the Bill by order which includes a power to make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill.

80. Specifically, paragraph 44(1) provides that the “existing regulations”, that is, the Parliamentary pension scheme, will continue to have effect as if they were the administration, MPs' and Ministers' etc pension schemes made under paragraphs 8, 12 and 16 of Schedule 7. This will be subject to any consequential provision made in an order under clause 94 of the Bill to allow this to have effect (and the subsequent powers of the IPSA and Minister for the Civil Service under paragraphs 8, 12 and 16 to make such schemes).

81. Paragraph 44(2) specifically provides that an order under clause 94 or 95 of the Bill may provide that provision in the existing Parliamentary pension scheme that could not be contained in the administration, MPs' or Ministers' etc pension scheme may continue to have effect as if contained in one of those schemes. This would allow, for example, current regulation N3 (refund of Prime Ministers' and Speakers' contributions) to continue to have effect as part of the MPs' scheme despite the fact that the IPSA would not have the power to include that exact provision in a scheme made under paragraph 12. This is because regulation N3 includes provision about the repayment of contributions (paid by an MP who subsequently becomes Prime Minister or Speaker) into the Consolidated Fund and the subsequent payment of those contributions out of the Consolidated Fund. However, the power under paragraph 29(2) of Schedule 7 to make “provision as to the circumstances and manner in which any such amounts are to be paid out of the Consolidated Fund in respect of transfer values paid into that Fund” is not a power that the IPSA will have (see paragraph 14(1)(a) of Schedule 7). If an order under clause 94 or 95 did provide that regulation N3 was to continue to have effect as part of the MPs' pension scheme then the IPSA, further to paragraph 44(5) of Schedule 7, would be able to revoke that provision or amend it so that it contained provision that could be included in the MPs' pension scheme further to the powers under paragraph 12 of Schedule 7 (or indeed leave it amended so that it continued to have effect).

82. The reasons for the order-making power and the parliamentary procedure used are further discussed in the context of clauses 94 and 95 below.

83. The related delegated power in paragraph 44(8) provides that the “existing regulations” means the regulations under section 2 of the 1987 Act in force immediately before the date specified in an order made by a Minister of the

Crown. This provision is part of the apparatus for effective commencement of the provisions in Schedule 7. It is therefore not considered necessary for any parliamentary procedure to apply as it is considered that the nature of this power is akin to the powers concerning the commencement of provisions of the Bill which are not subject to a parliamentary procedure.

Paragraph 48 of Schedule 7: extension of order making power in section 13 of the Parliamentary Standards Act 2009

Power conferred on: *Minister of the Crown*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *affirmative*

84. Paragraph 48 extends the order making power under section 13(6) of the 2009 Act concerning the making of transfer schemes in respect of staff, property and documents so that it extends to matters in connection with Schedule 7 (as well as in connection with the 2009 Act). Paragraph 48(1) provides that the power to provide for the employment of persons of a specified description who are employed in connection with matters dealt with by the rules to be transferred to the IPSA also includes those employed in connection with matters dealt with by the administration and MPs' pension schemes. Paragraph 48(2)(b) also specifically states that the powers under section 13(6)(b) and (c) of the 2009 Act in relation to the transfer of property and documents etc to the IPSA do not apply to property, rights and liabilities, or documents and information, held by or on behalf of the trustees of the Fund. Any scheme made by virtue of paragraph 48 is to be made by a Minister of the Crown with the consent of the person who chairs the House of Commons Commission, consistent with the provision in section 13(7) of the 2009 Act. An order made under section 13 of the 2009 Act (including one containing provision set out in paragraph 48 of Schedule 7) is to be made by statutory instrument subject to the affirmative procedure.

THE HOUSE OF LORDS

Clause 55: expulsion and suspension of members of the House of Lords

Power conferred on: *the House of Lords*

Power exercised by: *Standing Orders*

85. Clause 55(1) provides that the Standing Orders of the House of Lords may make provision under which the House may suspend or expel members of the House of Lords. Suspension would be time limited and would prevent the member participating in the work of the House for the duration of that suspension. Expulsion would be permanent.

86. The purpose of clause 55 is to provide the House of Lords with a clear power to expel a member permanently and to suspend a member beyond the lifetime of a Parliament. The 2009 Report on the Powers of the House of Lords in respect of its Members (First Report 2009-10, HL 87) concluded that the House did have the power to suspend a member temporarily, but only within a lifetime of a Parliament. It had no power to withhold the issue of a writ of summons at the beginning of a Parliament.

87. This power has been left to Standing Orders of the House to accord with the constitutional principle that the House is responsible for regulating its own affairs. It would be inappropriate for the Government generally to prescribe the circumstances in which the House should be able to exercise the power.

88. Clause 55 provides that the resolution would have to contain a statement that, “in the House’s opinion, the House is in disrepute because of the conduct of the person.”

89. Clause 55(8) provides that an expulsion or suspension resolution may contain other provision in addition to the matters specified in the clause. For example, the resolution could, in addition to the specified words, include a description of the conduct which led the House to conclude that the resolution should be passed.

90. Given that the power is to be exercised on the basis of the Standing Orders of the House in any event, no additional parliamentary scrutiny is thought to be necessary or desirable.

PUBLIC ORDER

Paragraph 1 of Schedule 9: new section 14ZA(3) of the Public Order Act 1986 – access to and from the Palace of Westminster

Power conferred on: *the Secretary of State*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

91. New section 14ZA of the Public Order Act 1986 would apply to public processions and assemblies held wholly or partly within the area around Parliament. Subsection (2) provides that a senior police officer may give directions imposing such conditions on those processions or assemblies that, in the officer’s reasonable opinion, are necessary for ensuring that the “specified requirements” are met. The order-making power relates to those “specified requirements”. It enables the Secretary of State to specify requirements relating to the maintenance of access to and from the Palace of Westminster. Subsections (4) and (5) make further provision about the order-making power. Subsection (4) provides that the order may specify requirements as to entrances at or by the Palace of Westminster or Portcullis House which must be kept open and to and from which there must be access routes for pedestrians and vehicles through the area around Parliament.

