Health and Social Care Bill 2011

Memorandum for the House of Lords Delegated Powers and Regulatory Reform Committee (updated to reflect the Bill as introduced in the House of Lords)

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Health and Social Care Bill 2011

Memorandum for the House of Lords Delegated Powers and Regulatory Reform Committee

1. This memorandum describes the purpose and content of the Health and Social Care Bill, identifies the provisions of the Bill that confer powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reasons for, the procedure selected.

Purpose

2. The Bill contains provisions on a range of policies. It contains 303 clauses over twelve Parts, and has twenty-four Schedules. The Bill is intended to give effect to the policies requiring primary legislation that were set out in the White Paper *Equity and excellence: Liberating the NHS*[1], which was published in July 2010. The Bill was amended during its passage through the House of Commons in response to the report of the NHS Future Forum. The Forum, a group of forty-five leading professionals from across health and social care, chaired by Professor Steve Field, led a listening exercise following the Bill's first Committee stage in the House of Commons. The Forum published its recommendations on 13 June 2011, to which the Government responded in detail on 20 June, setting out the changes it would make to meet the Forum's recommendations[2].

Provisions for delegated legislation

3. The Bill is not in general an enabling or framework Bill. There is a large amount of core legislation about bodies such as the NHS Commissioning Board on the face of the Bill. This is consistent with the vision of moving away from the current system – where the Secretary of State has wide powers to confer functions on various NHS bodies and wide-ranging powers of direction over their activity – to a more transparent system, with reduced scope for intervention from the centre. The Bill confers functions directly on those responsible for exercising them. This entails spelling out in more detail than in the past what the remaining role of the Secretary of State in relation to those bodies is.

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[1] http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm

[2] The Forum report and the Government response are available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_127443 Also available at that website are briefing notes on the Government amendments that were made to the Bill at the second Commons Committee and at Commons Report stage in order to fulfil the Government response.

4. This Bill also represents a positive approach to delegated powers in that it often transfers power from the executive to the legislature through the use of the affirmative resolution procedure for delegated powers that are likely to be of particular interest. This mechanism further circumscribes the powers of the Secretary of State and ensures that Parliamentary accountability for strategic decisions is maintained within the more operationally devolved system.

5. In deciding whether matters should be specified on the face of the Bill or dealt with in delegated legislation, the Department has carefully considered the needs:

- to avoid too much technical and administrative detail on the face of the Bill;
- to provide flexibility for responding to changing circumstances, so that requirements can be adjusted without the need for further primary legislation; and
- to allow detailed administrative arrangements to be set up and kept up to date within basic structures and principles that are set out in primary legislation, subject to Parliament's right to challenge inappropriate use of powers.

6. In deciding what procedure is appropriate for the exercise of the powers in the Bill, the Department has carefully considered in particular:

- whether the provisions amend primary legislation; and
- the importance of the matter to be addressed.

Any power in the Bill, or in a provision of the NHS Act 2006 amended or inserted by the Bill, to make an order or regulations is exercisable by statutory instrument: the commentaries on individual powers below identify the Parliamentary procedure, if any, applicable in each specific case. Directions given under powers in the Bill or under powers in other legislation amended or created by the Bill must generally be given in writing, but in some cases they may alternatively be given in regulations subject to the negative resolution procedure. Where this is relevant, it is noted in the commentaries below.

The structure of this memorandum

7. The rest of this memorandum is structured around the twelve Parts of the Bill. For each Part, there is an introduction, which gives an overview of the context and the powers concerned, and then a clause-by-clause commentary on the provisions that affect delegated powers.

PART 1: THE HEALTH SERVICE IN ENGLAND

8. This section of the memorandum provides, first a summary, under the following headings, of the delegated powers included in Part 1 of the Bill:

- The Secretary of State's powers
- The NHS Commissioning Board
- Clinical commissioning groups
- Public health
- Functions relating to mental health matters

and then a clause-by-clause commentary on those powers.

The Secretary of State's powers

9. The White Paper, *Equity and excellence: Liberating the NHS* sets out a clear vision for NHS autonomy: 'Current statutory arrangements allow the Secretary of State a large amount of discretion to micromanage parts of the NHS. We will be clear about what the NHS should achieve; we will not prescribe how it should be achieved. We will legislate to establish more autonomous NHS institutions, with greater freedoms, clear duties, and transparency in their responsibilities to patients and their accountabilities. We will use our powers in order to devolve them.' (*Liberating the NHS,* page 7.)

10. The Bill maintains the overarching duty of the Secretary of State, which dates from the original NHS Act of 1946, to promote "a comprehensive health service designed to secure improvement in the physical and mental health of the people of England, and in the prevention, diagnosis and treatment of illness." It distinguishes for the first time between healthcare and

public health, laying the way for the new Public Health England. It also sets clear constraints on the Secretary of State's ability to intervene in the NHS.

11. The Bill sets out a framework for the NHS in which functions are conferred directly on the organisations responsible for exercising them and the Secretary of State retains only those controls necessary to discharge core functions. This contrasts with the current model, in which the majority of duties, powers and functions are conferred on the Secretary of State and then delegated to NHS bodies.

12. Under the proposals in the Bill, the Secretary of State will set the legislative framework for the NHS but will be removed from operational management. Within the new system, there would be explicit mechanisms in place to govern the relationship with the NHS, primarily the process of setting the mandate for the NHS Commissioning Board ("the Board").

13. The Secretary of State's mandate to the Board will set objectives for the Board, and will include the Board's resource limits. The Board would be under a duty to seek to achieve the objectives set for it in the mandate, and would have a duty to comply with any requirements imposed on it for that purpose.

14. For the first time the Secretary of State would be under specific duties in relation to the promotion of improvement in quality and outcomes, and the reduction of inequality in healthcare provision. The Secretary of State, via the mandate, would set out objectives for the Board in these areas, including specific levels of improvement.

15. The Bill also places a new duty on the Secretary of State to act with a view to promoting the autonomy of arm's length bodies, commissioners and providers to exercise their functions as they see fit, so far as is consistent with the interests of the health service. This duty would require the Secretary of State, when considering whether to place requirements on the NHS, to make a judgement as to whether these were in the interests of the health service. If challenged, the Secretary of State would have to be able to justify why these requirements were necessary. It does not undermine his duty to promote a comprehensive health service. The Secretary of State will remain ultimately accountable for the NHS.

16. The overall framework proposed in the Bill is designed to give the NHS greater freedoms, improve transparency and help prevent political micro-management. The powers of the Secretary of State would be constrained and made more transparent. At the same time, political accountability to Parliament would be strengthened. For example, the Bill places a new duty upon the Secretary of State to keep health service functions under review and to report annually on the performance of the comprehensive health service.

17. The Bill also places a new duty on the Secretary of State to promote research and the Government has committed to introduce a duty to maintain a system for professional education and training as part of the comprehensive health service during the passage of the Bill through the House of Lords.

18. There are delegated powers relating to the following areas within the clauses on the Secretary of State's powers:

a) setting out the standing rules which govern the exercise of functions by the Board and clinical commissioning groups;
b) setting the Board's annual mandate;
c) conferring additional functions on the Board;
d) conferring additional functions on Special Health Authorities;
e) directing Special Health Authorities;
f) limitations around establishing new Special Health Authorities;
g) European Union (EU) obligations.

Standing rules

19. In line with the policy intention to give more autonomy to the NHS, the Secretary of State would not have a general power of direction over the Board or clinical commissioning groups. Instead, the Secretary of State would have a new power to make regulations ("standing rules") which set out the system rules with which the Board and clinical commissioning groups would need to comply in certain areas. These areas are specified on the face of the Bill, and the detail would be set out in regulations.

The mandate

20. The Secretary of State would publish the mandate to the Board and lay it before Parliament before the start of each financial year. The mandate would set out the Government's objectives for the NHS over what is likely to be a three-year period. The mandate will be updated annually and will include the resource limits for the Board. The Board would be under a duty to seek to achieve the objectives set for it in the mandate, and would have a duty to comply with any requirements imposed on it for that purpose.

Conferring additional functions on the Board

21. In addition to the areas that are covered by standing rules, there is a general power which allows the Secretary of State to confer additional functions related to the health service on to the Board if these are connected to another function of the Board. As this power is potentially quite broad, it is subject to the affirmative resolution procedure.

Special Health Authorities

22. The Secretary of State would have powers to direct a Special Health Authority to exercise any functions relating to the health service in England that are specified in the direction, whether these are functions of the Secretary of State or of another body in the system. The Secretary of State would also have the power to make regulations conferring additional functions in relation to the health service on a Special Health Authority, subject to the affirmative resolution procedure, similar to the power relating to the Board.

23. The Secretary of State would continue to have a power to establish new Special Health Authorities by order, but this would be subject to limitations. In order to establish a new Special Health Authority, the establishment order would have to specify the period for which the body is to be established, which could be no more than three years. At the end of that period, the body would be automatically abolished and its staff, property and liabilities transferred in accordance with the establishment order. If deemed necessary, the lifespan of a Special Health Authority could be extended by order subject to the affirmative resolution procedure, or the functions, staff and property of the Special Health Authority could be transferred to a new body established as a non-departmental public body through primary legislation.

EU obligations

24. The Secretary of State would have powers by regulations to require the Board and clinical commissioning groups to exercise functions connected to the health service for the

purpose of implementing EU obligations, and to give them directions about functions delegated in this way. In order to secure compliance with EU obligations, there is also a power to direct the Board or clinical commissioning groups about the exercise of any other of their functions.

The NHS Commissioning Board

25. The Bill would establish a new non-departmental public body to be known as the NHS Commissioning Board, accountable to the Secretary of State. The Board would receive resource allocations from the Secretary of State, who would determine how much money is allocated to the Board and have certain controls in relation to the management of that funding, accounts and other matters. As mentioned above, the Secretary of State would issue a mandate to the Board, updated annually and setting out objectives for the Board to achieve and other requirements with which it must comply. The mandate would also specify the Board's funding for that year. The Board would be required to publish a business plan and an annual report to ensure accountability. The Secretary of State would appoint the chair, the non-executive members and the first chief executive of the Board.

26. The Board would take on a number of functions in relation to the NHS. These would include some functions currently carried out by:

- the Secretary of State (such as issuing commissioning guidance and allocating NHS resources);
- Strategic Health Authorities (such as commissioning national specialised services);
- Primary Care Trusts (such as commissioning primary care services); and
- various arm's length bodies.

The Board would also have some new functions including powers in relation to clinical commissioning groups.

27. The Board would have broad overarching duties to promote a comprehensive health service (held concurrently with the Secretary of State but not extending to public health) and to exercise its functions so as to secure that services are provided for the purposes of the health service.

28. The intention is to establish an interim Board in 2011 as a Special Health Authority under existing legislation. The interim Board would carry out preparatory work during 2011/12 and the early part of 2012/13, relying on the Secretary of State's general powers in section 2 of the NHS Act 2006. Subject to the passage of legislation, the NHS Commissioning Board will then be established as an executive non-departmental public body no later than October 2012 to begin considering applications for authorisation from prospective clinical commissioning groups, taking on its full responsibilities from April 2013

Clinical commissioning groups

29. The intention is that clinical commissioning groups will be statutory corporate bodies. They must be constituted in accordance with the provisions of the Bill and established by the Board. Each provider of primary medical services (that is, each NHS GP practice based in England) will have to be a member of a clinical commissioning group. Under the proposals in the Bill, each clinical commissioning group will commission certain health services for patients registered with the GP practices in the group and people who usually live in the defined geographic area set out in the group's constitution who are not registered with a member of any clinical commissioning group. Each clinical commissioning group will also be responsible for other specified people, for example in relation to continuing health care for people who were provided with primary medical services by a person who is or was a member of the group. The intention is that the healthcare services that clinical commissioning groups will commission will include elective hospital care and rehabilitative care, urgent and emergency care, most community health services, and mental health (except high security psychiatric facilities) and learning disability services. The clinical commissioning group would be responsible for ensuring anyone present in their geographical area has access to emergency care. The default position would be that, if the Board does not have a duty to commission a healthcare service, it will be for clinical commissioning groups to commission.

30. The Board would be responsible for holding clinical commissioning groups to account for discharging their statutory functions. This would include their functions relating to the stewardship of NHS resources, quality of services that they commission and the outcomes they achieve, and for discharging their other statutory functions. In turn, each clinical commissioning group would have internal arrangements to ensure it holds its members to account. These internal arrangements would be for the group to determine, within a

framework set out in this legislation. This would include the obligation to have an accountable officer, whose responsibilities include ensuring that the clinical commissioning group complies with its financial duties and its duties in relation to quality improvement.

31. The intention is that clinical commissioning groups will generally have flexibility within the legislative framework to determine how they carry out their functions. There will, however, be a need to make further more detailed provision in secondary legislation regarding certain matters. These matters would include the circumstances where clinical commissioning groups have responsibility for commissioning services for persons other than those registered with the GP practices in the group; those who usually live in the area of the group and who are not registered with a member of another group; and the process for establishing clinical commissioning groups. Regulations would also set out matters such as the procedure that the Board must follow before it can exercise its power to intervene in the event of failure or the risk of failure by a clinical commissioning group. It is intended that the interactions between the Board and clinical commissioning groups would be conducted in a transparent "rules-based" manner, where groups are aware of the expectations upon them and the Board has appropriately circumscribed powers: the prescription of further detail is considered necessary to achieve that. In addition, regulations may prescribe much of the detail around the governing bodies of clinical commissioning groups, including their minimum size and requirements as to inclusion of certain classes of individuals on the governing body or on its audit or remuneration committees. Some of the matters that would be provided for in delegated legislation are purely administrative in nature (for example, the date by which groups must supply their commissioning plans to the Board, which is proposed to be the subject of a direction).

32. Other proposed delegated powers include powers for the Board to publish statutory guidance to clinical commissioning groups. These powers would be given to the Board primarily to ensure that it can fulfil its function of supporting groups in the discharge of their various responsibilities. This statutory guidance would also form part of the clear, rules-based framework within which we envisage that clinical commissioning groups would act.

Public Health

33. The White Paper *Equity and excellence: Liberating the NHS* said that the Government would use the Bill to support the creation of a new public health service that could combine the

work done now by a number of agencies to protect and improve the health of the people of England. Further detail on the new approach to public health and the creation of Public Health England is included within the public health White Paper *Healthy Lives, Healthy People: Our strategy for public health in England* (HM Government, November 2010[3]) and *Healthy Lives, Healthy People: Update and way forward* (HM Government, July 2011[4]).

34. At present, some kinds of public health are the responsibility of the NHS and local government. (For example, Primary Care Trusts have responsibilities for health improvement, and local authorities have some responsibilities for the control of disease.) In other ways, responsibility for public health is spread across a variety of organisations including the National Treatment Agency for Substance Misuse and the Health Protection Agency. Local authorities also hold the levers for some of the wider determinants of health such as housing and transport.

35. The Bill would change the law so that, broadly speaking, the Secretary of State for Health would take responsibility for health protection and local authorities would take responsibility for health improvement (although local authorities also have some responsibilities for health protection under existing legislation). Local authorities would be required, acting jointly with the Secretary of State, to appoint a director of public health.

36. The Secretary of State would have powers to make regulations to require local authorities to exercise his health protection functions, or to take prescribed steps in the exercise of their health improvement functions, subject to the affirmative resolution procedure. The Secretary of State would also have powers to specify additional functions to be performed by directors of public health and to give directions to a local authority to investigate or take other action when the director may be failing in respect of certain functions. In addition, the Secretary of State would have powers to specify in regulations when a local authority may make a charge for public health services (subject to the affirmative resolution procedure), and to issue guidance and other documents to local authorities. There are also a number of regulation-making powers conferred on the Secretary of State relating to the fluoridation of water supplies.

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[3] http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_121941
[4] http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_128120

Functions relating to mental health matters

37. Two clauses in this Part deal with delegated powers relating to mental health matters:

- one gives the Secretary of State new powers to arrange for other people to exercise certain approval functions under the Mental Health Act 1983 and to give them instructions about how they do so;
- another gives the Secretary of State the power to make regulations conferring the duty on a clinical commissioning group to secure after-care under section 117 of the Mental Health Act 1983 on another clinical commissioning group instead, or on the Board.

38. In addition, a provision in one of the Schedules introduced by this Part includes a power for the Secretary of State to use regulations to determine which clinical commissioning group is to be responsible in any given case for paying fees under section 236 of the NHS Act 2006 for certain examinations by doctors in connection with the Mental Health Act 1983.

The health service: overview

Clause 6: The NHS Commissioning Board
Schedule 1: The National Health Service Commissioning Board

39. This clause and Schedule insert Schedule A1 to the NHS Act 2006, which sets out requirements in relation to the constitution and accountability of the Board. The Schedule includes the following delegated powers.

Paragraph 11: Trust funds and trustees

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative*

40. This paragraph confers an order-making power on the Secretary of State similar to that in paragraph 13 of Schedule 2 to the NHS Act 2006, which currently enables the Secretary of

State to provide for the appointment of trustees for Strategic Health Authorities. The power enables the Secretary of State to appoint trustees for the Board to hold property on trust. An order may make provision as to appointment and number of trustees and specify conditions of the appointments. It may also make provision with respect to the term of office and removal of any trustees. Under sub-paragraph (3), where trustees have been appointed under such an order, the Secretary of State may by order provide for the transfer of any trust property from the Board to the trustees.

Reason for delegating the power

41. Delegating the power provides flexibility to appoint trustees if property is given to the Board to be held on trust.

Reason for the selected procedure

42. The negative resolution procedure is considered appropriate for these powers, which are administrative in nature. This is consistent with the current provision for orders under paragraph 13 of Schedule 2 to the NHS Act 2006, which is referred to above.

Paragraph 14: Provision of information to Secretary of State

Power conferred on: *Secretary of State*
Power exercised by: *Requirement*
Parliamentary procedure: *None*

43. This paragraph requires the Board to disclose to the Secretary of State such information, in such form, and at such time or within such period, as the Secretary of State may require, if the Secretary of State considers that information necessary for the purposes of the Secretary of State's functions in relation to the health service.

Reason for delegating the power

44. The Secretary of State and the Department require information to enable the effective and efficient management of the Department's financial position against the Departmental

Expenditure Limit (the annual spending limit imposed on a government department arising from its agreed, long-term financial settlement with the Treasury), Parliamentary Estimates and other controls, and also for the effective and efficient management of other Departmental business. In addition, the Department has a responsibility to provide information on bodies for which it is accountable to meet requirements that may be set by the Treasury and others on both financial and non-financial matters. The information required by the Department to fulfil these functions changes regularly over time, so it would be impractical to set the requirements in primary legislation.

Reason for the selected procedure

45. The power relates to the collection of routine information required by the Secretary of State to discharge the Secretary of State's functions effectively and efficiently. Such information would vary regularly over time in line with wider Government policy. The Department considers that a Parliamentary procedure is not necessary, given the administrative nature of these requirements.

Paragraph 15: Accounts
Paragraph 16: Annual Accounts
Paragraph 17: Interim Accounts

Power conferred on: *Secretary of State (with the approval of the Treasury in some cases)*
Power exercised by: *Directions*
Parliamentary procedure: *None*

46. Paragraph 15 requires the Board to keep proper accounts and records in relation to the accounts. Sub-paragraph (2) enables the Secretary of State, with the approval of the Treasury, to give directions to the Board as to the content and form, and the methods and principles to be applied in the preparation, of its accounts.

47. Paragraph 16 requires the Board to prepare consolidated annual accounts in respect of each financial year. This consolidated account will separately present the annual accounts of the Board itself (that is, as an arm's length body) and a consolidation of the Board's annual accounts and the accounts of individual clinical commissioning groups. Sub-paragraph (3)

enables the Secretary of State to direct the Board regarding the period within which the Board must send copies of the consolidated annual accounts to the Secretary of State and the Comptroller and Auditor General.

48. Paragraph 17 enables the Secretary of State, with the approval of the Treasury, to direct the Board to prepare consolidated interim accounts in respect of a period specified in the direction. Sub-paragraph (3) enables the Secretary of State to direct the Board regarding the period within which the Board must send copies of the interim accounts to the Secretary of State and, if the Secretary of State directs, the Comptroller and Auditor General. Sub-paragraph (4) would require the Comptroller and Auditor General to examine, certify and report on any interim accounts, and, if directed by the Secretary of State, the Comptroller and Auditor General would be required to send a copy of the report to the Secretary of State and lay copies of the accounts and the report on them before Parliament.

49. The Secretary of State will remain accountable to the Treasury for the Department's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all bodies, including the Board, that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that the Board's accounts, including the consolidation of its accounts with those of clinical commissioning groups, are prepared in accordance with the requirements set by the Treasury.

50. It is possible that Parliament might request in-year financial statements from the Department. It is therefore necessary to have a power to require in-year accounts from the Board and to direct that these are audited if required.

Reason for delegating the power

51. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

Reason for the selected procedure

52. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006).

Arrangements for provision of health services

Clause 10: Duties of clinical commissioning groups as to commissioning certain health services
Clause 11: Powers of clinical commissioning groups as to commissioning certain health services

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

53. Clause 10 amends section 3 of the NHS Act 2006 and makes provision for the duties of clinical commissioning groups as to commissioning certain health services. Clause 11 inserts new section 3A into the NHS Act 2006 and makes provision for discretionary powers of clinical commissioning groups to commission certain health services. Clause 10 inserts regulation-making powers at subsections (1B) and (1D) of section 3 of the NHS Act 2006. The powers in these new subsections of section 3 apply also to the discretionary power conferred by new section 3A, inserted by clause 11. The clinical commissioning group will also be responsible for ensuring anyone in their geographical area has access to emergency care if they need it.

54. The intention is that a clinical commissioning group will have responsibility for commissioning services for persons who are provided with primary medical services by a member of the group, in other words for people registered with the GP practices in the group. They will also be responsible for people who usually reside within the group's geographical area but who are not provided with primary medical services by a member of any clinical commissioning group. This may include, for example, students or homeless people.

55. Regulations under section 3(1B)(a) may provide that a clinical commissioning group also has responsibility (whether generally or in relation to a prescribed service or facility) for persons who were provided with primary medical services by a person who is, or was, a member of the group. It is intended that this power will be used to cover certain situations arising in respect of continuing healthcare arrangements, where the patient concerned has moved to live outside the geographic area of the group that originally commissioned the healthcare and has registered with a practice that is a member of a different group, but where it is appropriate that the first group retain responsibility for that arrangement. Regulations under section 3(1B)(b) may also provide that clinical commissioning groups have responsibility (generally or in relation to a prescribed service or facility) for persons who have a specified connection with the group's area. Subsection (1C) makes clear that the power in subsection (1B)(b) must be used to provide that a group is responsible for all people who are present within its area and who need emergency care.

56. Under subsection (1D), regulations may provide that subsection (1A) does not apply in some circumstances. The effect of such regulations would be that clinical commissioning groups would not have responsibility for certain people or cases that would otherwise meet the criteria. This could include, for instance, people who are resident in Scotland but registered with a practice that is a member of a clinical commissioning group and people who are receiving primary medical services as 'temporary residents'.

Reason for delegating the power

57. Delegating the power avoids the need to set out in primary legislation detailed provisions about the services to be provided and the groups to whom they must be provided. It also means that those details can be kept up to date without the need to wait for primary legislation. Regulations made under these powers would fulfil a similar function to the current NHS Functions Regulations[5].

Reason for the selected procedure

[5] The National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002, SI 2002/2375.

58. The Department considers the negative resolution procedure appropriate, since this provides a degree of Parliamentary oversight while ensuring that the details of the regulations can readily be kept up to date. Negative resolution is consistent with the procedure for the current NHS Functions Regulations.

Clause 12: Power to require Board to commission certain health services

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

59. This clause inserts new section 3B into the NHS Act 2006. New section 3B confers a regulation-making power on the Secretary of State, enabling the Secretary of State to require the Board to arrange for the provision of certain services as part of the health service, to such extent as it considers necessary to meet all reasonable requirements. Before making regulations under this power the Secretary of State would be required to obtain appropriate advice and consult the Board. New section 3B sets out the types of services that the regulations may require the Board to commission.

60. Currently, most NHS services are commissioned by Primary Care Trusts. It is intended that clinical commissioning groups will commission most health services, but the Board will have duties to commission certain other health services. Where the Board has this function, clinical commissioning groups will not be able to commission those services.

61. Under subsection (1)(a), regulations may require the Board to make arrangements for the provision of such dental services as are prescribed. The regulations may, for example, require the Board to commission dental services other than those that the Board is already required to commission under Part 5 of the NHS Act 2006 (as amended by the Bill). Part 5 of that Act refers to "primary dental services" and under this clause the Board could, for example, arrange for the provision of community dental services and hospital dental services.

62. Under subsection (1)(b), regulations under new section 3B may require the Board to arrange services for members of the armed forces or their families. The Ministry of Defence,

through the Defence Medical Services, provides primary care services to all members of the armed forces and a small number of their families resident in England.

63. The intention is that the regulation-making power would be used to make the Board responsible for arranging for the armed forces standard secondary services such as maternity services, elective (planned) surgery, and cancer services and community services such as wound management and district nursing.

64. Under subsection (1)(c), regulations may require the Board to make arrangements for the provision of healthcare services to people detained in prisons in England or other accommodation of a prescribed description. The provision of primary care services for prisoners in England is covered separately by the Board's functions in relation to primary care.

65. Under subsection (1)(d), regulations may require the Board to make arrangements for the provision of such other services or facilities as may be prescribed. In deciding which these should be, the Secretary of State must take into account the following factors:

a. the number of people who need to access those services;
b. the cost of providing those services;
c. the number of providers able to offer those services;
d. the impact on clinical commissioning groups of having to fund those services.

66. This regulation-making power could be used, for example, in relation to services such as those currently listed under Schedule 5 to the NHS Functions Regulations[6] and described as "specialised services" for rare conditions. These are currently commissioned nationally rather than regionally because of their low volume and high cost. The power could also be used to provide for the Board to commission services currently commissioned regionally by groups of Primary Care Trusts for each Strategic Health Authority region.

Reason for delegating the power

[6] The National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002, SI 2002/2375.

67. The services that it is appropriate for the Board to arrange could change over time, for example as new services develop, as existing specialised services become more common, and as the settings in which it is appropriate for the Board to arrange services change. A regulation-making power provides flexibility for the Secretary of State to take account of these changing factors and to require the Board through regulations to commission certain services in a way that primary legislation does not.

Reason for the selected procedure

68. The Department considers the negative resolution procedure appropriate, as the regulations would set out in more detail the descriptions of those services that the Board would be responsible for commissioning.

Clause 13: Secure psychiatric services
Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

69. High secure psychiatric services are provided to patients who are liable to be detained under the Mental Health Act 1983 and are judged to require treatment in conditions of high security on account of their dangerous, violent or criminal propensities. They are currently provided in England at three hospitals – Ashworth, Broadmoor and Rampton – each of which is part of an NHS trust.

70. This clause amends section 4 of the NHS Act 2006, which concerns the provision of high secure psychiatric services. The clause removes from the Secretary of State the duty to provide high secure services and instead places a duty on the Board to arrange for the provision of these services. The clause stipulates that providers of high secure services must be approved for that purpose by the Secretary of State. It also gives the Secretary of State powers to give directions (a) to high secure service providers about the provision of those services and (b) to the Board about its functions in relation to high secure services.

71. It is intended that the first of these powers would be used in a limited fashion in relation to issues such as safety and security, and children visiting high secure hospitals. The existing

directions given in relation to high secure services by the Secretary of State are the High Security Psychiatric Services (Arrangements for Safety and Security at Ashworth, Broadmoor and Rampton Hospitals) 2011 and the Visits by Children to Ashworth, Broadmoor and Rampton Directions 1999, which deal with risk assessment and safeguarding.

72. It is intended that the second power would be used in a limited manner to ensure that the Board in commissioning high secure services takes into account any conditions that might be set by the Secretary of State, including directions to providers and ensuring that there is sufficient capacity to meet the demands of the criminal justice system.

Reason for delegating the power

73. Taking a delegated power provides flexibility in responding to changing circumstances, including within the criminal justice system.

Reason for the selected procedure

74. The Department considers no Parliamentary procedure necessary, since the directions would make detailed administrative provision. The lack of a Parliamentary procedure is consistent with the current approach, under which the Secretary of State may give directions to Primary Care Trusts about the commissioning of such services and to the NHS trusts which manage the high secure psychiatric hospitals about safety and security at those hospitals.

Clause 14: Other services etc. provided as part of the health service

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

75. Subsections (7) and (8) of this clause amend paragraphs 7A and 7B of Schedule 1 to the NHS Act 2006, so as to transfer responsibility for certain public health activities relating to children from the Secretary of State to local authorities. Subsection (7) amends paragraph 7A so that the power to provide for the weighing and measuring of junior pupils in schools in a local authority's area which are maintained by the authority is transferred from the Secretary of State to local authorities.

76. Paragraph 7B of Schedule 1 to the NHS Act 2006 allows the Secretary of State to make regulations in relation to the weighing and measuring of children. The Secretary of State has exercised the powers under paragraph 7B to make the National Child Measurement Programme Regulations 2008 (SI 2008/3080). The Programme performs two key functions. The first is a health surveillance function, to gather height and weight data on all children in reception and year 6 in order to provide reliable population prevalence rates of obesity and overweight in children both nationally and locally, as well as enabling assessment of trends over time to inform policy and action. The second function is as a behaviour change intervention, providing parents with feedback on their child's weight status, guiding and enabling them to make healthy lifestyle choices.

77. As a result of the amendment made by clause 14(8), regulations under paragraph 7B would apply to local authorities. The regulation-making power allows the Secretary of State to make a number of detailed provisions relating to the exercise of functions by local authorities under paragraph 7A and includes the power to:

- require any weighing and measuring provided for by local authorities under paragraph 7A to be carried out in a prescribed manner and after compliance with any prescribed requirements, and
- make other provision regulating the processing of information resulting from any weighing and measuring provided for by local authorities under paragraph 7A.

78. The delegated power in question is an established one and not new to the Health and Social Care Bill. The only change the Bill makes is that the regulations will apply to local authorities.

<u>Reason for delegating the power</u>

79. Having a delegated power makes it possible to set out administrative and technical detail about the conditions for carrying out weighing and measuring exercises and gathering data (for example that the process should be carried out in an appropriate setting and parents should be given a reasonable opportunity to withdraw their child) and to keep those details up to date, without the need to wait for primary legislation.

Reason for the selected procedure

80. The negative resolution procedure is considered appropriate, given the administrative and technical nature of the regulations in question. This is consistent with the current Parliamentary procedure for the regulations. The change made by the Bill does not warrant a change in the Parliamentary procedure that applies to these regulations.

Clause 15: Regulations as to the exercise by local authorities of certain public health functions

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

81. This clause inserts new section 6C into the NHS Act 2006 and confers two regulation-making powers on the Secretary of State. The first, in subsection (1), enables the Secretary of State to require local authorities to exercise any of the Secretary of State's public health functions – that is, the Secretary of State's duty to take steps to protect public health, the Secretary of State's power to take steps to improve public health, and the Secretary of State's powers to provide or arrange for the provision of services under paragraphs 7C (supply of blood and human tissues), 8 (contraceptive services) and 12 (microbiological services) of Schedule 1 to the Act. Where regulations under subsection (1) require a local authority to exercise any of the public health functions of the Secretary of State, the regulations may also authorise or require the local authority to exercise any prescribed functions of the Secretary of State that are exercisable in connection with those functions (including the powers conferred by section 12).

82. The second, in subsection (2), enables the Secretary of State to prescribe the steps that a local authority must take in the exercise of its public health functions, in particular the steps it must take to improve the health of its population. The general effect of the two powers is that the Secretary of State would be able to prescribe steps, including services, functions and facilities relating to both health protection and health improvement, that must be taken or provided by local authorities. Local authorities would be under a statutory duty to comply with the steps specified in the regulations.

83. The power is sufficiently wide to enable the Secretary of State to prescribe not only what steps may be taken, but the persons in respect of whom such steps must be taken. As an example, this would allow the Secretary of State to prescribe that a particular step (such as providing health checks) must be taken but only in relation to certain groups. The power could be exercised generally for all local authorities, so as to establish a list of nationally required public health services that would be funded via the ring-fenced grant[7] and to ensure that there is stable national provision of core services. It could also be exercised in relation to a particular local authority or group of local authorities.

Reason for delegating the power

84. Delegating the power makes it possible to set out detailed requirements in secondary legislation. It also provides flexibility for the future, for example by allowing the Secretary of State to prescribe specific public health emergency preparedness and response functions which must be exercised by local authorities.

Reason for the selected procedure

85. The Department considers the affirmative resolution procedure appropriate, as the regulation-making power is broad and the regulations will be fundamental to the set-up of the public health system. The general policy is to allow local authorities the flexibility to determine what is necessary to improve public health, and so the specific duties to provide services should be exceptional.

Clause 16: Regulations relating to EU obligations

New section 6D: Regulations relating to EU obligations

Delegation of EU health functions

7 The Department will allocate a ring-fenced public health budget to upper tier and unitary local authorities. This budget will be based on relative population health need. The detail of how these budgets will operate and how they will be allocated are still in development but the allocation formula will include a new 'Health Premium' designed to promote action to improve population-wide health and reduce health inequalities.

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

86. This clause gives the Secretary of State power by regulations to require the Board or clinical commissioning groups to exercise a specified EU function, which is defined as any function exercisable by the Secretary of State for the purpose of implementing EU obligations which concern, or are connected to, the health service. Under the current system, the Secretary of State has general power to delegate any of the Secretary of State's functions to Primary Care Trusts and Strategic Health Authorities, and to direct them in the exercise of these. Under the proposals in the Bill, Primary Care Trusts and Strategic Health Authorities would be abolished and the Secretary of State would no longer have this general power. The power in this clause therefore enables the Secretary of State to delegate functions relating to EU obligations to the Board or clinical commissioning groups. For example, the Secretary of State might delegate to the Board the function of authorising patients in England to go to another EU state for their treatment (sections 6A and 6B of the NHS Act 2006).

Reason for delegating the power

87. Under EU law, the Secretary of State has ultimate responsibility for all EU obligations connected to the health service. As it would not be practical for the Secretary of State to carry out these obligations, they would be delegated to the Board or clinical commissioning groups, following the proposed abolition of Primary Care Trusts and Strategic Health Authorities. These obligations cannot be directly conferred on other bodies in the Bill at this stage because EU obligations may come into existence over time, for example, as a result of EU legislation or decisions of the European Court of Justice. In addition, the Secretary of State remains responsible for the UK's compliance with EU law.

Reason for the selected procedure

88. The negative resolution procedure is appropriate for regulations of this sort, which are an established part of the current system and are likely to be uncontroversial. It nevertheless gives Parliament the opportunity to debate the matters covered if it wishes to do so.

Compliance with EU legislation

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

89. New section 6D also gives the Secretary of State power to direct the Board or clinical commissioning groups about their exercise of any delegated functions relating to EU obligations. This would allow the Secretary of State to indicate to the Board or clinical commissioning groups the manner in which the delegated functions should be carried out in order to remain compliant with EU obligations. The Secretary of State would also have power to give directions about the exercise of any other functions of the Board or clinical commissioning groups, in order to secure compliance with EU obligations.

90. Directions could be addressed to an individual clinical commissioning group, if the group were considered to be in breach of EU obligations. This is one of only a small number of instances in the Bill where the Secretary of State could, if necessary, direct an individual clinical commissioning group. This power is to allow the Secretary of State to address quickly those infractions which may be triggered by the actions of an individual clinical commissioning group, but for which the Secretary of State ultimately remains responsible. Being able to act quickly in such a scenario is important to avoid the costs associated with full infraction proceedings against the UK.

Reason for delegating the power

91. Although new section 6D makes clear that the Board and clinical commissioning groups are legally liable for the way in which they carry out any delegated EU functions, the Secretary of State remains responsible for the UK's overall compliance with EU law, and is responsible for any fines resulting from a failure to comply. This means that it would be necessary for the Secretary of State to have power to give directions on the manner in which functions should be carried out, to ensure that they were being discharged effectively and in accordance with EU law.

Reason for the selected procedure

92. The directions would not be subject to a Parliamentary procedure. This is appropriate given their content (which would enforce existing law) and the possibility that action may need to be taken promptly in order to ensure compliance with EU law.

Clause 17: Regulations as to the exercise of functions by the Board or clinical commissioning groups

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Generally negative but affirmative for regulations under subsection (7)(c) of new section 6E*

93. This clause inserts into the NHS Act 2006 new section 6E, subsection (1) of which states that regulations (to be known as "standing rules") may be used to impose requirements on the Board and clinical commissioning groups. It would not be possible for standing rules to apply to an individual clinical commissioning group.

94. Subsections (2) to (7) of new section 6E outline a series of areas where the Secretary of State would have the power to make standing rules. These are:

a) commissioning functions of the Board or clinical commissioning groups

The provisions in subsections (2) and (3) are intended to allow continuation of:

- the existing arrangements for Continuing Healthcare (where the NHS is responsible for delivering a package of health and social care to individuals who have a primary health need); and
- certain rights in the NHS Constitution, which are currently given legal effect through directions to Primary Care Trusts. (For example, regulations under subsection (2)(c) would replicate the legal basis of the right to choice in the NHS Constitution, which is currently achieved through directions to Primary Care Trusts).

b) NHS contracts

(i) specifying matters which must be included in contracts which the Board or clinical commissioning groups enter into with providers of health care services, for example resilience planning and technical matters required commercially, such as payment terms and notice terms;

(ii) requiring the Board to draft terms and conditions relating to those matters and other matters which the Board considers should be included in contracts;

(iii) authorising the Board to draft model commissioning contracts;

c) the provision of information;

d) ensuring that commissioners exercise their functions in a manner consistent with securing compliance with EU obligations.

95. Subsection (7)(c) of new section 6E makes clear that regulations may impose such other requirements on either the Board or clinical commissioning groups as the Secretary of State considers necessary for the purposes of the health service. This would support the Secretary of State to fulfil the duty to promote the comprehensive health service and to respond flexibly to changes in the system over time.

96. The powers in this clause are limited by the need to have regard to the Secretary of State's duty as to promoting autonomy, which is included on the face of the Bill at clause 4. This duty states that in exercising duties in relation to the health service, the Secretary of State must, so far as is consistent with the interests of the health service, act with a view to securing:

i. that any other person exercising functions in relation to the health service or providing services for its purposes is free to exercise those functions or provide those services in the manner that it considers most appropriate; and

ii. that unnecessary burdens are not imposed on any such person.

Reason for delegating the power

97. Most of the standing rules would be technical, and require more detail than would usually be included on the face of a Bill. The standing rules would set out the basic framework for the commissioning system, so changes and adjustments could be required as the system develops. Delegating the power allows the Secretary of State to respond flexibly to these changes if necessary. New section 6E(9) sets an expectation that changes to the standing rules will normally be made annually, alongside the publication of the mandate. This is in order to create certainty and stability for the NHS.

98. The standing rules would make it possible to take forward existing arrangements, such as Continuing Healthcare and certain rights under the NHS Constitution, which are currently covered in delegated legislation (directions given to Primary Care Trusts and local authorities).

Reason for the selected procedure

99. Most of the rules would be non-controversial, as they are an established part of the current system. The negative resolution procedure enables the legislation to be adjusted in a timely fashion to respond to differing or changing circumstances; at the same time, it represents an increase in transparency, since no Parliamentary procedure is required for the directions (on Continuing Healthcare and NHS Constitution rights) that the standing rules would in part replace.

100. However, the power under subsection (7)(c) of the new section to make regulations imposing such other requirements on either the Board or clinical commissioning groups as the Secretary of State considers necessary for the purposes of the health service is potentially a broad power. The Department therefore considers that it should be subject to the affirmative resolution procedure.

Clause 18: Functions of Special Health Authorities

Power to direct a Special Health Authority

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless made by regulations – see section 273(4)(c) of the NHS Act – in which case negative)*

101. New subsection (1) of section 7 of the NHS Act 2006 gives the Secretary of State powers to direct a Special Health Authority to exercise any functions relating to the health service in England that are specified in the direction. The Secretary of State already has powers to direct a Special Health Authority to exercise any of the Secretary of State's functions relating to the health service (the current section 7(1) of the NHS Act 2006). This provision would amend the power so that it relates to health service functions in general, whether or not exercised by the Secretary of State. This is because of the changes made by the Bill, under which many functions would no longer be Secretary of State functions delegated to NHS bodies but would instead be functions conferred directly on those bodies. For example, some of the Secretary of State functions currently exercised by existing Special Health Authorities, in particular the NHS Business Services Authority and the NHS Litigation Authority, would be functions of the Board or clinical commissioning groups in the new system. For existing Special Health Authorities (NHS Blood and Transplant, the NHS Business Services Authority and the NHS Litigation Authority), there would be no need to re-issue the current directions specifying their functions: these would continue in force as if given under the new power (see Schedule 6, paragraph 3, to the Bill).

102. The Secretary of State would be able to direct a Special Health Authority to exercise functions of the Secretary of State or another body or bodies. If the Secretary of State planned to direct a Special Health Authority to exercise the function(s) of another body or bodies, the Secretary of State would be under a duty to consult with that body or those bodies prior to making the direction (see new subsection (1A)).

<u>Reason for delegating the power</u>

103. The Secretary of State already has a delegated power to direct a Special Health Authority to exercise any of his functions relating to the health service. The Bill's provisions retain the existing power, but modify it to reflect the changes to the structure of the health service under the Act as amended by the Bill.

Reason for the selected procedure

104. The direction-giving power replicates current arrangements. The directions may be given in writing, without a Parliamentary procedure, or by regulations subject to the negative resolution procedure. In general, the existing power is exercised by directions in writing rather than in regulations.

Power to confer additional functions on a Special Health Authority

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Affirmative*

105. New subsection (1B) of section 7 of the NHS Act 2006 gives the Secretary of State the power to confer additional functions on a Special Health Authority, as specified in regulations, provided that those functions are in relation to the health service. These would be new functions – that is, functions that, at the time of making the regulations, were not exercised by the Secretary of State or any other person or body. This is similar to the power to confer additional functions on the Board, set out in new section 13Z of the NHS Act 2006, as inserted by clause 20, and provides flexibility to respond to changes over time.