92. These amendments to the Public Order Act replace the existing regime for demonstrations in the vicinity of Parliament under sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (“SOCPA”). Should the SOCPA regime simply be repealed, leaving in place the Public Order Act regime that applies throughout the country, it was considered that there could be a lack of clarity for the police, Parliament and the public. This arrangement is designed to assist the police in understanding Parliament’s needs in terms of access to the Palace of Westminster, and to leave Parliament in a better position to know what to expect from the police. Rather than the requirements being left as a matter solely for the senior police officer at the scene, it was considered that the order-making power invested in the Secretary of State provides more transparency for the police, Parliament and protesters in terms of maintaining access to and from the Palace of Westminster. An order-making power is also thought to be an

advantage over setting out the requirements in primary legislation. This is primarily because the requirements may change from time to time and it is important to have an element of flexibility.

93. It is considered that the negative resolution procedure provides an appropriate level of parliamentary scrutiny for the exercise of this power. Although it is accepted that the requirements could have implications for the freedom of assembly, the power in new section 14ZA is limited in that the specified requirements must relate to the maintaining of access to and from the Palace of Westminster. In light of this limitation, the negative resolution procedure is thought to be sufficient.

**Paragraph 1 of Schedule 9: new section 14ZB(1) of the Public Order Act 1986
- the area around Parliament**

Power conferred on: *the Secretary of State*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

94. New section 14ZB(1) would enable the Secretary of State to specify by order made by statutory instrument the meaning of “the area around Parliament” for the purpose of new section 14ZA (access to and from the Palace of Westminster). Subsection (3) provides that the area specified may extend no further than 300 metres from the nearest relevant entrance. New subsection (4) lists Carriage Gates, St Stephen’s Entrance, Peers’ Entrance, Black Rod’s Garden Entrance, and the main entrance to Portcullis House as relevant entrances for the purpose of subsection (3).

95. The maximum extent of the area around Parliament has therefore been redefined from the Bill as introduced to increase the area from 250 metres to 300 metres and to base the area on the distance from the relevant entrances rather than from Parliament Square. The area has been redefined following discussions with the Metropolitan Police (amongst others). That consultation highlighted that 250 metres from Parliament Square did not adequately cover Black Rod’s Garden Entrance. It was also considered that the area should be extended to capture the whole of Westminster Bridge, Victoria Embankment and Whitehall as far as Downing Street in order to secure vehicular access. The Government considers that listing the relevant entrances on the face of the Bill provides transparency and clarity for protestors, police and Parliament alike. It is considered that the approach taken is the most effective and proportionate way to ensure access to Parliament is maintained.

96. This provision is similar to section 138 of SOCPA which provided for the Secretary of State to define “the designated area” around Parliament by means of an order subject to the negative resolution procedure. The boundaries of the designated area are identified in the Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005. Section 14ZB(2) adopts the same approach and provides that the area may be specified by description, by reference to a map or in any other way. The area must be within 300 metres of the nearest relevant entrance. The area may be subject to change and it is therefore important to retain an element of flexibility. Accordingly it is considered appropriate to determine the boundaries of the designated area in secondary legislation. It is considered that the negative resolution procedure provides an appropriate level of parliamentary

scrutiny for the exercise of this power. In particular, the negative resolution procedure was used for the power in section 138 of SOCPA.

Paragraph 1 of Schedule 9: new section 14ZC(1) of the Public Order Act 1986 – special provision if either House meeting outside Palace of Westminster

Power conferred on: *the Secretary of State*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

97. This provision mirrors the power in new section 14ZA in the event that either or both Houses are sitting or conducting committee meetings outside the Palace of Westminster which may happen should, for example, the Palace of Westminster undergo large-scale refurbishment. The Secretary of State can, by order, specify a building situated outside the Palace of Westminster. Subsection (1)(b) provides that the Secretary of State can specify an area which can be no further than 300 metres from the specified building.

98. It is likely that, at some stage, Parliament will sit outside of the Palace of Westminster and therefore this provision ensures that the powers available under the new section 14ZA can be transferred to another location if necessary. It may be that this transfer will need to be done with relatively short notice and it is again important to retain flexibility. Therefore it is considered appropriate to enable the practical effects of this change to be implemented by secondary legislation. For the reasons given above in relation to section 14ZB, it is considered that the negative resolution procedure provides adequate parliamentary scrutiny for the use of this power.

Paragraph 1 of Schedule 9: new section 14ZC(5) of the Public Order Act 1986 – special provision if either House meeting outside Palace of Westminster

Power conferred on: *the Secretary of State*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

99. This clause makes provisions relating to public procession or public assemblies held wholly or partly within the specified area (specified under section 14ZC(1)). The Secretary of State may, also by order, specify requirements that must be met in order to maintain access to and from the specified building. This order is to be made in relation to a week during which the building is used or planned to be used by a House of Parliament. The power is therefore time limited in a way which is consistent with the purpose of section 14ZC being for the special circumstances in which Parliament is not sitting in the Palace of Westminster. For the reasons given above in relation to section 14ZA, it is considered that the negative resolution procedure provides adequate parliamentary scrutiny for the use of this power.

NATIONAL AUDIT

Clause 71: remuneration package of the Comptroller and Auditor General

Powers conferred on: *the Treasury*

Powers exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative, Commons only*

100. Clause 71(7) allows the Treasury to disapply or modify the application of legislation to give effect to any agreed pension element of the Comptroller and Auditor General's remuneration arrangements. The power is restricted to purposes that are supplementary to pension arrangements made under this clause.

101. The interaction of pension and tax legislation is highly complex and is subject to regular change. If a pension element is included in the Comptroller's remuneration package, the form that element takes would be the subject of individual agreement on each occasion between the Prime Minister and the chair of the Public Accounts Committee under subsection (5). It is not practical to draft detailed provisions for the face of the Bill before the form of any pension arrangement is known. Further, to do so would be too inflexible since subsequent appointments may involve different pension arrangements and would require different modifications.