Reason for delegating the power

106. New functions may emerge which it would be appropriate to confer on a Special Health Authority. In such situations, it would be appropriate for the Secretary of State to be able to confer these functions on an existing Special Health Authority, or to create a new Special Health Authority to carry out these functions on a temporary basis, pending primary legislation.

Reason for the selected procedure

107. As this is potentially a broad power, it would be subject to the affirmative resolution procedure to ensure that Parliament is able to scrutinise any new functions that the Secretary of State wishes to confer on a Special Health Authority.

Further provision about the Board

Clause 20: The NHS Commissioning Board: further provision

108. This clause inserts into Part 2 of the NHS Act 2006 a new Chapter A1, which contains the following delegated powers.

New section 13A: Mandate to Board

Power conferred on: *Secretary of State*
Power exercised by: *Requirements*
Parliamentary procedure: *None*

109. New section 13A makes provision for the Secretary of State to publish and lay before Parliament before the start of each financial year a document to be known as "the mandate". The intention is that the Secretary of State's mandate to the Board will set out the Government's objectives for the NHS over what is likely to be a three-year period, updated annually. The mandate would have to specify the objectives that the Secretary of State thinks that the Board should seek to achieve during the year and any requirements necessary for the purpose of ensuring that it meets those objectives.

110. The Secretary of State would be able to make a change to the mandate in three specific circumstances only: (1) if the Board agreed to the revision, (2) following a Parliamentary general election, (3) if the Secretary of State felt that there were exceptional circumstances that made the revision necessary. After altering the mandate, the Secretary of State would be required to publish the revised document, and to lay the new version before Parliament with an explanation of the reasons for making the changes.

111. The Board would be under a duty to seek to achieve the objectives specified in the mandate and to comply with the requirements specified by the Secretary of State. This duty to comply with requirements would be equivalent to the duty to comply with directions.

Reason for delegating the power

112. The mandate is likely to cover a three-year period, and would need to be updated on an annual basis to reflect current priorities for the NHS. It would therefore not be appropriate to set out the details it would contain on the face of the Bill.

Reason for the selected procedure

113. No Parliamentary procedure is proposed, since the mandate would be updated on an annual basis. However, the Secretary of State would have to lay the mandate before Parliament, and would remain accountable to Parliament in relation to the Board.

New section 13Q: Information on safety of services provided by the health service

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

114. Subsection (4) of this new section puts a duty on the Board to give advice and guidance to such people as it considers appropriate for the purpose of maintaining and improving the safety of the services provided by the health service. Subsection (6) provides that a clinical commissioning group must have regard to any such advice or guidance given to it.

115. This delegated power is provided within the context that, more generally, this new section gives the Board responsibility for the functions in respect of reporting and learning from patient safety incidents currently carried out by the National Patient Safety Agency (which is to be abolished pursuant to clause 275 of the Bill). The aim in conferring these functions on the Board is to ensure that patient safety is embedded into the health service through clinical commissioning groups and the contracts they agree with providers. Providers of health services would be under no legal obligation to take account of this guidance, although it might help them ensure that they comply with the conditions of NHS contracts and requirements of registration with the CQC related to this topic.

Reason for delegating the power

116. The guidance is likely to deal with patient safety issues, at a level of detail that it would be undesirable to write into primary legislation. It is likely to be issued as and when required, in response to issues about patient safety as they are identified, and may need revision from time to time.

117. It is appropriate to delegate the power to the Board (rather than to Ministers), because new section 13Q gives the Board responsibility for devising, implementing and managing patient safety systems, or for arranging for another person to exercise these functions on its behalf. The Board would also have responsibility for providing commissioning guidance to clinical commissioning groups and for directing NICE to produce quality standards and other guidance. This would therefore preserve the link between learning and setting operational best practice.

Reason for the selected procedure

118. The advice and guidance would provide specific advice on handling emerging patient safety issues and would need to be issued as and when required. As such it is considered unnecessary for the guidance to be subject to a Parliamentary procedure.

New section 13R: Guidance in relation to processing of information

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

119. New section 13R places a duty on the Board to publish guidance on information processing requirements, sometimes termed information governance requirements, in respect of patient information or other information obtained or generated in the course of the provision of the health service. These requirements may cover requirements on confidentiality and information security and risk management practices, records management, data protection, disclosure of information and information quality. Subsection (2) requires registered persons who carry out activities connected to health care provision to have regard to the published guidance. (The intention is that compliance by registered providers with the guidance would be monitored and enforced by the Care Quality Commission.) Subsection (3) provides that

“patient information”, “processing” and “registered person” have the same meaning as in section 20A of the Health and Social Care Act 2008, which incorporates the definition of “processing” in the Data Protection Act. New section 20A is inserted by clause 274 of this Bill. “Information processing” therefore covers activity involving obtaining, holding, recording, using or sharing information.

120. The function of producing guidance for registered persons in relation to information processing will be closely linked to the power, given to the Board and also to the Secretary of State under clause 247, to prepare and publish information standards. Clause 247 defines an information standard as a document containing standards that relate to the processing of information. Information standards describe a nationally consistent way of recording, managing and disseminating different types of information across the health and social care system. They help ensure that patients experience joined up care and that their information is kept secure. Information guidance produced by the Board in fulfilling its duty under new section 13R may support the implementation of an information standard but may also provide support for decision-making or judgements, or establish general principles where a standardised approach is not desirable or practicable.

Reason for delegating the power

121. It would not be desirable to write the content of the guidance on information processing into primary legislation. It is likely to include administrative and technical details, and to need updating more frequently than writing it into primary legislation would allow.

122. It is appropriate for the guidance to be issued by the Board, rather than by Ministers. The White Paper *Equity and excellence: Liberating the NHS* identified the Board as the body that will determine information governance standards in future. Giving it the function of issuing guidance on information processing helps to ensure that that guidance is consistent with the relevant information standards.

Reason for the selected procedure

123. This guidance will provide procedural and technical advice on a wide range of topics relating to information handling, to support compliance with existing statutory duties. Given the procedural content of the guidance, a Parliamentary procedure is considered unnecessary.

New section 13Y: Exercise of functions

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

124. New section 13Y confers a power on the Board to arrange for any function of the Board to be exercised by or jointly with a Special Health Authority, a clinical commissioning group or any other body specified in regulations. This regulation-making power allows the Secretary of State to specify the other bodies (such as the Care Quality Commission, for example) who may exercise any functions of the Board jointly with it, or on behalf of it. New section 13Y also confers a power on the Secretary of State to specify in regulations that the Board's power, to make arrangements for another body to exercise its functions jointly with it or on its behalf, may not apply in relation to certain functions of the Board.

Reason for delegating the power

125. A delegated power provides flexibility to specify what functions of the Board may not be exercised jointly with or by another body and to identify the other bodies who may exercise functions on behalf of, or jointly with, the Board.

Reason for the selected procedure

126. These regulations would not create any new functions but could be necessary, for example, if new functions are conferred on the Board in the future, or if new bodies are established that have functions that are relevant to those of the Board. The Department considers that the negative resolution procedure would be appropriate to ensure Parliament has the opportunity to debate these matters if necessary.

New section 13Z: Power to confer additional functions on the Board

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Affirmative*

127. This new section gives the Secretary of State a regulation-making power to confer additional functions in relation to the health service on the Board.

128. The Secretary of State could confer on the Board additional functions only if the function conferred is connected to another function of the Board. The clause does not allow the Secretary of State to confer on the Board powers that are not connected to another function of the Board.

Reason for delegating the power

129. Delegating the power provides flexibility to respond to changes over time without the need to wait for primary legislation, for example, if new functions emerge or if the decision is taken that functions retained by the Secretary of State could be better managed in future by the Board.

Reason for the selected procedure

130. As this is potentially a broad power, concerning additional functions to be conferred on the Board, the Department considers the affirmative resolution procedure appropriate.

New section 13Z1: Failure by the Board to discharge any of its functions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None, unless made by regulations – see section 273(4)(c) of the NHS Act 2006 as amended by paragraph 136 of Schedule 4 to the Bill – in which case, negative*

131. This new section confers power on the Secretary of State to direct the Board in cases of serious failure by the Board as to how to carry out any of its functions.

132. The power enables the Secretary of State to give the Board a direction if the Secretary of State considers that the Board is failing or has failed to discharge any of its functions, or is failing or has failed to discharge any of its functions properly. The direction can direct the Board to discharge those functions in such manner and within such period as may be specified in the direction. If the Board fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State. The failure must be significant and the Secretary of State must publish his reasons for the intervention.

133. The Bill provides similar powers in relation to other arm's length bodies. For Monitor, Healthwatch England and the Care Quality Commission the Secretary of State cannot intervene in a 'particular case' (see clauses 67, 178 and 288). Instead he would need to demonstrate that there is a more widespread failure. This is a safeguard to protect regulatory independence and avoid any perception that the regulator or Healthwatch England could be swayed in its judgement on a specific issue by political pressure. However, this limitation is not relevant for the Board. The Board has a wide range of functions in relation to the health service. As a result, in the event of significant failure, it might be appropriate for the Secretary of State to intervene in a particular case, for example if the Board failed to allocate funds to a particular clinical commissioning group. This limitation is also not appropriate for NICE (clause 242) and the Information Centre (clause 266). Those bodies would be focused predominantly on supporting the health and social care system as a whole, rather than on oversight of individual organisations.

<u>Reason for delegating the power</u>

134. It would not be possible to set out in primary legislation exactly what intervention would be necessary in what circumstances, so this power provides the Secretary of State with flexibility to respond accordingly to failures by the Board and at speed. The power might be needed, not necessarily because of any fault on the part of the Board, but because of circumstances outside its control, for example, a serious infection affecting many of its staff and therefore its ability to perform its duties.

Reason for the selected procedure

135. The power would concern how an existing function should be exercised, rather than a matter of principle (such as what functions there should be). The directions concerned could be given either in writing (subject to no Parliamentary procedure) or through regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided based on the type of intervention that is necessary.

New section 13Z3: Interpretation

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative*

136. This new section sets out matters of interpretation relating to new Chapter A1 of the NHS Act 2006. Subsections (2) and (3) list those references to functions of the Board in Chapter A1 and in other sections of the Bill, as well as in provisions of other Acts as amended by the Bill, that are to include public health functions exercised on behalf of the Secretary of State by virtue of arrangements made under the powers in section 7A (as inserted by clause 19 of the Bill). Subsection (4) provides a power for the Secretary of State to amend those lists by order.

Reason for delegating the power

137. It is desirable to have the power to amend the lists in subsections (2) and (3). This might be needed, for example if additional functions are conferred on the Board because of future changes to legislation, or if future policy changes make it appropriate to remove certain functions from the lists.

Reason for selected procedure

138. Because of the technical nature of the changes that could be made under this power, the negative procedure is considered to be appropriate.

Clause 21: Financial arrangements for the Board

139. This clause inserts new sections into the NHS Act 2006 that set out the financial arrangements for the Board. These new sections include the following delegated powers.

New section 223B: Funding of the Board

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

140. Subsection (4) of new section 223B gives the Secretary of State a power to give directions to the Board with respect to the payment of sums by it to the Secretary of State in respect of charges or other sums referable to the valuation or disposal of assets. This power is needed to ensure that capital receipts in particular are applied to the best effect within the programmes for which the Department of Health is accountable. The power also prevents sums of cash accumulating with the Board in situations where the Board may not have either the need or the authority to spend that cash.

Reason for delegating the power

141. It would not be possible to set out in primary legislation the sums that should be paid, since these would vary from year to year in the light of circumstances.

Reason for the selected procedure

142. A Parliamentary procedure seems unnecessary, given the administrative content of the directions. This position is the same as for similar powers under the existing provisions of the NHS Act 2006 relating to funding of Strategic Health Authorities and Primary Care Trusts.

New section 223C: Financial duties of the Board: expenditure

Power conferred on: *Secretary of State*

Power exercised by: *Directions*
Parliamentary procedure: *None*

143. Subsection (3) gives the Secretary of State power to determine what expenditure by the Board or clinical commissioning groups is, and is not, to count as part of total health expenditure when calculating whether the Board has complied with its duty to ensure that total health expenditure does not exceed the aggregate of the amount allotted to it for a particular financial year under new section 223B and income from other sources. This power is similar to that which the Secretary of State currently has in relation to Strategic Health Authorities and Special Health Authorities under sections 226(7) of the NHS Act 2006.

144. Subsection (4) gives the Secretary of State a power (similar to that in section 226(7)(c) of the NHS Act 2006) to determine the extent to which, and the circumstances in which, sums received (whether by the Board from the Secretary of State under new section 223B or by clinical commissioning groups from the Board under new section 223G) but not yet spent must be treated for the purposes of this section as part of total health expenditure of the Board and to which financial year's expenditure they must be attributed.

145. Subsection (5) gives the Secretary of State a power to give directions as to the purposes for which the Board must use banking services specified in the direction in respect of any monies allotted and any balances held. This takes account of the Treasury requirement that all NHS money is held in Government Banking Service (GBS) accounts, where it offsets the national debt.

<u>Reason for delegating the power</u>

146. Delegated powers are needed under subsections (3) and (4) because the requirements as to what is or is not to be taken into account for the purposes of the various financial limits are likely to be detailed and to be subject to change from time to time. (Such requirements and accompanying clarifying guidance are typically contained in Government Finance Manuals that are issued to the NHS).

147. The delegated power in subsection (5) is needed so that the Government can ensure that allocations to the Board are held in GBS accounts, that these are the accounts in which

the Board keeps its allocation, and that the monies allocated to the Board stay in GBS accounts until paid out (although there may be circumstances in which other commercial accounts may be held).

Reason for the selected procedure

148. A Parliamentary procedure seems unnecessary, given the administrative content of the directions and the fact that the power under subsection (5) relates to delivery of a wider Government requirement. This position is the same as for similar powers under the existing provisions of the NHS Act 2006 relating to funding of Strategic Health Authorities and Primary Care Trusts.

New section 223D: Financial duties of the Board: controls on total resource use

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

149. New section 223D imposes duties on the Board to ensure that total capital resource use (subsection (2)) and total revenue resource use (subsection (3)) by the Board and clinical commissioning groups do not exceed sums specified by the Secretary of State. Subsections (4), (5) and (6) of new section 223D give the Secretary of State powers to give directions specifying what uses and descriptions of resources must, or must not, be taken into account for the purposes of determining whether the Board has complied with its duty to ensure that resource use remains within those limits.

Reason for delegating the power

150. These delegated powers are needed because the requirements as to what is or is not to be taken into account for the purposes of the various financial limits are likely to be detailed and to be subject to change from time to time. (Such requirements and accompanying clarifying guidance are typically contained in Government Finance Manuals that are issued to the NHS).

Reason for the selected procedure

151. A Parliamentary procedure is considered unnecessary, given the administrative content of the directions. This position is the same as for similar powers under the existing provisions of the NHS Act 2006 relating to funding of Strategic Health Authorities and Primary Care Trusts.

New section 223E: Financial duties of the Board: additional controls on resource use

Directions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

152. Subsections (1) and (2) of new section 223E give the Secretary of State the power to set limits on total capital or revenue resource use on specified matters by the Board and clinical commissioning groups, for the purposes of complying with a limit imposed by the Treasury. This power is needed to ensure compliance with technical limits that the Treasury might impose, for instance on the extent to which NHS bodies may enter into recurring spending commitments.

153. Subsection (3) of new section 223E gives the Secretary of State the power to direct that overall revenue resource use by the Board and clinical commissioning groups on administrative matters and the Board's own use of resources for these purposes do not exceed the amounts specified by the Secretary of State. This power is needed to ensure that the Department of Health does not exceed the limits set by Treasury, in line with Government commitments in this area. (The regulation-making power linked to this direction-making power is discussed below).

154. Subsection (4) of new section 223E gives the Secretary of State a direction-giving power in relation to the types of resource use which must or must not be considered under subsections (1), (2) or (3).

Reason for delegating the power

155. The limits on administrative costs and on resource use that would be imposed under this new section, and the detailed specification relating to them, would be likely to change from time to time, so would be unsuitable for primary legislation.

Reason for the selected procedure

156. A Parliamentary procedure is considered unnecessary, as the directions would deal with financial details. This position is the same as for similar powers under the existing provisions of the NHS Act 2006 relating to funding of Strategic Health Authorities and Primary Care Trusts.

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

157. Subsection (3) of new section 223E provides a power for the Secretary of State to prescribe in regulations the matters relating to administration that are to be covered by any limit on resource use attributable to such matters. In effect, the regulations will specify what counts as administration costs for the purposes of the proposed resource limits on such costs

Reason for delegating the power

158. It would not be appropriate to specify in primary legislation what constitutes administration costs for the purposes of the annual limit on those costs. This is a level of detail that is subject to change and updating (for example, in response to cross-Government changes and requirements linked, for example, to Spending Review settlements). The Bill therefore provides for these details to be set in regulations.

Reason for the selected procedure

159. The Department considers the negative resolution procedure appropriate for regulations under new section 223E(3), because the definition of what can be considered as administrative costs is an important means by which public spending can be controlled, and more than a matter of technical or accounting detail.

New section 223F: Power to establish contingency fund

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

160. New section 223F gives the Board power to set up a contingency fund, using a proportion of the funds allotted to it by the Secretary of State. From this fund it can make payments to itself or to clinical commissioning groups to enable them to discharge their commissioning functions, or to enable a clinical commissioning group to discharge its other functions exercisable by virtue of regulations under section 75 of the NHS Act. The new section also requires the Board to publish guidance about how it will operate the contingency fund.

Reason for delegating the power

161. It would not be desirable to put the content of the guidance into primary legislation, since its details will need to be revised from time to time. It is appropriate for the Board to have the power to issue the guidance, since, under the proposals in the Bill, the Board will be responsible for ensuring stability in the commissioning sector. The Board will determine the financial allocations that should be awarded to clinical commissioning groups in order to enable them to fulfil their functions, and the size of any contingency fund that may be required. It will therefore be best placed to provide guidance on how a contingency fund would operate and the circumstances in which payments would be made from it.

Reason for the selected procedure

162. Guidance on the operation of a contingency fund will be technical in nature and its content will be dependent on a number of variable factors, including the financial directions

outlined above and changes in the overall allotment. Given the procedural content of the guidance, it is not considered necessary for the guidance to be subject to a Parliamentary procedure.

Further provision about clinical commissioning groups

Clause 22: Clinical commissioning groups: establishment etc.

163. This clause inserts new Chapter A2 into Part 2 of the NHS Act 2006. It contains the following delegated powers.

New section 14A: General duties of Board in relation to clinical commissioning groups

Specifying the end of the initial period

Power conferred on: *Secretary of State*
Power exercised by: *Specification in writing*
Parliamentary procedure: *None*

164. This new section provides (in subsection (1)) a power for the Secretary of State to specify, in writing, the end of the initial period (that is, the end of the transition period during which the arrangements described in Schedule 6 apply). From this specified day, the Board must ensure that all providers of primary medical services (that is, all GP practices) are members of a clinical commissioning group and that the areas specified in groups' constitutions together cover the whole of England and do not coincide or overlap.

Reason for delegating the power

165. It is important that there are no gaps in the coverage of commissioning arrangements when Primary Care Trusts are abolished, and no ambiguity as to for which persons each clinical commissioning group is responsible. It is therefore desirable to have the flexibility provided by a delegated power when setting the end of the initial period.

Reason for the selected procedure

166. No Parliamentary procedure is thought necessary for this power, since the specification of the end of the initial period is an administrative step and the powers that the Board would exercise from this date are set out on the face of the Bill.

Prescribing primary medical services

Power conferred on: *Secretary of State*
Power exercised by*; Regulations*
Parliamentary procedure*: Negative*

167. As described for the power above, new section 14A(1) provides for the Board to ensure that, after the date specified by the Secretary of State, each provider of primary medical services is a member of a clinical commissioning group. Subsection (3) states that, for the purposes of this Chapter of the NHS Act 2006, a "provider of primary medical services" means a person who is a party to an arrangement mentioned in subsection (4). Subsection (4) lists the three types of arrangement under which primary medical services may be provided after the relevant provisions of the Bill have come into force, but narrows the description in each case to those arrangements to provide primary medical services "of a prescribed description". It is intended that this power to prescribe descriptions in regulations will be used to set out those primary medical services that may be classified as "essential services" (as, for instance, in the current NHS (General Medical Services Contracts) Regulations 2004, SI 2004/291). In essence, these are the services which might be described as the core services that would be expected of a GP. Currently some, but not all, providers of primary medical services are obliged to provide essential services.

Reason for delegating the power

168. Delegation of the power in each of these three instances allows regulations to be made that ensure that the obligation as to membership of a clinical commissioning group applies only to those who provide essential services. Having the delegated power means that the policy can continue to be delivered in the future, should there be changes in respect of which services must or can be provided under each of the types of arrangement.

Reason for the selected procedure

169. The negative resolution procedure is consistent with the procedure used when imposing general requirements that must be included in all General Medical Services and Personal Medical Services contracts.