102. The terms of the pension will have already been agreed between the Prime Minister and the leader of the Public Accounts Committee. It is therefore considered that the negative procedure provides sufficient parliamentary oversight. Because the provision is financial, the regulations are subject to House of Commons approval only. A similar supplementary power currently exists under section 13(10) of the Superannuation Act 1972 for the Comptroller's pension. That power is subject to the procedure proposed here.

Clause 79(3): definitions; Paragraph 1(12) of Schedule 13: transfer of property etc; and, Paragraph 5(4) of Schedule 13: old Comptroller and Auditor General to continue to be Comptroller and Auditor General.

Powers conferred on: *the Treasury*

Powers exercised by: *order made by statutory instrument*

Parliamentary procedure: *none*

103. These provisions concern the commencement of the main elements of the new National Audit structures. The Treasury may appoint a day on which the respective provisions are to take effect. The provisions set the start of the first financial year for the new National Audit Office ("the NAO") (clause 79(3)); the day on which certain property, rights and liabilities are to transfer from the Comptroller and Auditor General to the new NAO (paragraph 1(12) of Schedule 13); and the day from which the incumbent Comptroller and Auditor General will be treated as having been appointed under the new clauses (paragraph 5(4) of Schedule 13).

104. These powers, which concern the transition from the current structures to the new ones, are identified separately from the other commencement provisions in

this Part to provide greater clarity. As with commencement orders generally, there is no parliamentary procedure for these powers although the details of the property transfer scheme are subject to approval by a parliamentary committee, the Public Accounts Commission, see paragraph 1(2) of Schedule 13.

Clause 81: Power to make Companies Act companies subject to the audit of Comptroller and Auditor General

Powers conferred on: *the Treasury*

Powers exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

105. This clause would modify the parliamentary procedure for the delegated power in section 25(6) of the Government Resources and Accounts Act 2000 (“the 2000 Act”) when such orders are used to make non-profit-making companies subject to public audit by the Comptroller and Auditor General. A non-profit-making company which has been so designated is exempt from having a statutory audit provided it satisfies the conditions in section 482 of the Companies Act 2006 for that financial year.

106. The power in the 2000 Act is used to make Non Departmental Public Bodies (“NDPBs”) subject to public audit in line with a policy recommended by Lord Sharman in 2001, which has been consistently endorsed by both Houses of Parliament. Following changes in the Companies Act 2006, the power can now be used for non-profit-making companies. The population of such NDPBs changes more frequently than that of non-corporate NDPBs so such orders are expected to be needed regularly. The government believes that it remains appropriate to keep orders that concern non-corporate NDPBs subject to the affirmative procedure. Those bodies typically have bespoke constitutions and there is often a need to make consequential amendments to other legislation at the same time, using the consequential power of section 25(7)(b) of the 2000 Act. But Companies Act companies are more homogenous and when the power is used for them there is no need to amend bespoke primary legislation. We believe the negative procedure provides appropriate scrutiny for orders that only make non-profit-making NDPBs subject to audit by the Comptroller and Auditor General. The effect of such orders will be to make the body subject to enhanced parliamentary scrutiny by an auditor who reports to Parliament.

Clause 82 – Powers of the National Assembly for Wales: Auditor General for Wales

Power conferred on: *the National Assembly for Wales*

Power exercised by: *Measure of the National Assembly for Wales*

Parliamentary procedure: *none – approved by Her Majesty in Council*

107. The National Assembly for Wales may pass Assembly Measures in relation to the matters listed in Part 1 of Schedule 5 to the Government of Wales Act 2006 (“the 2006 Act”). An Assembly Measure may include any provision that could be made by an Act of Parliament, within the limits on the Assembly’s legislative competence set out in section 94 of, and Schedule 5 to, the 2006 Act.

108. Clause 82(2) confers legislative competence on the Assembly by inserting a new matter 14.1 into field 14 (public administration) in Part 1 of Schedule 5. Matter 14.1 enables the Assembly to pass Measures relating to certain aspects of the office and activities of the Auditor General for Wales, set out in paragraphs (1) to (9) of the matter.

109. Paragraphs (1) to (3) of matter 14.1 concern the Auditor General's terms of appointment, the number of times a person may be appointed Auditor General, and the other activities of a serving or former Auditor General. Paragraphs (4) to (6) concern the manner in which the Auditor General carries out activities, the authorisation of other people to perform the Auditor General's functions, and oversight and supervision of the Auditor General. Paragraphs (7) and (8) concern the provision of resources for the Auditor General and the charging of fees or other amounts. Paragraph (9) covers the restatement of the law relating to the Auditor General.

110. Part 2 of Schedule 5 to the 2006 Act sets out general restrictions on the Assembly's legislative competence. Clause 82(3) inserts a new paragraph 6A into Part 2, which provides that the restrictions which prevent a Measure amending certain provisions of the Government of Wales Act 1998 and the 2006 Act do not apply to Measure provisions based on the competence provided by matter 14.1. Instead, paragraph 6A(3) applies a narrower restriction to prevent an Assembly Measure from modifying paragraph 3 of Schedule 8 to the 2006 Act (which protects the independence of the Auditor General) or giving a role to an Assembly Committee which does not satisfy certain requirements of independence from the Welsh Assembly Government.

111. A proposed Assembly Measure will be scrutinised by the Assembly in accordance with sections 97 and 98 of the 2006 Act and the Assembly Standing Orders. Standing Order 23 provides for the Assembly to debate and vote on the general principles of a proposed Assembly Measure, for consideration of the details of the proposal first by a committee and then by the full Assembly, and for a final stage where the Assembly can pass or reject the proposal.

112. An explanatory memorandum prepared by the Welsh Assembly Government and giving more details about these powers is annexed to this document.

Paragraph 1(1) of Schedule 12: strategy

Power conferred on: *the NAO and Comptroller and Auditor General*

Power exercised by: *strategy document*

Parliamentary procedure: *approval by Public Accounts Commission*

113. This power provides for the NAO and the Comptroller and Auditor General to prepare a strategy for the national audit functions and to review it at least every twelve months. Among the functions of the strategy is to plan the allocation of resources by the NAO for the Comptroller's functions. The strategy is binding on both the NAO and the Comptroller, by paragraph 1(7) of Schedule 12.

114. The main requirements of the strategy are set out in primary legislation, particularly its role in allocating resources. The Public Accounts Commission has to approve the strategy, and may revise it before it does so (see paragraph 1(5) of Schedule 12). Since the detailed content of the strategy document will by its

nature be more strategic than legal and it will be subject to regular revision, this degree of parliamentary scrutiny is considered appropriate.

Paragraph 6(1) of Schedule 12: delegation of the Comptroller and Auditor General's functions

Power conferred on: *the Comptroller and Auditor General*

Power exercised by: *administrative scheme*

Parliamentary procedure: *approval by Public Accounts Commission*

115. This power allows the Comptroller and Auditor General to delegate his functions to employees of the NAO in accordance with a scheme approved by the Public Accounts Commission. The agreed scheme will be binding on the Comptroller. It is considered that prescribing the scope of permitted delegation on the face of the Bill would unduly constrain the ability of the Comptroller to make delegation decisions in response to operational needs. The requirement for the scheme to be approved by the Public Accounts Commission will provide the necessary flexibility while providing adequate scrutiny.

Paragraph 8(2) of Schedule 12: audit fees etc

Power conferred on: *the NAO*

Power exercised by: *administrative scheme*

Parliamentary procedure: *requires approval of Public Accounts Commission*

116. This power allows the NAO to prepare a scheme for charging fees for audits. The scheme requires the approval of the Public Accounts Commission. It is binding upon the NAO.

117. The primary legislation sets high level parameters for fee charging by the NAO, including requiring ministerial consent where fees are charged to bodies acting on behalf of the Crown, and for NAO-approved services, providing for fees to be consistent with the governing agreement. Normal public law principles mean that with a fee power of this type fees may only recover the costs of providing the service. It is not considered necessary for the details of the fee scheme also to be set out in primary legislation. The requirement for approval by the Commission provides a greater level of scrutiny than the current charging arrangements under section 4 of the National Audit Act 1983. This new level of scrutiny is considered appropriate since the Bill makes more explicit the oversight role performed by the Commission.

Paragraph 10(1) of Schedule 12: code of practice

Power conferred on: *the NAO and Comptroller and Auditor General*

Power exercised by: *code of practice*

Parliamentary procedure: *requires approval of Public Accounts Commission*

118. The power requires the National Audit Office and the Comptroller and Auditor General to draw up a code of practice. The code is to deal with the relationship between the Comptroller and Auditor General and the National Audit Office. The mandatory and optional contents of the code are set out in paragraph 12 of Schedule 12. The code is binding on the Comptroller and the NAO under paragraph 10(9) of Schedule 12 which requires each to comply with it.

119. The Bill requires the code to be approved by the Public Accounts Commission. It must also be laid before Parliament. It is considered that those obligations provide an appropriate level of scrutiny and transparency given that the principles as to the allocation of responsibilities between the NAO and the Comptroller to which the code gives further effect are on the face of the Bill in the main clauses and in Schedule 12.

Paragraph 1(1)(b) of Schedule 13: transfer of property etc.

Powers conferred on: *the Comptroller and Auditor General*

Powers exercised by: *scheme*

Parliamentary procedure: *approval by Commission*

120. The paragraph makes transitional arrangements for the property that is to be transferred from the old National Audit Office (where it is held in the name of the Comptroller and Auditor General) to the new National Audit Office to be described in a scheme.

121. The Comptroller and Auditor General is expected to transfer all property, rights and liabilities (except for audit contracts) to the new corporate NAO, whose duty it will be to manage resources for the Comptroller. Providing for the transferred assets to be described in a scheme, rather than on the face of the Bill, provides greater operational flexibility to tailor the transfer to such property, rights and liabilities as are in existence at the time, and to make pragmatic exceptions if that is appropriate. This is an established approach to the property transfers that occur when public bodies are reorganised which makes the complex process easier to manage. The parliamentary oversight provided by the requirement for the Public Accounts Commission to approve the scheme is considered sufficient for a reorganisation in which the property will remain with the successor body.

Paragraph 23 of Schedule 14: consequential amendments relating to Part 10

Power conferred on: *the National Assembly for Wales*

Power exercised by: *Measure of the National Assembly for Wales*

Parliamentary procedure: *none – approved by Her Majesty in Council*

122. Paragraph 23 of Schedule 14 amends Schedule 5 to the Government of Wales Act 2006.

123. Part 2 of Schedule 5 to the 2006 Act sets out general restrictions on the legislative competence of the National Assembly for Wales. Paragraph 5 provides that a provision of an Assembly Measure cannot make modifications of any functions of the Comptroller and Auditor General (or confer power to do so by subordinate legislation). To ensure that this restriction reflects the changes made by Part 10 of the Bill, this amendment extends the restriction to functions of the National Audit Office.

124. Part 3 of Schedule 5 to the 2006 Act sets out exceptions to the general restrictions on the Assembly's competence in Part 2. Paragraph 8 provides that those general restrictions do not prevent a provision of an Assembly Measure modifying any enactment relating to the Comptroller and Auditor General (or conferring power to do so by subordinate legislation) if the Secretary of State consents. To ensure that this exception reflects the changes made by Part 10 of the Bill, this amendment extends the exception to functions of the National Audit Office.

TRANSPARENCY OF GOVERNMENT FINANCIAL REPORTING TO PARLIAMENT

Clause 83: new section 4A(3) of the Government Resources and Accounts Act 2000 – inclusion in departmental estimates of resources used by designated bodies

Power conferred on: *the Treasury*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *negative*

125. Clause 83 amends the Government Resources and Accounts Act 2000 by inserting a new section 4A. The new section 4A(1) and (2) will enable the Treasury to direct that departmental estimates must be prepared in accordance with directions issued by the Treasury and that the Treasury may direct that such estimates include information relating to resources expected to be used by designated bodies. The new section 4A(3) and (11) provide that the Treasury may designate a body by order subject to the negative procedure.