New section 14B: Applications for the establishment of clinical commissioning groups

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Specification in a published document*
Parliamentary procedure: *None*

170. New section 14B(3)(c) enables the Board to specify other information which must accompany an application for establishment as a clinical commissioning group, in addition to the proposed constitution of the group required under new section 14B(3)(a) and the name of the person whom the group wishes the Board to appoint as its accountable officer as required under new section 14B(3)(b). This power would be used by the Board to specify the additional information that it would expect to see as part of the application process.

Reason for delegating the power

171. The power concerns technical details and procedures of a kind that it would not be desirable to write into primary legislation It is appropriate for the Board, rather than the Secretary of State, to have this power, so that it can obtain the information it needs to make decisions about a prospective clinical commissioning group's readiness to become established.

Reason for the selected procedure

172. This is a technical power, designed to assist the Board in discharging its functions under new section 14C, which sets out the matters as to which the Board, if satisfied, must grant an application for establishment as a clinical commissioning group. Given the administrative nature of the task, it is considered that a Parliamentary procedure is unnecessary.

New section 14C: Determination of applications

***Power conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

173. If the Board is satisfied as to the matters set out in subsection (2) of new section 14C, it must grant an application for the establishment of a clinical commissioning group. Within subsection (2), (a) to (f) list such matters and regulations under (g) may set out further matters as to which the Board must be satisfied.

174. Regulations under subsection (3) of new section 14C may also set out factors that the Board must or may take into account when determining whether it is satisfied as to the matters listed in subsection (2). For example, the regulations might specify that the Board must take into account the proposed arrangements for the clinical commissioning group to commission emergency care services when determining whether the geographical area specified by the group in its constitution is appropriate.

175. Regulations under subsection (3) may also make provision as to procedure for making and determining applications for establishment. It is intended that these would include matters such as how applications may be made, the manner in which decisions are to be notified, and overall timetables for the process.

Reason for delegating the power

176. A delegated power to prescribe such matters relating to applications in regulations avoids the need to include detailed provision in primary legislation. It also provides flexibility to amend the requirements and procedures if necessary to respond to experiences gained during the early stages of the establishment of clinical commissioning groups and any further changes that may become necessary.

Reason for the selected procedure

177. The Department considers it important that interactions between clinical commissioning groups and the Board are conducted in a transparent, rules-based, manner, so that clinical commissioning groups are aware of the expectations upon them and so that there are appropriately circumscribed powers for the Board. The Department therefore considers it appropriate for the regulations to be subject to a Parliamentary procedure. The principal matters as to which the Board is to be satisfied before it must grant an application for establishment are already set out on the face of the Bill. The regulations could add additional matters, set out factors that the Board must or may consider when determining applications, and deal with the process for application. The last two of these are in part procedural matters. Bearing these points in mind, the Department considers the negative resolution procedure appropriate.

New section 14E: Applications for variation of constitution

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

179. Under new section 14E, a clinical commissioning group may apply to the Board to vary its constitution. Subsection (3) provides that regulations may make provision about the procedure to be followed in relation to making and determining applications for a variation of constitution. They may also set out the circumstances in which the Board must or may grant, or must or may refuse, an application, and the factors that the Board must or may take into account in determining whether to grant such an application.

Reason for delegating the power

180. Detailed provision is likely to be needed to set out the circumstances in which the Board must or may grant or refuse an application and the factors that the Board must or may take into account when deciding whether to grant a clinical commissioning group's application to vary its constitution. Providing a delegated power avoids the need to set out this detailed provision, some of which will relate to administrative matters, in primary legislation.

Reason for the selected procedure

181. Bearing in mind that the regulations will deal with administrative matters, while recognising the desirability of transparency and a rules-based approach (as explained above, in relation to regulations under new section 14C), the Department considers the negative resolution procedure appropriate.

New section 14F: Variation of constitution otherwise than on application

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

182. New section 14F gives the Board powers to vary a clinical commissioning group's constitution otherwise than on application by the group. The Board may change the area specified in a group's constitution and may add a provider of primary medical services to, or remove one from, a group's membership list. The Board can exercise these powers only after consulting the group concerned and any other clinical commissioning group that the Board considers might be affected by the variation. The powers can be exercised only if the clinical commissioning group whose constitution is to be varied agrees to the change, or if the Board considers it necessary to make the variation to discharge its duties under new section 14A.

183. However, there may be other instances where the Board needs to change a clinical commissioning group's constitution (outside of an intervention – see new section 14Z19). There is therefore a power in subsection (5) to make regulations to confer powers on the Board to vary the constitution of a clinical commissioning group and to make provision as to the circumstances in which those powers are exercisable and the procedure to be followed before they are exercised.

<u>Reason for delegating the power</u>

184. The Board might need to change the constitution of a clinical commissioning group for administrative or technical reasons. Setting out in regulations the circumstances in which changes may be made, and the procedure for making them, would allow these details to be revised quickly, where necessary, to take account of operational experience.

Reason for the selected procedure

185. Bearing in mind that the regulations would largely concern administrative matters, while recognising the desirability of transparency, the Department considers the negative resolution procedure appropriate.

New section 14G: Mergers

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Specification in a published document*
Parliamentary procedure: *None*

186. Subsection (2)(c) of new section 14G means that the Board may specify, in a document, information that clinical commissioning groups must produce when applying to merge: that is, for one or more clinical commissioning groups to be dissolved and for a new group to be established in their place. This information would need to be supplied in addition to a copy of the proposed constitution for the new group and the name of its proposed accountable officer, as required under subsection (2)(a) and (b). Other information that the Board might specify could be, for example, an explanation as to why the applicant groups consider it is appropriate for them to merge to form a new group, and the timeframe for the proposed merger.

Reason for delegating the power

187. It is appropriate to provide a delegated power, since it is likely to be used to specify technical matters that may need to be specified in more detail than it would be desirable to write into primary legislation. The details might also be subject to change (for example, in the light of unforeseen operational issues). It is appropriate for the Board to have the power to produce a document specifying these matters since it will be the Board that takes decisions on proposed mergers.

Reason for the selected procedure

188. A Parliamentary procedure is not considered necessary, as this is a technical power, designed to assist the Board in discharging its functions.

New section 14H: Dissolution

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

189. New section 14H provides for a clinical commissioning group to apply to the Board to be dissolved. Regulations under subsection (2) may make provision about the circumstances in which the Board must or may grant, or must or may refuse, applications under this section; the factors that the Board must or may take into account in determining whether to grant those applications; and the procedure for making and determining applications. This regulation-making power mirrors that in new section 14E (described above) to vary the constitution of a clinical commissioning group on application.

Reason for delegating the power

190. A delegated power makes it possible to set out detailed provision, to deal with a range of circumstances that might arise, and for that provision to be kept up to date in the light of experience.

Reason for the selected procedure

191. Bearing in mind that the regulations would largely concern administrative matters, while recognising the desirability of transparency and a rules-based approach, the Department considers the negative resolution procedure appropriate.

New section 14I: Transfers in connection with variation, merger, dissolution etc.

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Scheme*
Parliamentary procedure: *None*

192. Where dissolutions of clinical commissioning groups take place (whether as a result of a merger under new section 14G or of an application under new section 14H), or variations to a constitution are made (either on application by a clinical commissioning group under new section 14E or otherwise than on application under new section 14F), property and rights and liabilities, including in relation to contracts of employment, might need to be transferred between clinical commissioning groups or between a clinical commissioning group and the Board. New section 14I gives the Board the power, in such cases, to make property and staff transfer schemes, transferring any property, rights or liabilities to the Board or to another clinical commissioning group. Part 3 of Schedule 2 to the Bill, which inserts new Schedule 1A into the NHS Act 2006, contains further provisions about the scope of these transfer schemes, and is considered further below. Transfer schemes provide a clear written record of the detail of the transfer. The power would be similar to existing powers under the NHS Act 2006, whereby the Secretary of State can transfer property, liabilities and staff. For example, paragraphs 23 and 29 of Schedule 3 to the NHS Act 2006 contain the power to transfer property, liabilities and staff of a Primary Care Trust (on its dissolution) to bodies, including another Primary Care Trust, by way of a transfer order.

Reason for delegating the power

193. A delegated power is needed, as it would not be practical to make specific provision in primary legislation in each case where a transfer of property and staff, and of the associated rights and liabilities, proves to be necessary. As the national body responsible for oversight of the commissioning function, the Board will be best placed to determine what transfers are needed and will need powers to effect such transfers swiftly.

Reason for the selected procedure

194. The Department considers a Parliamentary procedure unnecessary for the use of this power, since it would make provision for the property and staff of individual clinical commissioning groups, and for other rights and liabilities, within the limits set by Part 3 of Schedule 1A to the NHS Act. The existing powers, such as those referenced above, for the Secretary of State to make transfers between Strategic Health Authorities, NHS Trusts and Primary Care Trusts, are not subject to a Parliamentary procedure.

New section 14K: Guidance about the establishment of clinical commissioning groups etc.

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

195. New section 14K gives the Board powers to publish guidance about the making of applications for establishment as a clinical commissioning group, including guidance as to the form, content or publication of proposed constitutions. This would enable the Board, for instance, to issue guidance on how good governance principles (such as the Nolan principles of public life) might be reflected in a clinical commissioning group's constitution. The new section also gives the Board powers to issue guidance regarding applications by clinical commissioning groups to vary their constitutions, merge, or be dissolved and on the publication of their constitutions. (Under new section 14J, clinical commissioning groups are obliged to publish their final constitutions, including, if the case arises, constitutions as varied under new sections 14E or 14F).

Reason for delegating the power

196. The power would enable the Board to provide guidance in an accessible format and to ensure a smooth and efficient process for a variety of administrative matters. It is appropriate that the Board, rather than the Secretary of State, has the power to issue guidance as, under the proposals in the Bill, the Board will be responsible for granting or refusing clinical commissioning groups' applications for establishment.

Reason for the selected procedure

197. Given the procedural content of the guidance, a Parliamentary procedure is considered unnecessary.

New section 14L: Governing bodies of clinical commissioning groups

198. This new section introduces the requirement for each clinical commissioning group to have a governing body. The governing body will have the main function of ensuring that the group has made appropriate arrangements to fulfil its duty to act efficiently, effectively and economically (under new section 14P) and that it complies with such generally accepted principles of good governance that are relevant to it. It will have the further function of determining remuneration, fees and allowances payable to the group's employees and to any others who might provide services to the group and of determining the allowances payable under a pension scheme established under paragraph 10(4) of Schedule 1A to the NHS Act 2006. The new section includes the following delegated powers.

Additional functions for governing bodies

***Power conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

199. Under subsection (3)(c), a governing body also has such other functions connected with its main function as may be specified in the group's constitution or in regulations made by the Secretary of State. The regulation-making power would allow the Secretary of State to expand the role of governing bodies, for example, if it is decided that the governing body should take on responsibility for the group's duties under new section 14Z.

Reason for delegating the power

200. The functions it is desirable for a governing body to have may change over time, and delegating the power ensures that new functions can be added without the need to wait for primary legislation.

Reason for the selected procedure

201. The main function of a governing body is on the face of the Bill, and any additional functions given to it by regulations must be linked to its main function. Bearing in mind both this and the desirability of transparency, the negative resolution procedure is considered appropriate.

Governing body approval

***Power conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

202. Regulations under subsection (5) may set out the circumstances in which a clinical commissioning group must seek and obtain the approval of the governing body before it exercises any of the functions specified in those regulations. This would enable the Secretary of State to ensure that governing bodies are involved in the decisions of the membership of the clinical commissioning group in certain circumstances: for example, it could be decided that it would be appropriate for the governing body to sign off the group's annual commissioning plan.

Reason for delegating the power

203. A delegated power provides flexibility to update requirements about the involvement of governing bodies if they change over time, without the need to wait for primary legislation.

Reason for the selected procedure

204. Bearing in mind the desirability of transparency, that the functions of clinical commissioning groups are set out in the Bill and that any additional approvals must be linked with them, the negative resolution procedure is considered appropriate.

Publication of information

***Power conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

205. Subsection (6) provides a power for the Secretary of State to make regulations setting out the information that governing bodies must publish in relation to the determination of

remuneration, fees and allowances paid to the employees of clinical commissioning groups and those providing services to the group (that is, determinations under subsection (3)(a)).

Reason for delegating the power

206. It is likely that it will be necessary to prescribe in some detail the information that should be published, and that these details will change from time to time. Delegating the power avoids putting a large amount of technical detail (for example, about definitions) into primary legislation. The regulation-making power would also ensure the required information can more easily be updated to keep pace with good practice.

Reason for the selected procedure

207. The negative resolution procedure is considered appropriate, bearing in mind that remuneration matters are likely to be of public interest, and that detailed changes may be needed fairly frequently.

Guidance on exercise of functions

***Power conferred on**: NHS Commissioning Board*
***Power exercised by**: Guidance*
***Parliamentary procedure**: None*

208. Subsection (7) gives the Board a power to publish guidance for governing bodies on the exercise of their functions regarding remuneration, fees and allowances (as under subsection (3)(a)). This would enable the Board to present best practice on pay and allowances and to provide accessible and up-to-date information, for instance senior pay benchmarking data, to support governing bodies in making decisions on remuneration.

Reason for delegating the power

209. The guidance may go into some detail and will need updating from time to time; it would therefore be undesirable to aim to set out its contents in primary legislation. It is appropriate to delegate the power to the Board (rather than to the Secretary of State) because the Board will

be in regular contact with clinical commissioning groups and able to take a view across the whole system.

Reason for the selected procedure

210. Given the technical content of the guidance, it is considered unnecessary for it to be subject a Parliamentary procedure.

New section 14M: Audit and remuneration committees of governing bodies

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

211. This new section obliges governing bodies to have two committees; an audit committee and a remuneration committee. The audit committee will have such functions in relation to the clinical commissioning group's financial duties as the governing body considers appropriate for the purpose of assisting the governing body with its main function. The remuneration committee will have the function of making recommendations to the governing body as to the discharge of the governing body's function of determining remuneration, fees and allowances for the group's staff and for those providing services to the group. Additional functions, connected with the governing body's main function, can be conferred upon either committee by the group's constitution.

212. Subsection (2)(b) allows regulations to be made conferring additional functions, connected with the governing body's main function, on the audit committee. Subsection (3)(b) allows regulations to be made conferring additional functions, connected with the governing body's main function, on the remuneration committee.

Reason for delegating the power

213. The additional duties that it may be appropriate for the audit and remuneration committees of the governing bodies of clinical commissioning groups to undertake may change over time, and a delegated power makes it possible for the legislation to provide for this.

Reason for the selected procedure

214. A Parliamentary procedure is appropriate, in the interests of transparency and a rules-based approach. As any additional functions must be linked to the functions set out in the Bill, the negative resolution procedure is considered appropriate.

New section 14N: Regulations as to governing bodies of clinical commissioning groups

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

215. New section 14N introduces regulation-making powers linked to the form and procedure of the governing bodies of clinical commissioning groups and of their audit and remuneration committees. Regulations made under subsection (1) may prescribe the minimum number of members that a governing body must have.

216. Under subsection (2), regulations may be made regarding the membership of governing bodies and their committees. They may require that the governing body includes the accountable officer of the clinical commissioning group. They may also provide that governing bodies and their audit and remuneration committees must include people of a prescribed description. These are:

- healthcare professionals of a prescribed description;
- individuals who are lay persons; and
- other individuals of a prescribed description.

They may specify the minimum and maximum number of persons who must be appointed and the maximum number of persons who may be appointed and may bar persons of a prescribed description from being eligible for appointment by virtue of a clinical commissioning group's constitution (under 14L(4)(c)).

217. Regulations made under subsection (3) may make provision for: qualification and disqualification of members; method of appointment; tenure and circumstances for suspension and removal; and eligibility for reappointment.

218. Subsection (4) allows the Secretary of State to make regulations about the appointment of chairs and deputy chairs of the governing body and its audit or remuneration committees. This includes provision about qualification and disqualification; tenure and circumstances for suspension and removal; and eligibility for reappointment.

219. Regulations under subsection (5) may make provision for matters that must be included in the constitution of a clinical commissioning group in respect of how decisions are made, prevention of conflicts of interest, transparency of decision-making and holding open meetings. Regulations under this subsection may also make such other provision as the Secretary of State may see fit in relation to the procedure of governing bodies and audit and remuneration committees, including as to frequency of meetings.

Reason for delegating the power

220. The technical nature of these powers would make them inappropriate to set in primary legislation. The detailed provisions regarding governance arrangements may well be subject to change as the new commissioning system is implemented and developed.

Reason for the selected procedure

221. Given the technical nature of these measures and the likelihood that they may be subject to change, the negative resolution procedure is considered appropriate.

Schedule 2: Clinical commissioning groups

222. Clause 22 also introduces Schedule 2 to the Bill, which inserts a new Schedule 1A into the NHS Act 2006. The Schedule includes the following delegated powers.

Paragraph 2

***Power conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

223. Sub-paragraph 2(2) of the Schedule includes the power for the Secretary of State to prescribe in regulations requirements as regards the names of clinical commissioning groups. The intention is that clinical commissioning groups are recognisable as such by the public.

Reason for delegating the power

224. Because of the technical nature of this provision and the level of detail, it would not be appropriate to put it on the face of the Bill.

Reason for the selected procedure

225. Given the technical nature, but also the importance of these requirements, the negative resolution procedure is considered appropriate.

Paragraph 11: Accountable officer

***Power conferred on**: NHS Commissioning Board*
***Power exercised by**: Specification in a published document*
***Parliamentary procedure**: None*

226. Sub-paragraph (9) of paragraph 11 of the Schedule sets out the responsibilities of the accountable officer. Sub-paragraph (9)(a) states that the accountable officer must ensure the compliance of the clinical commissioning group (or of each group, in the case of a joint appointment) with certain obligations placed on groups by the NHS Act 2006 as amended by the Bill. These obligations are those listed at (i) to (iii) of sub-paragraph (a), plus any that are specified in a document published by the Board for these purposes under (iv) of the sub-paragraph.

Reason for delegating the power

227. A delegated power is desirable, as the role of accountable officers may evolve over time. It is appropriate for the Board to have the power to specify further functions for which accountable officers have oversight, since the Board would be responsible for holding clinical commissioning groups to account for stewardship of NHS resources.

Reason for the selected procedure

228. A Parliamentary procedure is not considered necessary, as any additional duties placed on accounting officers would relate to clinical commissioning groups' functions, set out either in the changes made by the Bill to the NHS Act 2006 or in secondary legislation made under the powers created by the Bill.

Paragraph 14: Trust funds and trustees

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative*

229. This paragraph confers an order-making power on the Secretary of State similar to that in paragraph 12 of Schedule 3 to the NHS Act 2006, which currently enables the Secretary of State to provide for the appointment of trustees for Primary Care Trusts. The power enables the Secretary of State to appoint trustees for a clinical commissioning group to hold property on trust. An order may make provision as to appointment and number of trustees and specify conditions of the appointments. It may also make provision with respect to the term of office and removal of any trustees. Under sub-paragraph (3), where trustees have been appointed under such an order, the Secretary of State may by order provide for the transfer of any trust property from the clinical commissioning group to the trustees.

Reason for delegating the power

230. Delegating the power provides flexibility to appoint trustees if property is given to a clinical commissioning group to be held on trust.

Reason for the selected procedure

231. The negative resolution procedure is considered appropriate for these powers, which are administrative in nature. This is consistent with the current provision for orders under paragraph 12 of Schedule 3 to the NHS Act 2006, which is referred to above.

Paragraph 16: Accounts and audits

Power conferred on: *NHS Commissioning Board, with the approval of the Secretary of State in some cases*
Power exercised by: *Directions*
Parliamentary procedure: *None*

232. This paragraph requires a clinical commissioning group to keep proper accounts and records in relation to the accounts. It gives the Board power to direct a clinical commissioning group, with the approval of the Secretary of State, to prepare accounts in respect of such period or periods of time as may be specified (sub-paragraph (3)), and as to the form and content, and methods and principles, for the production of their accounts (sub-paragraph (4)). The Board may also direct that any interim accounts that it has required to be produced should be audited (sub-paragraph (5)). It can also direct clinical commissioning groups as to timescales for submitting to it audited annual accounts, audited interim accounts, unaudited annual accounts and unaudited interim accounts (sub-paragraph (7)).

233. The Secretary of State will remain accountable to the Treasury for the Department of Health's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all bodies that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. Consistency of preparation of accounts throughout the healthcare system is necessary to achieve accurate consolidation of those accounts.

234. It is possible that Parliament might request in-year financial statements from the Department. It is therefore necessary to have a power to require in-year accounts from clinical commissioning groups and to direct that these are audited if required.

Reason for delegating the power

235. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

236. It is appropriate for the power to be delegated to the Board, because, under the arrangements envisaged by the Bill, it is the Board that will allocate resources to individual clinical commissioning groups. Setting requirements around accounting and audit sits logically with that role. However, use of the power would in some cases be subject to the approval of the Secretary of State to ensure consistency of preparation of accounts.

Reason for the selected procedure

237. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006).

Paragraph 17: Provision of financial information to Board

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None*

238. This paragraph gives the Board a power to direct a clinical commissioning group to supply it, within a specified period, with information about that group's accounts or its income or expenditure or use of resources. The required information may include estimates of future income, expenditure or use of resources and any information the Board considers necessary to enable it to verify any other information supplied to it under this provision.