126. The new section 4A(5) to (8) will prevent the Treasury from designating bodies whose only public funding comes from the Scottish Consolidated Fund, the Consolidated Fund of Northern Ireland or the Welsh Consolidated Fund and provides for consultation, where the Treasury consider it appropriate to do so, with the devolved administrations before a body is designated.

127. The new section forms part of the ongoing work taking place in relation to the Treasury's "Alignment Project". The Government's commitment to this work was set out in a Green Paper, *The Governance of Britain* in July 2007 and has received support from the Treasury Select Committee and the Public Accounts and Liaison Committees. At present there are significant differences between departmental estimates, departmental budgets and departmental accounts. A simpler and more transparent control framework would be more efficient and cost effective and would improve accountability to Parliament and the public. The aim of the Alignment Project is to create a single, coherent financial regime, that is effective, efficient and transparent, enhances accountability to Parliament and the public, and underpins the Government's fiscal framework.

128. To achieve this goal the project aims to align, as far as possible, departmental budgets, estimates and resource accounts. At present departmental budgets include the expenditure of non-departmental public bodies whereas any estimate prepared for the department will only include any grant in aid paid to that body. The new section will allow the Treasury to designate such bodies to bring them within the scope of the relevant departmental estimate.

129. The power to designate bodies is exercisable by order made by statutory instrument and is subject to the negative procedure. The negative procedure is considered appropriate given the large number of non-departmental public bodies and the fact that any list of such bodies is likely to be subject to regular amendment as new bodies are formed and old bodies are dissolved.

Clause 84: corresponding provision in relation to Wales

Power conferred on: *the Welsh Ministers*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *choice of negative or draft affirmative procedure in the National Assembly for Wales*

130. Clause 84 amends Part 5 of the Government of Wales Act 2006 ("the 2006 Act"). The changes are intended to simplify the arrangements for financial reporting and accountability to the National Assembly for Wales ("the Assembly"). This will be achieved by better aligning the contents of the annual budget motion with the use of the resources set out in the resource accounts produced by Ministers and other persons to whom the Assembly votes resources.

131. There are a number of Assembly Government Sponsored Public Bodies ("AGSBs") and other organisations in Wales that are classified as central government bodies and are funded, wholly or to a significant degree, by Welsh Ministers. At present, the Budget motion submitted to the Assembly annually does not show the proposed use of resources by those bodies. It is therefore difficult for Ministers to align the use of resources authorised by the Assembly in a Budget resolution with the use of resources included in the Welsh Ministers' resource accounts. And in turn, it is difficult for Assembly Members to see clearly how resources have been used.

132. The Assembly also votes resources to persons other than the Welsh Ministers. These persons are described as "relevant persons" in section 124(3) of the 2006 Act. They are: the National Assembly for Wales Commission, the Auditor General for Wales and the Public Services Ombudsman for Wales. Potentially, these other

“relevant persons” could also fund bodies in Wales that would be classified as belonging to central government. The changes to the 2006 Act made by clause 84 will apply to those “relevant persons”, as well as to the Welsh Ministers. This will allow bodies to be designated in relation to the other “relevant persons”, as well as to the Welsh Ministers. This means that the Assembly will see how resources are intended to be used by bodies funded by all the “relevant persons”, in the Budget motion - and in the accounts of each “relevant person”.

133. Clause 84 amends the 2006 Act to give the Welsh Ministers the power to designate bodies for the purpose of enabling a budget motion to include information relating to the resources expected to be used by that body. It also includes provision that requires the Welsh Ministers to obtain the consent of the Treasury before designating any body that receives funding from the UK Consolidated Fund or a devolved Consolidated Fund other than the Welsh Consolidated Fund. This is intended to avoid duplicate or erroneous designations, and the accounting problems that would ensue.

134. The power to designate bodies is exercisable by order made by statutory instrument and is subject to the negative procedure unless a draft order has been laid before, and approved by a resolution of, the Assembly. The choice of procedure will be made by Welsh Ministers as appropriate in recognition of their key budgetary responsibilities. For instance, the Welsh Ministers may choose to use the affirmative procedure where they are proposing major changes to the designated bodies, and it is appropriate for the Assembly to have the opportunity to debate these fully; while Ministers may choose the negative procedure in cases where minor or uncontroversial amendments are to be made.

PUBLIC RECORDS AND FREEDOM OF INFORMATION

Clause 85: Transfer of records to Public Record Office

Power conferred on: Lord Chancellor

Power exercised by: order made by statutory instrument

Parliamentary procedure: negative

135. Clause 85(1)(a) amends section 3(4) of the Public Records Act 1958 so that records selected for permanent preservation must be transferred to the Public Record Office or another appointed place of deposit no later than twenty years after the creation of the record instead of thirty years as at present. Under clause 85(1)(b), for a period of ten years from the commencement of clause 85 this twenty year period is subject to transitional, transitory and saving provisions made by order under clause 85(2).

136. Public bodies currently hold a large volume of records between twenty and thirty years old. The power under clause 85(2) allows the Lord Chancellor to permit public bodies to transfer such records to the relevant place of deposit over a ten year period in accordance with a scheme of his devising in order to avoid an excessive burden falling on public bodies on commencement of the new requirement. The power allows for different provisions to be made for records of different descriptions so that allowances can be made where there are difficulties with records of any particular type.

137. The power is exercisable by order made by statutory instrument and is subject to the negative parliamentary procedure. This is the appropriate procedure because the power is to make consequential provisions only, does not amend primary legislation and is limited in scope and duration. Use of the negative procedure for this power is consistent with use of the negative procedure for powers with similar purpose and effect under clause 94.

FINAL PROVISIONS

Clause 94: power to make consequential provision

Power conferred on: a Minister of the Crown or two or more Ministers of the Crown acting jointly

Power exercised by: order made by statutory instrument

Parliamentary procedure: Where a provision in primary legislation is amended or repealed affirmative

Otherwise – negative

138. Clause 94 enables a Minister, or Ministers acting jointly, to make by order provisions which are consequential on the provisions in the Bill. Such an order can be used to amend, repeal or revoke any provision made in either primary or secondary legislation in consequence of the provisions in this Bill. It may also include transitional, transitory or saving provision. This power is by its nature consequential and limited by the provisions of this Bill. While a number of consequential amendments are made in the Bill, particularly concerning the civil service in Schedule 2 and the national audit provisions in Schedule 14, the power has been taken to ensure that any further consequential changes can be addressed. For example, this power will permit provisions in current primary and secondary legislation that confer obligations on the Comptroller and Auditor General and the NAO (of which there are many) to be updated to ensure that those obligations are appropriately transferred to reflect the changed responsibilities of those persons.

139. The parliamentary procedure adopted depends on the nature of the legislation amended by the order. Where the order amends or repeals a provision in primary legislation, the affirmative procedure applies. Where the order does not amend or repeal such a provision, it is the negative procedure that is to be followed. This approach ensures that parliamentary involvement in the order-making process is appropriately high where that order amends primary legislation. It is consistent with the view of the Committee that the affirmative procedure should generally apply where consequential changes to primary legislation are to be achieved through secondary legislation.¹³ Where the order does not amend or repeal primary legislation, it is considered that a negative procedure is sufficient.

140. The Committee, when it considered the corresponding power in the draft of the Bill, considered that the power “is well precedented and not inappropriate” (paragraph 6). The Committee suggested that the power should be expressly confined, as it relates to the amendment of primary legislation, to the amendment of Acts passed before or in the same session as the Bill. The Committee stated that it should also be made clear whether incidental or supplementary provision may be

¹³ 3rd Report, Session 2002-03, HL Paper 21.

made under subsection (1). The Joint Committee endorsed the recommendation that the power in this provision should be limited to the amendment of Acts passed before or in the same session as the Bill (paragraph 363). The Bill reflects the recommendation of the Joint Committee.

Clause 95: extent, commencement, transitional provision and short title

Power conferred on: *a Minister of the Crown or two or more Ministers of the Crown acting jointly*

Power exercised by: *order made by statutory instrument*

Parliamentary procedure: *none*

141. This clause provides powers concerning the commencement of the Bill. A Minister, or Ministers acting jointly, may by order appoint a day on which the Bill is to come into force and different days may be appointed for different purposes. There is also a power to make transitional, transitory or saving provision in connection with the commencement of any provision of the Act. This power is necessary to ensure a smooth transition to the new arrangements provided for in this Bill. As with commencement orders generally, there is no parliamentary procedure for these powers.

Ministry of Justice

Cabinet Office

Home Office

Her Majesty's Treasury

Wales Office

March 2010

WELSH ASSEMBLY GOVERNMENT MEMORANDUM ON FRAMEWORK POWERS CONFERRING LEGISLATIVE COMPETENCE ON THE NATIONAL ASSEMBLY FOR WALES

Introduction

1. This memorandum sets out the background and context relevant to clause 82 of the Constitutional Reform and Governance Bill, conferring legislative competence on the National Assembly for Wales (“the NAW”) in relation to governance arrangements for the Auditor General for Wales (“the AGW”) and the Wales Audit Office (“the WAO”).

Background

2. Part 3 of the Government of Wales Act 2006 (c.32) (“the 2006 Act”) gives the NAW the power to pass legislation known as Assembly Measures. Assembly Measures can make any provision that can be made by an Act of Parliament in relation to those Matters, subject to the restrictions contained in the 2006 Act.

3. The NAW may pass Measures in relation to the “Matters” which are listed in 20 “Fields” in Part 1 of Schedule 5 to the 2006 Act. Additions to the Assembly’s

legislative competence are made by adding new Matters to the Fields in Part 1 of Schedule 5. The 2006 Act includes a power to add new matters by Order in Council, and matters may also be added by provisions in Acts of Parliament, which are referred to as “framework powers”.

4. Clause 82(2) of the Bill would grant the NAW law-making powers by inserting a new Matter (i.e. Matter 14.1) in Field 14 (Public Administration). The purpose of Matter 14.1 is to enable the NAW to put in place new governance arrangements for the AGW and WAO (which may be similar to those that the Bill proposes for the Comptroller and Auditor General and the National Audit Office) whilst fully respecting the operational independence of the AGW. Clause 82(3) would also insert a new paragraph 6A into Part 2 of Schedule 5 (which sets out general restrictions on the NAW’s legislative competence) to enable the NAW to modify the provisions of the 2006 Act relating to the AGW.

Context

5. The Public Audit (Wales) Act 2004 created a single public audit body for Wales, covering the Assembly Government, its sponsored bodies, local government and the NHS in Wales. As a result, the AGW performs a role equivalent to that of both the Comptroller and Auditor General and the Audit Commission in England but with some important differences. There is no direct ‘devolved’ equivalent to the Public Accounts Commission in Wales, although the NAW is required by the 2006 Act to have an Audit Committee. The 2006 Act continued the office of the AGW with minor modifications including new functions reflecting changes in the devolution settlement, such as granting approvals to draw from the Welsh Consolidated Fund and auditing the accounts of the NAW Commission.

6. Detailed provisions about the appointment and status of the AGW, the AGW’s staff, financial affairs and general powers of the AGW are set out in Schedule 8 to and, in relation to financial matters, Part 5 of the 2006 Act. The office of the AGW is a corporation sole whereas the WAO has no legal personality of its own being a collective term to describe the AGW and the AGW’s staff.

7. The AGW is appointed by Her Majesty on the nomination of the NAW. The tenure of the AGW is governed by paragraph 2 of Schedule 8 to the 2006 Act. There is no express statutory provision that governs either the length of the appointment or the number of times that a person may hold that office but such provision is made in the terms and conditions of the AGW’s appointment.

8. In the exercise of his functions, the AGW is not subject to the direction or control of the NAW or the Assembly Government. The AGW is not an officer of the NAW in the way that the Comptroller and Auditor General is an officer of the House of Commons.