Reason for delegating the power

239. There is a wide range of financial information which may currently be required from NHS bodies during the financial year and which will in future continue to be required, including from clinical commissioning groups. This information is necessary to enable the Board, and in turn the Secretary of State, to comply with Parliamentary and Treasury reporting and budgetary requirements. Because the information required may need to be specified in detail, and may change from time to time, it would not be desirable to put the requirement to provide it into primary legislation. It is appropriate for the power to be delegated to the Board, because it is the Board that will allocate resources to individual clinical commissioning groups.

Reason for the selected procedure

240. As the directions would concern technical and administrative matters, a Parliamentary procedure is not considered necessary.

Paragraph 18: Provision of information required by the Secretary of State

Power conferred on: *Secretary of State*
Power exercised by: *Requirement*
Parliamentary procedure: *None*

241. This paragraph requires all clinical commissioning groups to disclose to the Board such information, in such form, and at such time or within such period, as the Secretary of State may require, if the Secretary of State considers that information necessary for the purposes of the Secretary of State's functions in relation to the health service. It would not be possible for the Secretary of State to request information from a single clinical commissioning group or a group of clinical commissioning groups: the same request for information would need to be made to all clinical commissioning groups.

242. The paragraph also requires the Board to provide any information it obtains from clinical commissioning groups under the power above to the Secretary of State in such form, and at such time or within such period, as the Secretary of State may require.

Reason for delegating the power

243. The Secretary of State and the Department require information both to enable the effective and efficient management of the Department's financial position against the Departmental Expenditure Limit, Parliamentary Estimates and other controls and for the effective and efficient management of other Departmental business. In addition, the Department has a responsibility to provide information on bodies for which it is accountable to meet requirements that the Treasury and others may set on both financial and non-financial matters. The information required by the Department to fulfil these functions would change regularly over time, so it is appropriate to have a delegated power, rather than to set the requirements in primary legislation.

244. It is appropriate for responsibility for collecting the information and passing it to the Secretary of State to rest with the Board, because it would be responsible for holding clinical commissioning groups to account for stewardship of NHS resources.

Reason for the selected procedure

245. The power relates to the collection of routine information required by the Secretary of State to discharge his functions effectively and efficiently. Such information would vary over time in line with wider Government policy. Given the administrative nature of these requirements, the Department considers a Parliamentary procedure unnecessary.

Clause 23: Clinical commissioning groups: general duties etc.

246. This clause inserts new sections into Part 2 of the NHS Act 2006. They contain the following delegated powers.

New section 14T: Duty to promote involvement of each patient

***Power conferred on**: NHS Commissioning Board*
***Power exercised by**: Guidance*
***Parliamentary procedure**: None*

247. This new section confers a duty upon clinical commissioning groups, in the exercise of their functions, to promote the involvement of patients, and their carers and representatives, in

decisions about provision of healthcare to the patient. This is in addition to the duty to involve the public under new section 14Z. Subsection (2) gives the Board the power to make guidance on this subject. Clinical commissioning groups must have regard to any such guidance.

Reason for delegating the power

248. It would not be appropriate to put the content of this guidance into primary legislation. There are many ways that the duty to involve patients might be fulfilled and to set this out in detail on the face of the Bill would be unduly prescriptive. It is appropriate for the power to issue guidance to be held by the Board so it can fulfil its function of supporting clinical commissioning groups in the discharge of their various responsibilities.

Reason for the selected procedure

249. The Bill itself sets out the duty to involve patients. Since this would be guidance about the discharge of the duty, a Parliamentary procedure is not considered necessary.

New section 14V: Duty to obtain appropriate advice

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

250. This new section puts a duty on clinical commissioning groups to obtain advice, appropriate to enabling the group to discharge its functions effectively, from persons taken together who have a range of professional expertise in the prevention, diagnosis and treatment of illness and in the protection or improvement of public health. Under subsection (2), the Board may publish guidance on this duty, to which clinical commissioning groups must have regard.

Reason for delegating the power

251. It would not be appropriate to put the content of this guidance into primary legislation. There are many ways that the duty to obtain appropriate advice might be fulfilled and to set this

out in detail on the face of the Bill would be unduly prescriptive. It is appropriate for the power to issue guidance to be conferred on the Board so it can fulfil its function of supporting clinical commissioning groups in the discharge of their various responsibilities.

Reason for the selected procedure

252. The Bill itself sets out the duty to obtain appropriate advice. Since this would be guidance about the discharge of the duty, a Parliamentary procedure is not considered necessary.

New section 14Z: Public involvement and consultation by clinical commissioning groups

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

253. This new section sets out requirements for public involvement and consultation. Clinical commissioning groups must make arrangements to involve individuals to whom services are being or may be provided:

- in planning commissioning arrangements;
- in developing and considering proposals for changes in the commissioning arrangements, where those proposals would have an impact on how services are provided or the range of health services available; and
- in decisions affecting the operation of commissioning arrangements that would likewise have an impact.

254. Under subsection (4), the Board may publish guidance for clinical commissioning groups on how to discharge their functions under this section, and clinical commissioning groups must, under subsection (5), have regard to any such guidance. The Board could, for instance, give guidance on effective ways of engaging and seeking views from members of the public, including how to engage people who do not regularly access healthcare services or who are from disadvantaged communities. The Board could also give guidance to help clinical

commissioning groups decide in what circumstances the duty to involve might most appropriately be met by providing information and in what circumstances a clinical commissioning group should actively seek people's views through consultation.

Reason for delegating the power

255. It would not be appropriate to put the content of this guidance into primary legislation. There are many ways that the duty might be fulfilled and to set this out in detail on the face of the Bill would be unduly prescriptive. It is appropriate for the power to issue guidance to be held by the Board so it can fulfil its function of supporting clinical commissioning groups in the discharge of their various responsibilities.

Reason for the selected procedure

256. The Bill itself sets out the duty on public involvement. Since this would be guidance about the discharge of the duty, a Parliamentary procedure is not considered necessary.

New section 14Z2: Joint exercise of functions with Local Health Boards

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

257. Regulations may be made under this new section to allow any prescribed functions of a clinical commissioning group to be exercised jointly with a Local Health Board. Local Health Boards are the bodies responsible for commissioning and providing health services in Wales. Regulations may make provision for any such functions to be exercised by a joint committee of the clinical commissioning group and the Local Health Board.

Reason for delegating the power

258. Regulations would provide flexibility to review which functions of clinical commissioning groups may be exercised jointly with Local Health Boards.

Reason for the selected procedure

259. The proposed power is akin to that in section 19 of the NHS Act 2006, which is subject to the negative resolution procedure.

New section 14Z5: Responsibility for payments to providers

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Specification in writing and guidance*
Parliamentary procedure: *None*

260. This new section gives the Board the power to publish a document specifying circumstances in which a clinical commissioning group is liable to make payments to a provider for services provided under arrangements commissioned by another clinical commissioning group and how the amount of any payment is to be determined. A clinical commissioning group is obliged to make payments in accordance with any such document published by the Board. The Board may, under subsection (6), also publish guidance to assist clinical commissioning groups in understanding and applying this written specification.

261. The context is that regulations under clauses 10 and 11 would set out the legal framework as to which clinical commissioning group is responsible for commissioning services for particular persons. In broad terms, these powers would be used to make provision akin to that in regulation 3(7)-(10) of the NHS Functions Regulations[8]. The policy intention is that the responsibility for payment for those services should also be clear and that there should be mechanisms in place to enable providers to recover payment from the appropriate clinical commissioning group without placing undue burdens on clinical commissioning groups. The general proposition is that the clinical commissioning group with responsibility for commissioning the service should have responsibility for paying for that service. As a matter of law it must be implied that, if a clinical commissioning group has legal responsibility for the commissioning of a service unless otherwise provided, that clinical commissioning group is legally responsible for payment for that service.

[8] The National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002, SI 2002/2375.

262. However, there are to be exceptions to this and this provision would, for instance, enable the Board to specify that, where a person uses an urgent care service commissioned by a clinical commissioning group other than the one that is ordinarily responsible for that person's healthcare, the cost of that service is to be charged to the latter clinical commissioning group. The Board would not be obliged to make such a specification. For instance, it could decide that clinical commissioning groups should be left to agree mutual arrangements for sharing costs where patients from a number of different groups use the same urgent care service. The Board might subsequently make a specification if circumstances show that such mutual arrangements are not operating effectively. A specification in writing ensures that the arrangements are set out clearly for all parties. Guidance would allow the Board to supplement the specification with practical information to enable clinical commissioning groups to interpret and apply it appropriately.

Reason for delegating the power

263. Taking delegated powers to enable the Board to make the specification described above and to publish guidance on the subject enables the Board, if necessary, to set out the detail of such arrangements and provides the flexibility to modify the details specified if changes are required. It is appropriate for the Board to have this power, as it is to be responsible for ensuring that clinical commissioning groups work together effectively to commission services and manage their finances.

Reason for the selected procedure

264. Since the power is concerned with operational and administrative matters in the context of the responsibilities conferred by clauses 10 and 11, a Parliamentary procedure is considered unnecessary.

New section 14Z6: Guidance on commissioning by the Board

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

265. Under the proposals in the Bill, a key function of the Board will be to provide support to clinical commissioning groups as they fulfil their commissioning functions. This new section provides that the Board must publish guidance for clinical commissioning groups on the discharge of their commissioning functions and that groups must have regard to this guidance.

266. We envisage that the Board might focus the guidance in particular on how clinical commissioning groups can secure continuous improvement in safety and effectiveness of services and the quality of experience their patients have, through the commissioning of health services.

267. This guidance would form one means by which the Board works with clinical commissioning groups to implement the Secretary of State's mandate, which would set out the Government's principal healthcare priorities, which the Board should seek to achieve. The guidance could, for example, set out best practice required to deliver improved healthcare outcomes in a specified area of health.

268. The new section requires that the Healthwatch England Committee of the Care Quality Commission is consulted before the Board publishes any guidance, or any revised guidance containing significant changes. This is to help ensure that the Board pays appropriate regard, in producing the guidance, to the need to promote patient and public involvement and improve patient experience.

Reason for delegating the power

269. A delegated power is desirable, as it allows information to be conveyed to clinical commissioning groups in an accessible format and kept up-to-date. It is also expected that this guidance will be extensive. It is appropriate for the Board to have the duty to produce statutory guidance because that would help ensure that the Board is able to play its envisaged national leadership role, for instance in relation to promoting quality improvement, promoting public and patient involvement and patient choice, and reducing inequalities in access to healthcare and healthcare outcomes.

Reason for the selected procedure

270. Given that the guidance relates to a duty set out in the Bill, and the detailed nature of its likely content, a Parliamentary procedure is considered unnecessary.

New section 14Z7: Exercise of functions by the Board

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

271. It is the intention that clinical commissioning groups will have the flexibility to ask the Board to exercise functions on their behalf. The rationale for this is that some services might be better commissioned on a national basis (for example, if it is decided that demand for a service becomes so low that only a limited number of treatment packages need to be commissioned across the country). This new section therefore provides that the Board may act on behalf of a clinical commissioning group and arrange the provision of services if requested to do so by a clinical commissioning group. However, it is considered appropriate that the Secretary of State should be able to circumscribe how far the Board might take on such additional commissioning functions. The rationale for these reforms is that commissioning decisions should, as far as possible, be led by the clinicians who best know the healthcare needs of their patients. The new section therefore sets out that regulations may provide that this power for the Board to take on additional functions does not apply to services or facilities of a prescribed description. This would enable the Secretary of State to ensure that responsibility for commissioning services remains, in the main, with clinical commissioning groups.

<u>Reason for delegating the power</u>

272. Decisions about those services that clinical commissioning groups should not be able to arrange for the Board to commission are likely to involve considering a number of technical and operational factors. Delegating the power means that the details of the services identified can be kept up to date in the light of developments in services available and other matters.

<u>Reason for the selected procedure</u>

273. The negative resolution procedure is considered appropriate, to ensure transparency about the decisions made while recognising that the services identified may need regular or speedy adjustment.

New section 14Z9: Commissioning plan
New section 14Z10: Revision of commissioning plans
New section 14Z11: Consultation about commissioning plans

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions and guidance*
Parliamentary procedure: *None*

274. New section 14Z9 makes provision with regard to the commissioning plans of clinical commissioning groups. Subsection (1) stipulates that each group must prepare a plan before the start of each financial year (or before a date as directed by the Board during its first financial year) to set out how it will exercise its functions. The plan must in particular explain how the group proposes to discharge its duties to seek continuous improvement in the quality of services (under new section 14Q) and to involve and consult the public (under new section 14Z) and its financial duties (under new sections 223H to 223J). This plan must be published and sent to the Board before a date specified by the Board in a direction. A clinical commissioning group may revise its plan (under new section 14Z10). Under new section 14Z11, when preparing the plan and when preparing any significant revisions to it, a clinical commissioning group must consult each relevant Health and Wellbeing Board and the people for whom it is responsible under section 3 of the NHS Act 2006 (as amended by the Bill). Subsection (7) of new section 14Z9 contains a power for the Board to publish guidance for clinical commissioning groups in respect of the discharge of their functions under new sections 14Z9-14Z11. Clinical commissioning groups must have regard to such guidance.

<u>Reason for delegating the power</u>

275. It will be necessary to set a date by which clinical commissioning groups must provide their commissioning plans to the Board, to ensure that groups comply with the requirement to produce plans, which are an essential part of the commissioning process. Delegating the

power to specify the date ensures that it can be set to take account of all the circumstances. It is appropriate for the Board to have the power to specify the date as the Board will be the recipient of all clinical commissioning groups' commissioning plans.

276. A delegated power to produce guidance means that the guidance can be provided in an accessible format and more easily kept up to date. In the light of the Board's role overseeing the work of clinical commissioning groups, it is appropriate to give the Board a power to publish guidance on how to fulfil the statutory requirements relating to commissioning plans.

Reason for the selected procedure

277. No Parliamentary procedure is thought necessary for the directions or the guidance. The directions would be essentially administrative requirements setting deadlines for the production or submission of plans, and the content of the guidance would be largely operational and administrative,

New section 14Z13: Reports by clinical commissioning groups

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None*

278. Under this new section, in each financial year, save during its first year of operation, a clinical commissioning group must prepare, and provide the Board with, an annual report on how it has discharged its functions in the previous financial year. The report must in particular explain how the group has fulfilled its duties to seek continuous improvement in the quality of services (new section 14Q) and its duties as to public involvement and consultation (new section 14Z). It must also review the extent to which the group has contributed to the delivery of the latest relevant joint health and wellbeing strategy (which it would be under a duty to have regard to under the Local Government and Public Involvement in Health Act 2007). The clinical commissioning group must publish the report and present it at a public meeting.

279. Under subsection (4), the Board can give directions to clinical commissioning groups on the form and content of an annual report. For example, directions could specify that the report

must include a review of joint arrangements with local authorities. Under subsection (5), a clinical commissioning group must give a copy of its annual report to the Board before a date specified by the Board in a direction.

Reason for delegating the power

280. Delegating the power recognises that some aspects of the form and content of the annual report may need to be altered on an annual basis. Clinical commissioning groups' reports may also need to be consistent in terms of content and structure, in order to enable effective comparison between reports. Delegating the power makes it possible to set detailed requirements and modify them as necessary. It is appropriate for the Board to have the power as it is responsible for overseeing the discharge by clinical commissioning groups of their functions and will conduct annual performance assessments of each clinical commissioning group (under new section 14Z14).

Reason for the selected procedure

281. A clinical commissioning group's annual report provides a means by which it can describe how it has discharged its statutory functions. A Parliamentary procedure seems unnecessary for what would be essentially administrative requirements relating to the production of the report.

New section 14Z14: Performance assessment of clinical commissioning groups

***Power conferred on**: Secretary of State*
***Power exercised by:** Published document*
***Parliamentary procedure:** None*

282. New section 14Z14 places a duty on the Board to conduct an annual performance assessment of each clinical commissioning group. This is an assessment of how well the clinical commissioning group has discharged its functions during that financial year. Subsection (5) of new section 14Z14 provides that the Board must, in particular, have regard to any guidance published under new section 14Z6 and any document published by the Secretary of State for the purposes of this section. The Secretary of State may wish to ensure

that certain information is included in annual assessments in relation to the NHS Outcomes Framework or that they are in a certain format. This power will enable documents to be issued to which the Board must have regard.

Reason for delegating the power

283. The requirements that the Secretary of State may wish to set – in particular, in relation to outcomes – might change from year to year and might relate to specific and detailed issues. For both reasons, it is desirable to have a delegated power, rather than to set any requirements out in primary legislation.

Reason for the selected procedure

284. The annual assessment would relate to the group's performance of its functions, which would be set out in legislation. A Parliamentary procedure seems unnecessary for a document published under new section 14Z14(5), which would deal with administrative details about how the assessment is to be carried out.

New section 14Z17: Power to require explanation

***Power conferred on**: NHS Commissioning Board*
***Power exercised by:** Specification*
***Parliamentary procedure:** None*

285. This new section sets out the Board's power, where the conditions in section 14Z15 are met, to require an explanation, either in writing or orally, at such time and place as the Board may specify, regarding any matter relating to the clinical commissioning group's exercise of its functions. That explanation can include an explanation of how the group is proposing to exercise its functions.

Reason for delegating the power

286. The time and place at which a clinical commissioning group must give an explanation may vary depending on operational circumstances, so it is appropriate to have the flexibility

provided by a delegated power in this regard. The Board has oversight and accountability functions in relation to clinical commissioning groups, so it is appropriate for it to have this power.

Reason for the selected procedure

287. A Parliamentary procedure seems unnecessary for what would be essentially an administrative requirement which may need to be implemented at short notice.

New section 14Z19: Power to give directions, dissolve clinical commissioning group etc.

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions and schemes*
Parliamentary procedure: *None*

288. This new section sets out the Board's powers to intervene where it considers that a clinical commissioning group is failing or has failed to discharge any of its functions, or there is a significant risk that it will fail. The Board will need a range of intervention powers, which are set out in this new section, in order to avoid financial or service failure.

289. The powers set out in this new section are powers to:

- direct a clinical commissioning group as to how to discharge specified functions and the period in which it is to do so;
- direct a clinical commissioning group or its accountable officer to cease any functions for a specified period, so that those functions can instead be performed on the clinical commissioning group's behalf by the Board or by another clinical commissioning group or its accountable officer;
- direct another clinical commissioning group or its accountable officer to carry out those functions on the failing clinical commissioning group's behalf;
- make a scheme to transfer to the Board or another clinical commissioning group any property, rights or liabilities (including criminal) in relation to property or staff of a clinical commissioning group that has been dissolved or varied by the Board in exercise of powers under subsections (6) or (7) of this new section. Part 3 of

Schedule 2 to this Bill, which would become Schedule 1A to the NHS Act 2006, contains further provisions about the scope of these property and staff transfer schemes.

Reason for delegating the power

290. Delegating the power recognises that intervention powers may need to be exercised in a timely fashion so as to minimise the effects of a clinical commissioning group's failure to discharge its duties, and that is not feasible to set out in primary legislation what action would be required in the range of circumstances that might arise.

291. Where the power is exercised to dissolve or vary a clinical commissioning group's constitution, it may be essential for legal and operational purposes to transfer property or staff, or associated rights or liabilities, to the Board or another clinical commissioning group. As the national body responsible for oversight of the commissioning function, the Board would be best placed to determine what transfers are needed and would need powers to effect such transfers swiftly. Transfer schemes provide a clear written record of the detail of any transfer made.

Reason for the selected procedure

292. It is not proposed to associate a Parliamentary procedure with the use of these powers. However, to allow Parliamentary oversight of the proposed intervention regime, it is envisaged (see below) that regulations, made by the negative resolution procedure, may set out in more detail the procedure that must be followed before the Board can exercise its intervention powers.

New section 14Z20: Procedural requirements in connection with certain powers

293. In addition to the intervention powers in new section 14Z19, new sections 14Z16 and 14Z17 give the Board powers to require documents and information or to require an explanation where the Board has reason to believe that the area of a clinical commissioning group is no longer appropriate, or that the group might have failed, might be failing, or might fail, to discharge any of its functions. New section 14Z20 provides two delegated powers in this connection.

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

294. The procedural requirements that the Board must fulfil before it uses its intervention powers to dissolve a clinical commissioning group are set out in new section 14Z20(1)-(4): the Board must consult that clinical commissioning group, any relevant local authority and any other persons it considers appropriate, and provide those persons with a statement explaining its proposed actions and reasons for them. The Board must also publish a report in response to this consultation and, where it decides to exercise its power to dissolve a clinical commissioning group, explain in the report its reasons for doing so. Intervention by the Board to dissolve a clinical commissioning group would be the most significant form of intervention, used rarely and only in severe circumstances, so it is appropriate to set out on the face of the Bill the procedural requirements the Board must follow before using that power.

295. New section 14Z20 also provides for the Secretary of State to make regulations setting out procedural requirements the Board must follow before exercising the powers in new sections 14Z16, 14Z17 and 14Z19. This will allow the Secretary of State to set out a clear and transparent framework within which the Board must operate when exercising these powers.

Reason for delegating the power

296. Delegating the power means that regulations can set out in more detail the procedure that must be followed before the Board can exercise other intervention powers, which we envisage would be used in less severe circumstances. This would help ensure that, if necessary, changes can be made to the procedures adopted without the need to wait for primary legislation.