9. The AGW appoints staff to work in the WAO, sets their terms and conditions and remuneration and has power to secure provision of services for assisting in the exercise of the AGW’s functions. Sums required for these purposes and other expenses are paid from the AGW’s budget, the estimate for which is considered (and possibly modified by) the NAW’s Audit Committee in accordance with paragraph 12 of Schedule 8 to the 2006 Act and which forms part of the overall budget motion moved annually in the NAW (as required by section 125 of the 2006 Act).

10. The AGW is empowered in some cases and required in others, to charge fees for auditing accounts and carrying out inspections and examinations, for example,

into economy, efficiency and effectiveness. In addition to any funds made available in a NAW budget resolution by virtue of section 120(1) and (2) of the 2006 Act, certain provisions of enactments may authorise the AGW in some circumstances to retain receipts, for example, from fees charged for specified purposes. The AGW also has power to borrow to meet a temporary excess of expenditure over income.

11. The AGW is the Accounting Officer for the WAO. The NAW appoints the auditor of the accounts of the AGW and sets the terms and conditions of that appointment. The AGW is required to pay that auditor such remuneration as is provided for in the terms of appointment. The auditor of the AGW certifies the AGW's accounts and lays them with the auditor's report before the NAW. That auditor may also carry out examinations into the economy, efficiency and effectiveness with which the AGW has used resources in the exercise of his functions and the auditor may lay any report on such an examination before the NAW.

12. The AGW has appointed an Audit and Risk Management Committee, made up of independent members who are external to the WAO, which advises on audit, risk and governance in the WAO.

13. There is a need to put in place enhanced governance and accountability arrangements for the operation of the AGW and the WAO. To this end, the Audit Committee of the NAW, which has an oversight role, is considering undertaking a review of the governance of the AGW/WAO. The Committee has yet to establish formal terms of reference for such a review and will be considering the outcome of the International Peer Review of the WAO (commissioned by the AGW at the start of 2009 and published on 8 October) before making a final decision. The Peer Review expressed the view that "there is scope to enhance and strengthen the governance of the Wales Audit Office without restricting the AGW's crucial independence to examine whatever subjects he chooses, and to make independent audit judgments on them free from political interference" (Recommendations, paragraph 8).

14. The legislative competence conferred by the proposed amendment would allow the Assembly to take forward any legislation that would be required as a result of the Audit Committee's review. However, the competence will not allow the Assembly to legislate in any way that would infringe the principle of auditor independence or that would alter the statutory role, or audit functions, of the AGW and WAO. In that connection, the provisions would enable the NAW to place functions relating to the AGW and the WAO on NAW committees but not on the NAW itself or the Welsh Ministers, given the protection afforded to the AGW's independence by paragraph 3 of Schedule 8 to the 2006 Act. Furthermore, such functions could only be conferred on the NAW Audit Committee or another committee which is independent from the Welsh Assembly Government.

Scope of Proposed Powers

15. The proposed competence would provide the NAW with law-making powers to modernise the governance and accountability arrangements for the AGW and the WAO, subject to certain restrictions to ensure that the AGW continues to have complete discretion in the carrying out of his functions.

16. The powers being sought would create a new “Matter 14.1” enabling the Assembly to pass legislation on:

- the AGW’s terms and conditions of employment relating to tenure and remuneration, and the number of times that an individual may be appointed to the office of the AGW;
- restrictions on the other offices and positions that may be held by an AGW or the activities of a previous AGW;
- requiring the AGW to aim to carry out AGW functions in an efficient and cost effective manner and to have regard to the standards and principles expected of an expert accountant or auditor;
- the authorisation of persons to exercise the functions of the AGW or on the AGW’s behalf;
- the oversight or supervision of the AGW or the AGW’s functions;
- the provision or use of resources in support of the AGW’s functions including the employment and use of staff; procurement and use of services; the holding of documents or information; and the keeping of records;
- the charging of fees and other amounts relating to the AGW’s functions or to auditors appointed by the AGW (such as auditors which the AGW appoints under section 13(2) of the Public Audit (Wales) Act 2004 to audit the accounts of local government bodies in Wales); and
- the restatement of any law relating to the AGW.

17. Matter 14.1 would enable the NAW to make changes in the governance arrangements for the AGW and WAO, which could be similar to those which are set out in Part 10 of the Bill in relation to the Comptroller and Auditor General and the National Audit Office. For example, the provision which might be made by a Measure relating to matter 14.1 could include establishing the WAO as a body corporate with functions relating to the oversight or support of the AGW, and specifying the number of members, and the terms of appointment of a Chair, members and Chief Executive. However, the nature of any changes would be for the NAW to determine.

18. The proposed amendment would also add a new paragraph 6A to Part 2 of Schedule 5 to the 2006 Act (“General Restrictions”). Part 2 of the Schedule lists restrictions on the provision which can be made in an Assembly Measure. If a provision of a Measure breaches any of them, it is outside of the NAW’s legislative competence and is not law. The restrictions are subject to exceptions set out in Part 3 of Schedule 5.

19. New paragraph 6A would apply to any provision that may flow from new Matter 14.1. In relation to such a provision, paragraph 6A disapplies paragraph 6(1) of Part 2 (which provides that an Assembly Measure cannot modify provisions in the 2006 Act) and paragraph 3 (which protects certain other enactments against amendment) insofar as it relates to certain provisions of the Government of Wales Act 1998. The effect is that a provision to which paragraph 6A applies may amend the 2006 Act and the specified provisions of the 1998 Act.

20. However, paragraph 6A goes on to provide that such a provision may not amend paragraph 3 of Schedule 8 to the 2006 Act, which protects the independence and status of the AGW. It also provides that a provision to which

paragraph 6A applies may only give a role to a NAW committee which excludes from its membership the First Minister, the Welsh Ministers, their Deputies and the Counsel General (or anyone acting as such); and which is not chaired by an Assembly Member who is a member of a political group with an executive role. In other words, a Measure may only give a role relating to the AGW or WAO to the NAW Audit Committee or another committee which is independent of the Assembly Government.

Geographical limits

21. Section 94 of the 2006 Act provides that a provision of an Assembly Measure is outside the NAW's legislative competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation.

22. The limitation relating to functions other than in relation to Wales means that the NAW would not be able by Measure to generally confer functions which did not relate to Wales. The functions of the AGW relate to Wales and to Welsh public bodies.

Restrictions on modifying and conferring functions

23. By virtue of paragraph 1 of Part 2 of Schedule 5 to the 2006 Act, and paragraph 7 of Part 3 of that Schedule, the NAW may not by Measure alter or remove functions of a Minister of the Crown without the consent of the relevant Secretary of State (and may not create new Minister of the Crown functions at all). The proposed provisions themselves do not modify or remove any functions of a Minister of the Crown. In relation to any future proposals for Assembly Measures that may impact on Minister of the Crown functions, the appropriate UK Government Departments would first be consulted and agreement sought before any change to, or modification of, those functions could be made.

24. By virtue of paragraph 5 of Part 2 of Schedule 5, and paragraph 8 of Part 3 of that Schedule, a provision of an Assembly Measure cannot modify functions of the Comptroller and Auditor General unless the Secretary of State consents. Paragraph 23 of Schedule 14 to the Bill will extend these provisions of the 2006 Act to functions of the new National Audit Office. This consequential amendment reflects the fact that, if Part 10 of the Bill is enacted, certain functions currently carried out by the Comptroller and Auditor General will in future be carried out by the National Audit Office. The NAW will not be able to modify those functions without the agreement of the Secretary of State.

March 2010

APPENDIX 3 FLOOD AND WATER MANAGEMENT BILL — GOVERNMENT RESPONSE

Letter to the Chairman from Lord Davies of Oldham, Parliamentary Under Secretary of State, Department for Environment, Food and Rural Affairs

1. The 6th Report of the Delegated Powers and Regulatory Reform Committee, published on 4 March, included the Committee's views on delegated powers contained within the Flood and Water Management Bill. I am writing to you to set out the Government's response to the Committee's detailed comments on the Bill.

Clauses 4 and 5

2. We note the Committee's concern that the powers in clauses 4(2)(f) and 5(2)(c) are not expressly limited to adding only statutory functions. As we stated in our memorandum to the Committee, we only intend to use the power to add existing functions to the list. Since this is explicit elsewhere in the Bill (such as in clause 11(7) and (9)) we are now tabling amendments to make it clear that these powers too are confined to statutory functions.

Clause 7

3. The Committee's report points out that the provisions on guidance in clause 7 of the Bill do not follow the precedent in the Environmental Protection Act 1990, for other similar guidance which must be complied with, and provide for negative resolution procedure.

4. In light of the concerns raised by the Committee we are tabling amendments for negative resolution procedure to apply to the strategy and the guidance under clause 7. Following discussion with Welsh Assembly Government, we will also be tabling an amendment for the guidance under clause 8 to be subject to the negative resolution procedure in the National Assembly for Wales.

Clause 15, and Schedules 1, 3 and 4 – Appeals

5. The Committee took the view that the various appeals provisions in the Bill would also need to cover matters such as the grounds for appeal and the powers of the prescribed appellate body. It argued, therefore, that the powers to make provision about appeals in clause 15(8), and elsewhere in the Bill should be subject to the affirmative resolution procedure, at least the first time those powers are used. We are now tabling amendments to that effect.

Clause 15 – Maximum penalty

6. We have considered the Committee's concerns around the ability to change, by order made under clause 15(9), the maximum penalty that can be imposed under this clause. In light of this we are tabling an amendment to ensure that changes may only be made in order to reflect a change in the value of money.

Clause 29 – Restructuring

7. The Committee notes that while a Henry VIII power such as this might be limited to Acts passed before the end of the Session in which the legislation containing the power is passed, there is no such limitation here. While the

Committee made no recommendation for a change to this provision, it suggested that the House might wish to seek an explanation for this drafting.

8. We have carefully considered the Committee's concerns around the application of this Henry VIII power but in this instance consider that its application to future legislation is justified for the following reasons. Specifically, we intend – as recommended by Sir Michael Pitt's Review into the Summer 2007 floods - to consolidate the present Bill with existing flood and coastal erosion legislation (and any further legislation not included in this Bill but identified in the draft Bill published in April last year). The power in clause 29 would also need to apply to any such further floods legislation and to any subsequent consolidation legislation.

9. Generally, it is also necessary to have this power since future legislation may create bodies which it may be thought should be integrated into the flood or coastal erosion risk management institutional framework. This need may not be apparent at the time the legislation is passed and so the power to do so at a later time by virtue of the power in clause 29 without having to wait for yet further primary legislation would ensure the sort of future flexibility we consider necessary to allow the Government of the day to be adaptive and responsive in ensuring all the relevant bodies are best placed to tackle flood or coastal erosion risk.

10. The provision does, of course, make any use of the power to transfer responsibilities subject to both a duty to consult those bodies affected and the affirmative resolution procedure in Parliament.

Clause 47 – Pre-consolidation amendments

11. We have considered the Committee's point on why the power in clause 47 is not conditional on the presentation, or passing, of a consolidation Bill, and have decided that it would be beneficial to make the power in clause 47 conditional on the presentation of a consolidation Bill. We are therefore tabling an amendment to this effect.

Schedule 4 – Reservoirs

12. The Bill proposes a mix of negative and affirmative procedures for the new delegated powers to be inserted into the Reservoirs Act 1975, but as the Committee has rightly noted, the existing delegated powers in the Act attract no parliamentary procedure. These cover technical, procedural, matters but all the same form part of the suite of delegated powers in the revised Reservoirs Act that will implement a more risk-based approach, which is our main aim.

13. The Committee has made no recommendation, noting only that the absence of scrutiny is not inappropriate to the existing powers. However, where we believe it beneficial to provide for parliamentary procedure for the existing delegated powers in the Act, we are now tabling amendments to do so.

14. Finally, I should say that we were most grateful to the Committee for its report. I hope this letter has helped clarify the Government's position on these matters. I am placing a copy in the Library of the House.

Department for Environment, Food and Rural Affairs

March 2010