Reason for the selected procedure

297. A Parliamentary procedure helps ensure transparency, so that the intervention regime is operated fairly and equitably, with all parties knowing what is expected of them. The negative resolution procedure is considered appropriate, bearing in mind that changes to the intervention regime might need to be made relatively quickly when these are considered necessary.

Guidance

Power conferred on: *Board*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

298. Under new section 14Z20(7), the Board would be required to publish guidance as to how it proposes to exercise the intervention powers conferred by new sections 14Z16, 14Z17 and 14Z20. Again, the aim is to ensure that the intervention process is clear and that clinical commissioning groups know how they will work with the Board to remedy any challenges should they arise. This will further help to ensure that the intervention process is as transparent and rules-based as possible.

Reason for delegating the power

299. Delegating the power is consistent with the proposal that the Secretary of State should have a delegated power to set out some procedural requirements in regulations: the guidance would need to take account of these. It is appropriate that the Board is responsible for the guidance, since it will set out how the Board proposes to use its powers.

Reason for the selected procedure

300. It is not considered to necessary to have a Parliamentary procedure for the guidance issued by the Board, since this will concern how the Board proposes to operate within the constraints set by legislation.

New section 14Z22: Interpretation

***Power conferred on**: Secretary of State*
***Power exercised by**: Order*
***Parliamentary procedure**: Negative*

301. This new section sets out matters of interpretation relating to new Chapter A2 of the NHS Act 2006. Subsections (2) and (3) list those references to functions of clinical commissioning groups in Chapter A2 and in other sections of the Bill, as well as in provisions of other Acts as amended by the Bill, that are to include public health functions exercised on behalf of the Secretary of State by virtue of arrangements made under the powers in section 7A (as inserted by clause 19 of the Bill). Subsection (4) provides a power for the Secretary of State to amend those lists by order.

Reason for delegating the power

302. It is desirable to have the power to amend the lists in subsections (2) and (3). This might be needed, for example if additional functions are conferred on clinical commissioning groups because of future changes to legislation, or if future policy changes make it appropriate to remove certain functions from the lists.

Reason for selected procedure

303. Because of the technical nature of the changes that could be made under this power, the negative procedure is considered to be appropriate.

Clause 24: Financial arrangements for clinical commissioning groups

New section 223G: Means of meeting expenditure of clinical commissioning groups out of public funds

***Power conferred on:** NHS Commissioning Board*
***Power exercised by:** Directions*
***Parliamentary procedure:** None*

304. Under new section 223G(6), the Board may direct that sums paid to a clinical commissioning group as part of an increase in its allotment are spent in a certain way. The direction would apply only to the amount by which the allotment has increased, rather than the total allotment. Such a power provides reassurance that, where appropriate, there is a mechanism for the Board to require clinical commissioning groups to deliver certain services and commitments by other government departments that fall to the NHS. The Board may also direct that the clinical commissioning group pay money to the Board in relation to charges or other sums that relate to the valuation or disposal of assets.

Reason for delegating the power

305. Delegating the power means that requirements can be set in the light of the circumstances applying when the direction is issued. For instance, where additional funds are made available to make a specific service or therapy more widely available, the Board might direct that a specific increase in the allotment is spent a certain way. Such a power may be necessary particularly during the first few years of clinical commissioning groups' development.

306. It is appropriate for the Board, rather than the Secretary of State, to have this power of direction, as the Board would be the organisation responsible for oversight of the functioning of clinical commissioning groups as commissioners and would be responsible for holding them to account for the management of their finances.

Reason for the selected procedure

307. No Parliamentary procedure is thought necessary for this power, as the direction to the clinical commissioning group would be in relation to a specific amount of money to be used, or required by the Board from clinical commissioning groups, for a specific purpose.

New section 223H: Financial duties of clinical commissioning groups: expenditure

Subsection (2)

***Power conferred on**: NHS Commissioning Board*
***Power exercised by**: Directions*

Parliamentary procedure *None*

308. Powers under subsection 223H allow the Board to make directions determining whether specified sums are to be counted as received by a specific clinical commissioning group for accounting purposes. Directions may also specify whether sums must or must not be counted as expenditure within the permitted expenditure of a clinical commissioning group. Finally, under this section the Board can make directions specifying the extent to which, and the circumstances in which, sums received by clinical commissioning groups under new section 223G, but not yet spent, must be treated for the purposes of this section as part of the expenditure of the group, and to which financial year's expenditure they must be attributed.

Reason for delegating the power

309. Delegating these powers is necessary in order to provide the required level of detail as to what will be taken into account in determining whether a clinical commissioning group remains within its expenditure limits. These details are subject to change and will require updating and would not be appropriate for inclusion in primary legislation. It is appropriate for the Board to have this power, since it will be responsible for holding clinical commissioning groups to account for their stewardship of NHS resources.

Reason for the selected procedure

310. No Parliamentary procedure is thought necessary for these directions, as they are technical in nature and may vary amongst clinical commissioning groups.

Subsection (3)

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

311. This subsection gives the Secretary of State a power to give directions as to the purposes for which clinical commissioning groups must use banking services specified in the direction in respect of any monies allotted and any balances held. This takes account of the

Treasury requirement that all NHS money is held in Government Banking Service (GBS) accounts, where it offsets the national debt.

Reason for delegating the power

312. A delegated power is needed, so that directions can ensure that all allocations to clinical commissioning groups are held in GBS accounts, that these are the accounts in which clinical commissioning groups keep their allocation, and that the monies allocated to clinical commissioning groups stay in GBS accounts until paid out (although there may be circumstances in which other commercial accounts may be held).

Reason for the selected procedure

313. No Parliamentary procedure seems necessary, since this power relates administrative requirements set in order to deliver a wider Government requirement.

New section 223I: Financial duties of clinical commissioning groups: use of resources

***Power conferred on**: NHS Commissioning Board*
***Power exercised by**: Directions*
***Parliamentary procedure** None*

314. Directions under new section 223I allow the Board to set a clinical commissioning group's capital and revenue resource limit. When it does so, the Board must inform the Secretary of State. Any directions made by the Secretary of State under section 223D (Financial duties on the Board: controls on total resource use) – see above – also apply to clinical commissioning groups for the purposes of this section. Directions may also be made determining to which group a use of capital resources or revenue resources should be attributed for the purposes of this section and section 223J.

Reason for delegating the power

315. The detail of these directions will vary according to the circumstances of the individual clinical commissioning group and so it is necessary to have the flexibility that will be afforded

by a delegated power. It is appropriate for the Board to have this power because of its responsibility for holding groups to account for their stewardship of NHS resources.

Reason for the selected procedure

316. No Parliamentary procedure is considered necessary, because of the technical and annually changing nature of these directions.

New section 223J: Financial duties of clinical commissioning groups: additional controls on resource use

Directions by the Board

***Power conferred on**: NHS Commissioning Board*
***Power exercised by**: Directions*
***Parliamentary procedure** None*

317. New section 223J contains several direction-making powers. These allow the Board to limit a clinical commissioning group's capital and revenue expenditure on specified matters (under subsections (1) and (2)) and its administration expenditure (part of the revenue resource) on prescribed matters (under subsection (3)). Subsection (4) allows the Board to specify uses of resources that must or must not be taken into account for the purposes of subsections (1), (2) and (3). The Board may make directions under subsections (1), (2) and (3) only where the Secretary of State has made directions under the relevant provisions of new section 223E (Financial duties of the Board: additional controls on total resource use).

Reason for delegating the power

318. As these powers are dependent on directions having already been issued to the Board, it is logical for them also to be direction-giving powers. They are technical and changeable in nature. It is appropriate for the Board to have these powers because of its responsibility for holding groups to account for their stewardship of NHS resources.

Reason for the selected procedure

319. A Parliamentary procedure is considered unnecessary since the use of these powers will be technical and mutable in nature.

Regulations by the Secretary of State

***Power conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

320. As described above, new section 223J gives the Board powers to specify the maximum sums that clinical commissioning groups must not exceed in terms of capital spend, revenue spend, or expenditure on prescribed matters relating to administration.

321. Subsection (3) of new section 223J gives the Secretary of State the power to set, and vary, in regulations the matters relating to administration costs that will be subject to this provision. We envisage that the specification would include the cost of employing or engaging staff to carry out commissioning functions and the cost of paying for an external organisation to provide commissioning support.

Reason for delegating the power

322. Delegating this power is necessary in order for the Secretary of State to provide the required level of detail on what will be taken into account in determining what is meant by administration costs. This is a level of detail which is subject to change and updating (for example, in response to cross-Government changes and requirements linked, for example, to Spending Review settlements) and would not be appropriate for inclusion in primary legislation.

Reason for the selected procedure

323. The Department considers the negative resolution procedure appropriate for regulations under new section 223E(3), because the definition of what can be considered as administrative costs is an important means by which public spending can be controlled, and more than a matter of technical or accounting detail.

New section 223K: Payments in respect of quality

Power conferred on*: Secretary of State*
Power exercised by*: Regulations*
Parliamentary procedure *Negative*

324. Powers under new section 223K will allow the Secretary of State to add procedural detail to the 'quality reward', which is designed to reward clinical commissioning groups for good performance. These powers (under subsection (4)) allow regulations to specify principles or other matters that the Board must or may take into account in assessing the factors, set out in subsections (2) and (3) of new section 223K, used to assess eligibility for a payment. These factors are the quality of services provided during the financial year and improvement in the quality of services when compared with previous financial years; and the outcomes identified during the financial year as having been achieved from the provision at any time of relevant services and improvements in those outcomes in comparison to previous financial years. The Board may also take relevant inequalities and reductions in inequalities identified during the previous financial year into account.

325. In addition, under subsection (5) regulations may prescribe the circumstances in which the Board may decide to reduce a payment or not to make one that it would otherwise have made under subsection (1). For instance, these regulations might allow the Board to decide to reduce or not make a payment if a clinical commissioning group had risked the finances of other groups by overspending. Regulations (under subsection (6)) may also set out how any payment made to a clinical commissioning group in respect of quality may be spent, including on its distribution amongst the group's members.

<u>Reason for delegating the power</u>

326. Given that the content of these regulations may be amended as priorities in the health service change, it is considered inappropriate to set it on the face of the Bill. In addition, provision made under these powers could be complex in nature and therefore more appropriate for regulations.

Reason for the selected procedure

327. Taking account of the value of ensuring transparency and of the procedural nature of these regulations, the negative resolution procedure is considered appropriate.

Clause 25: Requirement for primary medical services provider to belong to clinical commissioning group

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

328. Subsection (1) of this clause amends section 89, and subsection (2) amends section 94, of the NHS Act 2006. This affects the delegated powers provided by those provisions.

329. Currently section 89 of the NHS Act 2006 provides a broad regulation-making power to impose general requirements that must be included in all General Medical Service (GMS) contracts. Section 89(2) provides examples of the areas that may be covered by the regulations such as:

(i) the manner in which, and standards to which, services are to be provided;
(ii) the persons to whom services will be provided;
(iii) the persons who perform services;
(iv) contract variation and enforcement; and
(v) the adjudication of disputes.

330. Section 89(3) (read with section 89(2)(c)) allows regulations to set out the relationship between a contractor and the contractor's patients. The relevant provisions are in Part 2 of Schedule 6 to the GMS Regulations[9] and:

(i) provide a framework to allow patients to register with a contractor;

[9] The National Health Service (General Medical Services Contracts) Regulations 2004 (SI 2004/291).

(ii) allow a contractor to refuse a patient registration (for example in the case of a violent patient);

(iii) provide a framework under which a patient can be assigned to a particular contractor;

(iv) provide for the termination of a contractor's responsibility for patients; and

(v) require all contractors to have in place systems that allow patients to choose the person who will treat them.

331. Section 89(4)(a) allows regulations to make provision about the circumstances in which a GMS contract variation may be imposed, for example where a failure to reach an agreement with a contractor would prevent the Board from fulfilling its statutory duty. These provisions, as they currently relate to Primary Care Trusts, are at paragraph 104 of Schedule 6 to the GMS Regulations.

332. Section 89(4)(b) allows the regulations to make provision about the suspension or termination of a duty under the GMS contract of a prescribed nature. For example, Schedule 2 to the GMS Regulations identifies a number of "additional services" (for example, cervical cytology, contraceptive services, vaccinations and immunisation, child health surveillance and maternity services) that practices can opt not to provide. Schedule 3 of the GMS Regulations details the procedures through which the option can be effected.

333. Section 89(5) allows the services prescribed under subsection (4)(b) to be prescribed by reference to the manner or circumstances in which they are provided.

334. Subsection (1) of this clause inserts new subsections (1A) – (1E) into section 89 of the NHS Act 2006. These new subsections set out further examples of what may be included in the regulations made under this section. They outline matters that relate to the relationship between a GMS contractor and the contractor's clinical commissioning group.

335. New section 89(1A)(a) is in support of the requirement that each contractor that provides services to persons who are registered as patients is to be required to be a member of a clinical commissioning group. New section 89(1A)(b) provides that a contractor may be required to nominate an individual to act on the contractor's behalf in dealings with the clinical commissioning group. This is to ensure that joining the relevant clinical commissioning group

is not a passive act but one that requires participation. New section 89(1A)(c) permits regulations to set out requirements about how the nominated individual carries out those dealings. This could include matters such as engaging regularly with all members of the contractor's practice both to provide information about the activities of the clinical commissioning group and to provide an effective conduit for practice members to feed into the work of the clinical commissioning group and to ensure the active participation of the contractor. New section 89(1A)(d) enables the regulations to provide that the contractor delivers services under the contract with a view to supporting the clinical commissioning group in the delivery of its functions and in meeting its obligations under its constitution, for example a requirement to have regard to the clinical commissioning group's duty to manage its affairs effectively, efficiently and economically.

336. New section 89(1B) provides that regulations under new section 89(1A)(a) may define services by reference to the manner or circumstances in which they are performed.

337. New section 89(1C) provides that regulations can make provisions about the individual responsibilities of members of an ordinary partnership that holds a GMS contract and their relationship with the clinical commissioning group, for instance ensuring that all the partners are responsible for ensuring that the partnership is a member of a clinical commissioning group.

338. New section 89(1D) provides that regulations can include the effect of changes in the constitution of that partnership, for instance when a partner retires or a new partner joins. The arrangements made between the contractor and the clinical commissioning group should not have to be reset each time a new partner joins the contractor or an existing partner leaves or retires.

339. New section 89(1E) provides that the regulations can specify that a person nominated to be the contractor's representative in the clinical commissioning group should be a healthcare professional as defined in section 25(3) of the National Health Service Reform and Health Care Professions Act 2002 and that the representative should comply with any other conditions that may be set out in the regulations. The regulation-making power provides flexibility to take account of any future changes to section 25(3), for example to ensure that appropriate healthcare professionals continue to represent the contractor.

340. Currently, section 94 of the NHS Act 2006 provides a broad regulation-making power to impose general requirements that may be included in Personal Medical Services (PMS) agreements. Section 94(1) requires that the regulations must include a provision that participants other than the Board must be able to withdraw from the agreement if they wish. This provision is currently translated, as it relates to Primary Care Trusts and Strategic Health Authorities, into secondary legislation by paragraph 100 of Schedule 5 of the PMS Regulations.[10]

341. Section 94(3) provides examples of the areas that may be covered by the regulations such as:

(i) that only prescribed services, or prescribed categories of services, may be provided in accordance with section 92 arrangements;
(ii) conditions to be satisfied by persons performing services;
(iii) contract variation and enforcement; and
(iv) provisions allowing parties to a section 92 arrangement to be treated as health service bodies.

342. Sections 94(4) and (5) make provisions relating to the payments that can be made under a PMS agreement. They have broadly similar effect to section 87 (GMS contracts: payments) but there is no equivalent of the extensive GMS payment directions set out in the Statement of Financial Entitlements. The Secretary of State's direction-giving power has been used sparingly in areas such as payments under the flexible careers scheme and the GP retainer scheme.

343. Section 94(6) provides a power, distinct to PMS, which permits regulations to set out the circumstances in which the Board must enter into a GMS contract with an existing PMS contractor who asks to replace an existing contract with a GMS contract. The relevant provision, as it currently relates to Primary Care Trusts and Strategic Health Authorities, is contained in Part 6 of the PMS Regulations.

[10] The National Health Service (Personal Medical Services Agreements) Regulations 2004 (SI 2004/627).

344. Section 94(7) allows regulations to set out the relationship between a contractor and the contractor's patients. The relevant provisions are in Part 2 of Schedule 5 to the PMS Regulations and:

(i) provide a framework to allow patients to register with a contractor;
(ii) allow a contractor to refuse a patient registration (for example in the case of a violent patient);
(iii) provide a framework under which a patient can be assigned to a particular contractor;
(iv) provide for the termination of a contractor's responsibility for patients; and
(v) require all contractors to have in place systems that allow patients to choose the person who will treat them.

345. Subsection (2) of this clause inserts new subsections (3A) – (3E) into section 94. These new subsections set out further examples of what may be included in the regulations made under this section. They outline matters that relate to the relationship between a PMS contractor and the contractor's clinical commissioning group.

346. New section 94(3A)(a) is in support of the requirement that each contractor that provides services to persons who are registered as patients is to be a member of a clinical commissioning group. New section 94(3A)(b) provides that a contractor may be required to nominate an individual to act on the contractor's behalf in dealings with the clinical commissioning group; this is to ensure that joining the relevant clinical commissioning group is not a passive act but one that requires participation. New section 94(3A)(c) permits regulations to set out requirements about how the nominated individual carries out those dealings. This might include matters such as engaging regularly with all members of the contractor's practice both to provide information on the activities of the clinical commissioning group and to provide an effective conduit for the practice members to feed into the work of the clinical commissioning group and ensure the active participation of the contractor. New section 94(3A)(d) enables the regulations to provide that the contract holder delivers services under the contract with a view to supporting the clinical commissioning group in the delivery of its functions and meeting its obligations under its constitution, for example a requirement to have regard to the clinical commissioning group's duty to manage its affairs effectively, efficiently and economically.

347. New section 94(3B) provides that regulations under new section 94(3A)(a) may define services by reference to the manner or circumstances in which they are performed.

348. New section 94(3C) provides that regulations can make provisions about the individual responsibilities of persons who collectively hold a PMS agreement and their relationship with the clinical commissioning group, for instance ensuring that all such persons are responsible for ensuring that the PMS contractor is a member of a clinical commissioning group.

349. New section 94(3D) provides that regulations can include the effect of changes in a group of persons who collectively hold a PMS agreement, for instance when a person leaves or a new person joins. The arrangements made between the contractor and the clinical commissioning group should not have to be reset each time a new person joins the contractor or an existing person leaves.

350. New section 94(3E) provides that the regulations can specify that a person nominated to be the contract holder's representative in the clinical commissioning group should be a healthcare professional as defined in section 25(3) of the National Health Service Reform and Health Care Professions Act 2002 and that the representative should comply with any other conditions that may be set out in the regulations. The regulation-making power will provide flexibility to take account of any future changes to section 25(3), for example to ensure that appropriate healthcare professionals continue to represent the contractor.

Reason for delegating the power

351. The two sections being amended, sections 89 and 94, currently provide broad regulation-making powers and the introduction of the new subsections setting out the relationship between the contractor and the clinical commissioning group do not in themselves justify moving from a delegated regulation-making power to a detailed procedure set out in primary legislation. The detail of the services provided in general practice has been a matter for delegated legislation since the inception of the NHS, a procedure that lends itself to the regular process of consultation held with the profession over the detailed content of these regulations.

352. Setting out these new areas in the regulations provided by sections 89 and 94 would provide clarity for all the parties about these relationships and allow the administrative provisions within the GMS contract and the PMS agreement to apply to any new requirement; examples of relevant administrative provisions are the provision of information, dispute resolution and actions in relation to a breach of the contractual conditions. The alternative would be to set out a completely new regulatory framework to cover this relationship, which we believe is unnecessary and inappropriate

Reason for the selected procedure

353. The delegated powers in sections 89 and 94 are currently subject to the negative resolution procedure. The Department considers that this remains the appropriate Parliamentary procedure, being in keeping with existing equivalent powers and appropriate having regard to the matters to be legislated for.

Further provision about local authorities' role in the health service

Clause 26: Other health service functions of local authorities under the 2006 Act

Dental public health

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

354. Currently section 111 of the NHS Act 2006 contains a regulation-making power to prescribe dental public health functions that must be exercised by Primary Care Trusts. These functions include oral health promotion programmes, dental inspection of pupils in attendance at schools maintained by local education authorities and the provision of oral health surveys. Subsection (2) of clause 26 amends the section, so that the power is to prescribe that such functions are exercisable by local authorities rather than Primary Care Trusts. Functions that are likely to be prescribed under this sub-section include dental inspection in schools and oral health promotion. The existing regulations are the Primary Care Trusts (Dental Public Health) (England) Regulations 2006, SI 2006/185.

Reason for delegating the power

355. The dental public health needs of the population will not remain constant and regulations would allow for flexibility in deciding what dental services will be provided under a General Dental Services (GDS) contract and what services will be provided as part of the local authority dental public health functions to reduce oral health inequalities in that particular area.

Reason for the selected procedure

356. Much of the detail within the regulations will be technical. Unlike the regulations made under new section 6C (see clause 15), the negative procedure is appropriate here given the limited scope of the regulation-making power. The delegated power in question is an established one and not new to the Health and Social Care Bill. The only change the Bill makes is that the regulations will apply to local authorities.

Joint working with the prison service

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

357. Currently section 249 of the NHS Act 2006 gives the Secretary of State the power to make regulations to allow NHS bodies and the prison service to enter into arrangements relating to an NHS body exercising prescribed health-related functions of the prison service and the prison service exercising prescribed functions of the NHS. These arrangements may be entered into only if they are likely to lead to an improvement in the way in which those functions are exercised for prisoner health. This clause provides that local authorities are to be treated as an NHS body for the purposes of section 249 and so gives the Secretary of State the power to make regulations enabling local authorities to enter into arrangements with prison services.

Reason for delegating the power

358. The arrangements made under this clause would enable new and different approaches to the exercise of functions which would need to be reviewed and developed in a flexible manner. Regulations allow for this flexibility. Since local authorities would have the duty to take steps for improving the health of the people in their areas, it is appropriate for them to be considered one of the bodies for whom arrangements can be made.

Reason for the selected procedure

359. Much of the detail within the regulations would be technical. The delegated power in question is an established one and not new to the Health and Social Care Bill. The only change the Bill makes is that the regulations will apply to local authorities.

Clause 27: Appointment of directors of public health

New section 73A: Appointment of directors of public health

Subsection (1)(f)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

360. This clause inserts new section 73A into the NHS Act 2006, to provide for the appointment of directors of public health by local authorities, acting jointly with the Secretary of State. Paragraphs (a) to (e) of new section 73A(1) list the responsibilities of the director of public health who must be appointed under this section. The list covers the various public health functions in the Bill, but paragraph (f) enables the Secretary of State to prescribe in regulations any other functions relating to public health.

Reason for delegating the power

361. The power would enable the Secretary of State to add any public health functions conferred by regulations to the list of functions: for example, the function of providing vitamins under the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 (SI

2005/2362), which is currently conferred on Primary Care Trusts. There may be various functions set out in regulations which need to be covered by this provision, and the list of such additional public health functions exercised by local authorities may change over time. The Department needs the flexibility to be able to include those functions within the responsibilities of the director of public health.

Reason for the selected procedure

362. The power under subsection (1)(f) would enable the Secretary of State to prescribe in regulations any other functions which are to be the responsibility of the director. Those functions would typically be functions specified in regulations made subject to the negative resolution procedure (such as the Healthy Start regulations). The negative procedure would be appropriate here too as the power is limited in nature and confirmed to public health functions. Secondly, conferring existing local authority functions on directors of public health is not of sufficient significance to justify an affirmative procedure. The power is restricted to specifying the functions of the local authority which are the responsibility of an individual officer, not conferring, transferring or modifying the functions themselves.

Subsection (4)

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

363. Subsection (4) of new section 73A gives the Secretary of State the power to direct a local authority to take certain action in relation to the director of public health with a view to addressing or remedying any failure by a director to discharge (or discharge properly) the director's responsibilities under subsection (1)(b) or subsection (1)(c) where the arrangements under section 12 relate to the Secretary of State's functions under section 2A. The Secretary of State must consult the local authority.

364. The Secretary of State may exercise the power if the Secretary of State considers that the director of public health has failed or may have failed to discharge (or discharge properly) the relevant responsibilities. The Secretary of State would be able to use this power to direct

the local authority to review and investigate the alleged failures and the director's performance in relation to those matters, or to consider instituting a process for disciplinary action. The Secretary of State's power would be limited to directing the local authority to consider particular remedial or disciplinary measures. The Secretary of State could also direct the local authority to report back on the action it had taken.

Reason for delegating the power

365. There needs to be a line of accountability between directors of public health and the Secretary of State to ensure a cohesive public health service. This power of direction would allow the Secretary of State to direct a local authority to launch an internal investigation process. This power of direction is less intrusive than a wider power for the Secretary of State to dismiss a director of public health but still maintains a line of accountability.

Reason for the selected procedure

366. The power would enable effective governance and accountability between the Secretary of State and the directors of public health and would relate to individual authorities and the position of individual directors, rather than being a power to make general provision for local authorities. The Department therefore considers a Parliamentary procedure neither appropriate nor necessary.

Clause 28: Exercise of public health functions of local authorities

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

367. This clause inserts new section 73B of the NHS Act 2006 which provides for a local authority to have regard to any document published by the Secretary of State for the purposes of this section and for the Secretary of State to issue guidance in relation to local authorities' public health functions. The powers would be used by the Secretary of State to publish a public health outcomes framework to which local authorities must have regard and to publish guidance. New section 73B(2) specifies the functions where the local authority must have

regard to the document. The list covers the various public health functions in the Bill, but subsection (2)(e) also enables the Secretary of State to prescribe in regulations any other functions relating to public health to which the duty applies.

Reason for delegating the power

368. The power would enable the Secretary of State to ensure that future or existing public health functions conferred by regulations can be the subject of guidance to which local authorities must have regard. There may be various functions set out in regulations which need to be covered by this provision, and the list of such additional public health functions exercised by local authorities may change over time. The Department needs the flexibility to be able to cover those functions in its guidance.

Reason for the selected procedure

369. The negative resolution procedure is appropriate given the limited nature of the power, and consistent with the fact that the public health functions which might be prescribed under subsection 2(e) are likely to be conferred (or to have been conferred) by regulations subject to the negative resolution procedure.

Clause 29: Complaints about exercise of public health functions by local authorities

***Powers conferred on**: Secretary of State*
***Power exercised by**: Regulations*
***Parliamentary procedure**: Negative*

370. This clause inserts new section 73C into the NHS Act 2006 (local authorities and the NHS). New section 73C confers a regulation-making power on the Secretary of State to provide for the handling and consideration of complaints about:

- the exercise by an English local authority of public health functions under the Act;
- the exercise by such an authority of the Secretary of State's public health functions under the Act;

- the exercise by such an authority of other functions relating to public health which are the responsibility of its director of public health; or
- the provision of services by another person following arrangements made by a local authority in exercising these functions.

371. The regulations may also provide for matters such as who may make a complaint and to whom a complaint may be made, the complaints which may or may not be made, and the procedure for making, handling and considering a complaint. Provision may also be made in relation to charges in relation to the consideration of a complaint, making information available to the public about the procedures to be followed, and the disclosure of information or documents. Provision may also be made for a complaint or any matter raised by a complaint to be referred to a Local Commissioner for consideration as to whether to investigate the complaint under their legislation, or to be referred to any other person or body who may take action.

Reason for delegating the power

372. The arrangements for handling and considering complaints could change over time, for example to reflect changing expectations amongst service users. A regulation-making power provides flexibility for the Secretary of State to take account of these changing factors in a way that primary legislation does not. The regulations will also include procedural detail that is not appropriate for the face of the Bill. Very similar regulation-making powers are conferred on the Secretary of State in relation to complaints regarding NHS care or local authority social care – see sections 113 to 115 of the Health and Social Care (Community Health and Standards) Act 2003.

Reason for the selected procedure

373. We envisage that the regulations would largely concern matters of administrative or procedural detail, so the negative resolution procedure would be appropriate. The powers are subject to the same procedure as the powers of the Secretary of State under sections 113 to 115 of the Health and Social Care (Community Health and Standards) Act 2003. The Secretary of State used these powers to make the National Health Service (Complaints) Regulations 2004 (SI 2004/1768), enabling them to be amended in 2006 (SI 2006/2084) and, following

public consultation, for the NHS and adult social care complaints arrangements to be reformed in April 2009, when the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 (SI 2009/309) came into force.

Functions relating to fluoridation of water

Clause 33: Procedural requirements in connection with fluoridation of water supplies

374. Clauses 32-33 transfer the responsibility for proposing, and conducting, consultations on fluoridation schemes from Strategic Health Authorities to local authorities, and transfer the responsibility for contracting for fluoridation schemes from Strategic Health Authorities to the Secretary of State.

375. Clause 33 inserts new sections 88B to 88O into the Water Industry Act 1991. New sections 88B to 88G set out the arrangements for making a new fluoridation proposal. New sections 88I to 88N make similar provision, but for a proposal to vary or terminate arrangements. The new sections provide the following delegated powers.

New section 88D: Additional requirements where other local authorities affected

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

376. Currently, consultation on fluoridation schemes is a function of Strategic Health Authorities, whose areas often cover a complete water distribution zone. Given that local authorities are much smaller in size, it is likely that a number of them would be affected by a proposal made under the arrangements envisaged by the Bill. In addition, local authorities are more democratically accountable than Strategic Health Authorities and the decision to consult on fluoridation must be taken in this context. The power will allow the Secretary of State to specify how a decision on whether to launch a consultation process should be made where more than one local authority is affected.

377. The Bill sets out a number of initial steps that the lead or proposing local authority must take including consulting with relevant water undertakers and the Secretary of State to ensure a proposed scheme is operable and efficient. Once this initial preparatory work has been completed, the proposing local authority must notify any other local authorities which are affected by the proposal and must make arrangements for enabling all affected local authorities to decide whether further steps should be taken. Subsection (4) of new section 88D requires the Secretary of State to make regulations on the arrangements that must be made by a local authority that wishes to take forward a proposal for fluoridation that would affect other local authorities, and on the conditions that must be satisfied before any further steps may be taken in relation to the proposal.

Reason for delegating the power

378. Delegating the power makes it possible to set out in secondary legislation provision that is more detailed than it would be desirable to include in primary legislation. For example, the process for reaching a decision on whether to undertake a consultation may need to vary depending on the number of local authorities affected. The regulations will need to consider the implications of disagreement between the affected local authorities and the process for resolving disagreements. It is the Department's intention that no single local authority should have the power to veto a consultation process if the majority of affected local authorities wish to proceed with a consultation. Delegating the power also provides flexibility to deal with changing circumstances.

Reason for the selected procedure

379. The negative resolution procedure is considered appropriate for the regulation-making power in light of the detailed nature of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulations if it wishes to do so.

New section 88E: Decision on fluoridation proposal

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*

Parliamentary procedure: *Negative*

380. New section 88E contains three regulation-making powers.

381. Once a decision has been taken to proceed with consultation, the local authorities affected would need to consult and ascertain opinion in relation to the proposal, in accordance with requirements set out in regulations made by the Secretary of State under subsection (2) of new section 88E. Subsection (6) permits the Secretary of State to prescribe the procedure to be followed in exercising functions under subsection (2).

382. Subsection (4) of new section 88E states that the fluoridation proposal may not be modified so as to extend the boundary of any area to which it relates, or to add another area, except in circumstances prescribed by the Secretary of State.

383. Subsection (6) of new section 88E provides for the Secretary of State to make regulations specifying the factors which local authorities must consider in deciding whether to proceed with a fluoridation proposal following any requirements to consult or ascertain opinion. Secondly, the Secretary of State may prescribe the procedure followed in reaching that decision.

Reason for delegating the power

384. The regulations would make detailed provision about the process that local authorities should follow when carrying out a consultation exercise and the factors that should be considered post-consultation in reaching a decision whether to fluoridate or not. It seems appropriate for such details to be set out in secondary, rather than primary, legislation.

Reason for the selected procedure

385. The negative resolution procedure is considered appropriate for the regulation-making powers in light of the technical content of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulations if it wishes to do so.

New section 88F: Decision-making procedure: exercise of functions by committee

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

386. New section 88F requires that, unless the proposal affects only a single authority or affects more than one authority, but the other authorities do not wish to participate in the decision, the affected local authorities must set up joint committees to consult on a proposal for fluoridation and make the final decision as to whether to request the Secretary of State to make the necessary arrangements. Where more than one local authority is involved, they might choose to set up a joint 'supra' Health and Wellbeing Board or arrange for an existing joint committee to exercise the fluoridation functions. Subsection (4) of new section 88F allows the Secretary of State to make provision for:

- the membership of a joint committee established under new section 88F (including provision as to qualification and disqualification of membership and the holding and vacating of office as a member);
- establishing the membership of a joint sub-committee of Health and Wellbeing Boards;
- the procedures to be followed by any joint committee, or any joint sub-committee of Health and Wellbeing Boards, in exercising the fluoridation functions.

387. Subsection (4) of new section 88F would also allow the Secretary of State to ensure that where the affected local authorities want to arrange for an existing joint committee of the authorities to exercise fluoridation functions, the existing committee must still meet prescribed conditions as to its membership. It will be important to ensure that the joint committee (in whatever manifestation it takes) has a broad range of representatives.

<u>Reason for delegating the power</u>

388. The regulations would make detailed provision about the process that local authorities should follow when establishing joint committees. It seems appropriate for such details to be set out in secondary, rather than primary, legislation

Reason for the selected procedure

389. The negative resolution procedure is considered appropriate for the regulation-making power in light of the detailed nature of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulation if it wishes to do so.

New section 88I: Variation or termination or arrangements under section 87(1)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

390. New section 88I provides powers to make regulations in relation to the variation or termination of fluoridation schemes.

391. Under usual circumstances, the Secretary of State may not vary arrangements for fluoridation unless a proposal has been made by the affected local authorities. Nor can the Secretary of State give notice to a water undertaker to terminate arrangements unless a termination proposal is made by the affected local authorities. There may however be circumstances where the Secretary of State should be able to vary or terminate without a proposal from a local authority: for example, if (against all evidence to date), risks to general health were identified from fluoridation and it became necessary to 'switch off' the supply without delay. Subsection (4) enables the Secretary of State to specify in regulations cases where this applies.

392. In addition, subsection (6) allows the Secretary of State to specify in regulations that where a termination proposal is made in relation to arrangements, no further termination proposal may be made in relation to the arrangements until the end of a specified period. As the consultation process would be costly a group of local authorities should not be expected to undertake another consultation or a series of consultations on terminating a fluoridation scheme at unreasonably short intervals.

Reason for delegating the power

393. The regulations made under subsection (4) deal with detail that cannot necessarily be predicted and may need to change as new evidence emerges for example, in relation to recommended levels of fluoride concentration.

394. Regulations under subsection (6) will make detailed provision in relation to termination procedures. It seems appropriate for such details to be set out in secondary, rather than primary, legislation

Reason for the selected procedure

395. The negative resolution procedure is considered appropriate for the regulation-making power in light of the detailed nature of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulation if it wishes to do so.

New section 88K: Additional requirements where other local authorities affected

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

396. As well as consulting on proposals to launch a fluoridation scheme, local authorities will be required to consult on proposals to vary or terminate a scheme. A variation might apply where the water undertaker has to carry out changes to the engineering of the water distribution system which would result in changes in the area receiving fluoridation water.

397. In most circumstances, the process for initiating a consultation relating to fluoridation will be the same whether the consultation is on the introduction of a new scheme or varying or terminating an existing scheme. However, there are circumstances where it would be an inappropriate use of time and resources to establish joint decision-making processes, for example, where there are minor variations to be made in the boundaries of an existing

fluoridation scheme. The Water Fluoridation (Consultation) (England) Regulations 2005 (SI 2005/921) already contain similar provision.

398. New section 88K (3) imposes a duty on the proposer to make arrangements for enabling the authorities affected by a proposal to decide whether further steps should be taken.

399. There are relevant regulation-making provisions relating to new section 88K(3). First, new section 88K(4) gives the Secretary of State the power to make regulations which describe the circumstances where the requirements under subsection 88K(3) do not apply. Secondly, section 88K(6) requires the Secretary of State to make regulations relating to the arrangements that must be made for the purposes of subsection (3). Those regulations must also prescribe the conditions with respect to the outcome of the arrangements which must be satisfied before any further steps can be taken in relation to the proposal.

Reason for delegating the power

400. Delegating the powers makes it possible to set out in secondary legislation provision that is more detailed then it would be desirable to include in primary legislation. Having a regulation-making power will enable different provision to be made for different cases – for example, a minor variation might be subject to provision different from that for a major variation. The regulations made under subsections (4) and (6) deal with detail that cannot necessarily be predicted and may need to change as new evidence emerges. It seems appropriate for such details to be set out in secondary, rather than primary, legislation

Reason for the selected procedure

401. The negative resolution procedure is considered appropriate for the regulation-making power in light of the detailed nature of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulations if it wishes to do so.

Directions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

402. As well as the regulation-making power outlined above in new section 88K(4), new section 88K(5) gives the Secretary of State a power to give directions (by instrument in writing) to specify the circumstances when a proposing local authority does not need to make arrangements to enable all affected local authorities to come together to decide on next steps. This direction-giving power in many ways replicates the regulation-making power but is likely to be used in different circumstances. The direction may apply generally or in relation to a particular proposal

Reason for delegating the power

403. Directions made under subsection (5) deal with detail that cannot necessarily be predicted and may need to change as new evidence emerges. Directions are likely to be used where the circumstances dictate that a termination or variation must take place quickly for reasons of population safety or where there are circumstances that affect an individual area where the reason for disapplying subsection (3) would not be applicable at a national level (that is, that it would be inappropriate to include in the regulations).

Reason for the selected procedure

404. The proposed power is a power of direction which is not subject to Parliamentary procedure. We consider that this is appropriate given the administrative nature of directions likely to be made under this power. The direction-giving power would also allow the Secretary of State to react quickly to any issues concerning water safety.

New section 88L: Decisions on variation or termination proposal

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

405. The provisions in new section 88L broadly mirror those of new section 88E which is about the steps that must be taken in relation to consultation and ascertaining opinion and the subsequent decision-making. Once a decision has been taken to proceed with a proposal to vary or terminate arrangements, the affected local authorities would need to consult and ascertain opinion in relation to the proposal, in accordance with requirements set out in regulations made by the Secretary of State under subsection (2) of new section 88L. Subsection (8) permits the Secretary of State to prescribe the procedure to be followed in exercising functions under subsection (2). Under subsection (3) the Secretary of State may disapply the duty in subsection (2).

406. Subsection (6) of new section 88L states that the fluoridation may not be modified so as to extend the boundary of any area to which it relates, or to add another area, except in circumstances prescribed by the Secretary of State.

407. Subsection (7) requires a proposer to take a decision as to whether or not to ask the Secretary of State to vary or terminate arrangements. Subsection (8) of new section 88L provides for the Secretary of State to make regulations specifying the factors which local authorities must consider in reaching such a decision and secondly, enables the Secretary of State to set out the procedure followed.

Reason for delegating the power

408. The regulations would make detailed provision about the processes that local authorities should follow when carrying out a consultation exercise and the factors that should be considered post-consultation in reaching a decision whether to fluoridate or not. It seems appropriate for such details to be set out in secondary, rather than primary, legislation.

Reason for the selected procedure

409. The negative resolution procedure is considered appropriate for the regulation-making power in light of the content of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulation if it wishes to do so.

Directions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

410. As well as the regulation-making power outlined above in new section 88L(3), new section 88L(4) gives the Secretary of State a power to give directions (by an instrument in writing) to specify the circumstances when a proposing local authority does not need to make arrangements to enable all affected local authorities to come together to decide on next steps in relation to a termination proposal. This direction-giving power is more limited than the regulation-making power in subsection (3), and is likely to be used in different circumstances. The direction may apply generally or in relation to a particular proposal.

Reason for delegating the power

411. Directions made under subsection (4) would deal with detail that cannot necessarily be predicted and may need to change as new evidence emerges. Directions are likely to be used where the circumstances dictate that a termination of a fluoridation scheme must take place quickly for reasons of population safety or where there are circumstances that affect an individual area where the reason for disapplying subsection (2) would not be applicable at a national level (that is, would be inappropriate to include in the regulations).

Reason for the selected procedure

412. The proposed power is a power of direction which is not subject to Parliamentary procedure. We consider that this is appropriate given the administrative nature of directions likely to be given under this power. The direction-giving power would also allow the Secretary of State to react quickly to any issues concerning water safety.

New section 88M: Decision-making procedure: exercise of functions by committee

413. The provisions in new section 88M broadly mirror those of new section 88F which define the requirements relating to the decision-making committee. New section 88M requires that,

unless the proposal affects only a single authority or affects more than one authority, but the other authorities do not wish to participate in the decision, the affected local authorities must set up joint committees to consult on a variation or termination proposal and make the final decision as to whether to request the Secretary of State to vary or terminate the arrangements. Where more than one local authority is involved, they might choose to set up a joint, 'supra' Health and Wellbeing Board or arrange for an existing joint committee to exercise the fluoridation functions. New section 88M contains the following delegated powers

Subsection (3)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

414. New section 88M (2) imposes a duty on the proposer to make arrangements for an existing joint committee, a new joint committee or a joint subcommittee of the relevant Health and Wellbeing Boards to exercise decision-making functions under section 88L. New section 88M(3) gives the Secretary of State the power to make regulations which describe the circumstances where the requirements under subsection 88M(2) do not apply.

Reason for delegating the power

415. Delegating the powers makes it possible to set out in secondary legislation provision that is more detailed then would be desirable to include in primary legislation. Having a regulation-making power enables different provision to be made for different cases – for example, a minor variation might be subject to provision different from that for a major variation. Regulations made under subsection (3) will deal with detail that cannot necessarily be predicted and may need to change as new evidence emerges. It seems appropriate for such details to be set out in secondary, rather than primary, legislation

Reason for the selected procedure

416. The negative resolution procedure is considered appropriate for the regulation-making power in light of the detailed nature of the regulations in question. The negative resolution

procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulations if it wishes to do so.

Subsection (4)

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

417. As well as the regulation-making power outlined above in new section 88M(3), new section 88M(4) gives the Secretary of State a power to give directions (in an instrument in writing) to specify the circumstances when a proposing local authority does not need to make arrangements to enable all affected local authorities to come together to decide on next steps. This direction-giving power in many ways replicates the regulation-making power but is likely to be used in different circumstances. The direction may apply generally or in relation to a particular proposal

Reason for delegating the power

418. Directions are likely to be used where the circumstances dictate that a termination or variation must take place quickly for reasons of population safety or where there are circumstances that affect an individual area where the reason for disapplying subsection (2) would not be applicable at a national level (that is, would be inappropriate to include in the regulations).

Reason for the selected procedure

419. The proposed power is a power of direction which is not subject to Parliamentary procedure. We consider that this is appropriate given the administrative nature of directions likely to be made under this power. The direction-giving power would also allow the Secretary of State to react quickly to any issues concerning water safety.

Subsection (6)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

420. Subsection (6) of new section 88M allows the Secretary of State to make provision for:

- the membership of a joint committee established under new section 88M (including provision as to qualification and disqualification of membership and the holding and vacating of office as a member);
- establishing the membership of a joint sub-committee of Health and Wellbeing Boards;
- the procedures to be followed by any joint committee, or any joint sub-committee of Health and Wellbeing Boards, in exercising the fluoridation functions.

Paragraph (a) of subsection (6) of new section 88M would also allow the Secretary of State to ensure that where the affected local authorities want to arrange for an existing joint committee of the authorities to exercise fluoridation functions, the existing committee must meet prescribed conditions as to its membership. It will be important to ensure that the joint committee (in whatever manifestation it takes) has a broad range of representatives.

Reason for delegating the power

421. The regulations would make detailed provision about the process that local authorities should follow when establishing joint committees. It seems appropriate for such details to be set out in secondary, rather than primary, legislation

Reason for the selected procedure

422. The negative resolution procedure is considered appropriate for the regulation-making power in light of the detailed nature of the regulations in question. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulation if it wishes to do so.

New section 88O: Power to make regulations as to maintenance of section 87 arrangements

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

423. New section 88O covers regulation-making powers in relation to consultation on the maintenance of existing fluoridation arrangements.

424. The Secretary of State may by regulations prescribe circumstances in which arrangements for consulting on the maintenance of existing fluoridation schemes must be made. The regulations must make provision requiring the Secretary of State to give notice to the water undertaker under section 87C(7) of the Water Industry Act if the local authorities do not want to maintain a fluoridation scheme and the Secretary of State is satisfied that any requirements imposed by regulations have been made. Subsection (4) provides that the regulations may make provision corresponding or similar to any requirements imposed by or under sections 88K to 88M.

425. The Water Fluoridation (Consultation) (England) Regulations 2005 (SI 2005/921) currently include criteria for determining when consultation is required on maintaining or continuing existing schemes. The current regulations provide that consultation is required for the continuation of a scheme if it involves the upgrading or the replacement of fluoridation plant unless it is for the purpose of meeting operational or health and safety standards.

Reason for delegating the powers

426. Delegating the powers make it possible to set out in secondary legislation provision that is more detailed then would be desirable to include in primary legislation. It seems appropriate for such details to be set out in secondary, rather than primary, legislation

Reason for the selected procedure

427. The negative resolution procedure is considered appropriate for the regulation-making power in light of the technical nature of the regulations in question. The negative resolution

procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulation if it wishes to do so.

Functions relating to mental health matters

Clause 35: Approval functions

Power conferred on: *Secretary of State*
Power exercised by: *Instructions, given in such form as the Secretary of State determines, and requirements imposed by the Secretary of State.*
Parliamentary procedure: *None*

428. This clause inserts new sections 12ZA and 12ZB into the Mental Health Act 1983 (the 1983 Act). Both new sections relate to the Secretary of State's power to approve people for the purposes of the Act under section 12 (section 12 doctors) or section 145 (approved clinicians).

429. Certain decisions under the 1983 Act may only be taken by people who have been so approved. For example, an application cannot be made to detain a patient under the Act unless it is supported by two medical recommendations, one of which is given by a section 12 doctor. Similarly, only an approved clinician can be the "responsible clinician" in overall charge of the case of a patient detained for treatment under the Act.

430. At present, both these approval functions are delegated by the Secretary of State to Strategic Health Authorities by means of directions under section 7 of the NHS Act 2006[11]. The Secretary of State could also use directions under that section to delegate the functions to Primary Care Trusts or a Special Health Authority, but has chosen not to do so (although, in the case of approved clinicians, the Secretary of State's directions permit Strategic Health Authorities themselves to delegate the function to Primary Care Trusts).

431. Under the proposals in the Bill, Strategic Health Authorities and Primary Care Trusts are to be abolished. New section 12ZA therefore empowers the Secretary of State to arrange with any willing party for that party to exercise either or both of the approval functions, in general or

[11] In respect of section 12 doctors, see regulation 3(3) of and Schedule 2 to (as well as regulation 7 of) the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002 (SI 2002/2375). In respect of approved clinicians, see The Approved

only to a more limited extent (for example, only in respect of a particular area of England). The section does not place any limits on who that other party might be. It could, for example, be a statutory regulatory body, a professional body, or even a body formed specifically for the purpose.

432. New section 12ZB empowers the Secretary of State to require the Board or a Special Health Authority to exercise one or both of the approval functions.

433. It would also be possible for approval functions to be exercised concurrently both by parties to an agreement under section 12ZA and by the Board or a Special Health Authority under section 12ZB.

434. Whether they are exercising the approval functions by agreement under section 12ZA or as a result of a requirement under section 12ZB, the people exercising that function would be required to comply with instructions given to them by the Secretary of State.

435. That is intended in part to allow the Secretary of State to ensure consistency in the way that approval functions are exercised (if, as now, they are being exercised by more than one body or person). It would also allow the Secretary of State to establish rules about matters such as the qualifications and competencies that people must have to be approved, the period for which they may be approved, the training they must undertake, and the records which must be kept about their approval.

436. The Department has in mind that these instructions will take the place of the current directions to Strategic Health Authorities about approved clinicians. Those directions are, in effect, a set of national rules for approval, and (amongst other things) are the means by which the Secretary of State has determined the professions from which approved clinicians may be drawn. (Although his powers under section 7 of the NHS Act 2006 allow him to do so, the Secretary of State does not currently set any equivalent national rules for the approval of section 12 doctors. But the ability to issue instructions would, in effect, preserve the power to set such rules, should the Secretary of State think it appropriate.)

Clinician (General) Directions 2008, available at www.dh.gov.uk/en/Healthcare/Mentalhealth/InformationontheMentalHealthAct/DH_106657

437. It would be for the Secretary of State to determine the form in which instructions under these new provisions are given. But the Department recognises that the instructions might well contain information of great significance to people who wished to be approved and to the patients about whom those people will be empowered to make decisions as a result of being approved. For that reason, the new sections 12ZA and 12ZB require the Secretary of State to publish the instructions.

438. The Secretary of State would also have a specific power (in section 12ZA(6)) to instruct a party to an agreement under section 12ZA to stop exercising an approval function (either completely, or to a specified extent). That is necessary to ensure that an agreement with the Secretary of State could never confer on another party a contractual right to go on exercising an approval function against the Secretary of State's wishes.

439. There would be no equivalent power for the Secretary of State to instruct the NHS Board or a Special Health Authority to stop exercising approval functions under section 12ZB, because in that case the Secretary of State would instead be able to vary (or remove) the requirement on that body to exercise the functions.

440. The Secretary of State would not be required to publish instructions to parties to agreements under section 12ZA to stop exercising approval functions. But in practice it would almost always be necessary for the Secretary of State to ensure that details of the changed arrangements for approval are disseminated to those who need to know about them, just as he would need to ensure that people know which bodies have, at any time, agreed, or been required, to exercise approval functions, and for what purposes.

<u>Reason for delegating the power</u>

441. The Department believes it is important, and consistent with current practice, that the Secretary of State should continue to be able to arrange for other people in practice to exercise these approval functions, and to set rules for how they do so. The Department of Health may well not be best placed to exercise the functions by itself, and the Secretary of State should be free to make alternative arrangements for their exercise if appropriate.

442. Although exercised now by Strategic Health Authorities by virtue of the NHS Act 2006, these approval functions are not confined to people providing NHS services, nor can they properly be categorised as NHS commissioning functions. For that reason, the Department has sought to provide flexibility for the Secretary of State either to continue to require an NHS body (in future, the Board or a Special Health Authority) to exercise these functions, or else to reach agreement with another party who may be outside the NHS.

Reason for the selected procedure

443. As explained above, instructions under sections 12ZA and 12ZB and requirements under section 12ZB would, in effect, take the place of directions to Strategic Health Authorities under the NHS Act 2006, but with the difference that the recipient of the instructions would, under section 12ZA, be exercising the function by agreement. Like those directions, instructions and requirements would not be made by statutory instrument, nor require any Parliamentary procedure. Instructions (apart from those telling a party to stop exercising approval functions) would, however, have to be published by the Secretary of State. In practice, the Department of Health is likely to publish them on its website (as it does with current directions).

444. The matters dealt with in instructions and requirements under these provisions would be of a largely administrative and technical nature. They are also matters which, if the Secretary of State were to decide to exercise these powers directly through the Department of Health, would not be dealt with in delegated legislation at all. The Department therefore considers it appropriate to continue the current approach of not requiring these matters to be subject to a Parliamentary procedure. The Department believes that the approach of using directions has worked to date without difficulty, and it would be disproportionate in future to require a statutory instrument to be used for instructions or requirements under the new arrangements. It would be particularly inflexible to require a statutory instrument to be used for instructions requiring a party to an agreement to stop exercising functions, as it might be necessary for the Secretary of State to issue those instructions without delay, if a serious problem were to be identified

Clause 37: After-care

Power conferred on: *Secretary of State*

Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

445. This clause amends section 117 of the 1983 Act. That section places a duty on Primary Care Trusts (in England), Local Health Boards (in Wales) and local social services authorities (in both England and Wales) to provide after-care for people who have been detained in hospital for treatment for mental disorder under that Act. After-care is not defined in section 117, but, in practice, the after-care provided by the NHS under section 117 consists of the same range of services provided under other powers to other patients, whose needs are identical, but who happen not to be covered by section 117.

446. The main effect of this clause is to transfer the duty on Primary Care Trusts to clinical commissioning groups.

447. Currently, section 117(3) says that responsibility falls on the local social services authority and the Primary Care Trust (or Local Health Board) for the area in which the person concerned "is resident or to which he is sent on discharge by the hospital in which he was detained". Case-law[12] has established that, in most cases, this means that the duty falls on the local social services authority and Primary Care Trust (or Local Health Board) for the area in England or Wales where the person was resident before being detained (whether or not that body is responsible for other aspects of the person's health or social care.) If there is no such area, the duty falls on the authorities for the area to which the person is sent on leaving hospital.

448. The amendments mean that section 117(3) would apply to clinical commissioning groups as it does now to Primary Care Trusts. However, subsection (4) of this clause inserts a new section 117(2G) giving the Secretary of State the power to make regulations conferring the duty on another clinical commissioning group, or on the Board, instead.

449. The purpose of this regulation-making power is to allow the Secretary of State to align commissioning responsibilities under section 117 as closely as possible with those for other NHS services. At present, section 117 is anomalous in the way it distributes responsibility between Primary Care Trusts. That can result in one Primary Care Trust being responsible for

a patient's section 117 after-care even though another Primary Care Trust is responsible for all other aspects of the patient's mental and physical health care. This is not the only anomalous result of the way section 117 is currently drafted. The intention behind this clause generally is to integrate section 117 as far as possible into the mainstream of the new NHS commissioning architecture, thereby minimising those anomalies.

450. In practice, the Secretary of State has in mind to use these regulations to align the distribution of clinical commissioning groups' responsibilities under section 117 as closely as possible with those under section 3 of the NHS Act 2006. As amended by provisions earlier in the Bill, section 3 places a duty on clinical commissioning groups to commission various services to meet the reasonable requirements of persons for whom they are responsible.

451. It would not be possible to align responsibilities entirely with section 3, as section 117(3) means that there would still be certain patients for whom clinical commissioning groups are responsible under section 117 but for whom no clinical commissioning group is responsible under section 3 of the NHS Act because they are resident and registered with a GP in Wales. It is for the same reason that a separate regulation-making power is proposed, rather than inserting on the face of section 117 a direct reference to the way that responsibilities are distributed between clinical commissioning groups under section 3.

452. The Secretary of State also has in mind to use these regulations to require the Board to commission services under section 117 in place of clinical commissioning groups where the services in question are of a kind which the Board, rather than clinical commissioning groups, is required to commission under the NHS Act 2006, by virtue of regulations under section 3A of that Act (as inserted by an earlier provision of the Bill). The Department thinks it would be anomalous and inefficient for responsibility for commissioning such services to lie with a clinical commissioning group, rather than the Board, just because they happened to fall to be arranged under section 117.

<u>Reason for delegating the power</u>

[12] R. v Mental Health Review Tribunal, ex p. Hall [1999] 3 All ER 132.

453. As the Board's commissioning responsibilities under the NHS Act 2006 are to be determined in regulations, the Department considers it would be impracticable for the Board's responsibilities under section 117 to be set out on the face of the legislation. Similarly, the distribution of responsibility between clinical commissioning groups under section 3 of the NHS Act may be determined, at least in part, in regulations. Again, the Department believes it would be impractical – and likely to lead to new anomalies – if there were not a corresponding regulation-making power in respect of section 117.

454. For the same reason, this clause inserts a new subsection (2I) into section 117 to say that the general provisions in section 272(7) and (8) of the NHS Act about the scope of regulations under that Act also apply to these proposed new regulations. That is intended to ensure that there is no obstacle to using these regulations to align responsibilities under section 117 as closely as possible with those under the NHS Act.

Reason for the selected procedure

455. The Department considers the negative resolution procedure to be appropriate. The regulations will distribute responsibility between NHS bodies, but will not change the nature of the duty owed to patients under section 117. It would also be anomalous for these regulations to be subject to a procedure different from that for regulations under sections 3 and 3A of the NHS Act.

Emergency powers

Clause 44: Secretary of State's emergency powers

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless made in regulations, which case negative)*

456. Currently, section 253 of the NHS Act 2006 confers on the Secretary of State the power to give directions to any body or person exercising functions under the Act (other than NHS foundation trusts), where he considers it necessary by reason of an emergency to do so in order to ensure that a service under the Act is provided. Clause 43 amends the section so as

to extend the Secretary of State's powers and make them consistent with the new framework for the health service provided for by the Bill. For example, under the Bill, unlike the existing position under section 8 of the NHS Act, the Secretary of State will not have a general power to give directions to NHS bodies about how they exercise their functions.

457. Subsection (2) amends section 253 so that the Secretary of State can give a direction under the section where he considers it is appropriate, not just necessary, to do so by reason of an emergency. In addition, the effect of the amendment is that the power is not limited to giving directions to ensure that a service is provided. Subsection (3) provides that the Secretary of State's power to direct applies to all NHS bodies except Local Health Boards (which are Welsh NHS bodies) – that is, it covers the NHS Commissioning Board, clinical commissioning groups, Special Health Authorities NHS trusts and NHS foundation trusts. The power also applies to the National Institute for Health and Care Excellence (NICE), the Health and Social Care Information Centre (the Information Centre) and any other body or person providing services in pursuance of arrangements made by the Secretary of State under section 12, the NHS Commissioning Board or a clinical commissioning group under section 3, 3A, 3B or 4 or Schedule 1, by a local authority for the purposes of the exercise of its functions under or by virtue of section 2B or 6C(1) of Schedule 1, or by the NHS Commissioning Board, a clinical commissioning group or a local authority by virtue of section 7A. This covers all providers of NHS or public health services commissioned as part of the health service in England, other than providers of primary care services.

458. Subsection (4) substitutes new subsections (2) and (2A) of section 253 and specifies how the direction-giving powers may be exercised. A distinction is made between NHS bodies, NICE and the Information Centre, on the one hand, and a provider of NHS services on the other. In relation to NHS bodies, NICE and the Information Centre, the Secretary of State may direct the body about the exercise of any of its functions; to cease to exercise its functions; to exercise its functions concurrently with another body; or to exercise the functions of another body under the NHS Act. In relation to providers, the power is more limited and the Secretary of State can direct the provider about the provision of NHS services by the provider; to cease to provider services; or to provide additional services. This ensures that the Secretary of State may give directions to both NHS bodies and providers of NHS and public health services not only regarding their own activities but also to ensure coordination between bodies in exercising

their activities in times of emergency. Subsection (5) allows the Secretary of State to direct the Board to exercise the Secretary of State's powers of direction.

459. Subsection (6) removes the exclusion of NHS foundation trusts from the Secretary of State's emergency powers. Subsection (7) amends the NHS Act so that directions under this provision can be given either in writing or by regulations, as with certain other directions under the NHS Act 2006.

Reason for delegating the power

460. Emergencies, by their very nature, often require the power to respond rapidly in situations that may have been unforeseen, so a specific requirement could not be written into primary legislation. There is also the requirement to retain a flexible response to rapidly changing situations.

Reason for the selected procedure

461. The directions may be given by an instrument in writing or by regulations subject to the negative resolution procedure. The Secretary of State's existing emergency powers in section 253 of the NHS Act 2006 may be given only by an instrument in writing, not subject to any Parliamentary procedure. In the Department's view, powers of direction in writing are the most appropriate procedure to use where there is a need to act quickly and flexibly in an emergency, particularly where the emergency may threaten health or safety, or the effective operation of the health service. Unlike the existing powers, however, there is provision for the directions to be given by regulations subject to the negative resolution procedure. This recognises that a Parliamentary procedure may be appropriate in certain cases: for example, if substantial burdens are to be placed on private providers in addition to their existing contractual requirements.

Miscellaneous

Clause 45: New Special Health Authorities

Power conferred on: *Secretary of State*

Power exercised by: *Order*
Parliamentary procedure: *Negative to create a Special Health Authority, affirmative to extend its existence*

462. This clause inserts new section 28A into the NHS Act 2006. New section 28A applies in relation to an order under section 28 of the National Health Service Act 2006, which provides for the establishment of Special Health Authorities. New section 28A puts limitations on the Secretary of State's power when establishing these bodies. The new provision would apply to all such Authorities established after this provision is brought into force.

463. Under new section 28A, an order setting up a Special Health Authority must include provision for its abolition within three years of its establishment (subsections (2)(a) and (3)). The order must also include provision allowing for the transfer of the Authority's staff, property and liabilities on its abolition (subsection (2)(b)).

464. The Secretary of State would be able, by an order made in advance of the date fixed for abolition, to vary the terms of the order setting up the Special Health Authority (subsection (4)). However, if in doing so he sets a later date for abolition of the Authority, that date must be within three years of the date previously set for abolition (subsection (5)) and the order making the variation would be subject to the affirmative resolution procedure (subsection (6)).

Reason for delegating the power

465. These powers would allow the Secretary of State to establish a Special Health Authority for a specific function, but only for a time-limited period. The time limit is intended to maintain a stable system architecture by ensuring that when a Special Health Authority is required for a specific purpose, it does not continue to exist once that purpose has been met. This is a limitation on the existing delegated power, under which the Secretary of State may establish a Special Health Authority without any 'sunset' provision for its abolition.

Reason for the selected procedure

466. The negative resolution procedure is the existing procedure for a Special Health Authority establishment order and continues to be appropriate. In order to discourage the

proliferation of Special Health Authorities without Parliament's agreement, however, the provision for extending their lifespan beyond the initial three year period would be subject to the affirmative resolution procedure.

Clause 46: Primary care services: directions as to exercise of functions

467. This clause amends sections in the NHS Act 2006 that deal with primary care services. It makes the following changes to delegated powers.

Sections 98A (1), (2, (3) & (4), section 114A (1) and (2), section 125A (1), (2), (3) & (4) and 168A (1) & (2)

Power conferred on: *Secretary of State and the NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None*

Sections 98A(5) and 125A(5)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

468. Primary care services encompass four distinct disciplines: primary medical services, primary dental services, primary ophthalmic services and pharmaceutical services, as set out in Parts 4 – 7 of the NHS Act 2006. These services are generally provided by independent contractors and Parts 4 – 7 of the Act currently set out a range of delegated powers that are used to set the details of how those services are to be provided. In addition, the Secretary of State utilises his general direction-giving powers in sections 7 and 8 of the Act to set out some day-to-day operational relationships and requirements, for instance the Optical Vouchers (Cessation of Payments) Functions Directions.

469. Further examples can be found across the medical, dental, ophthalmic and pharmaceutical provisions. For instance, in primary medical services a number of directions have been issued pursuant to section 7 and section 8 powers, of which examples are:

- the Alternative Provider Medical Services Directions 2010;
- the NHS (General Medical Services – Premises Costs) (England) Directions 2004;
- the Directions to Primary Care Trusts in relation to their functions relating to primary medical services.

470. The latter directions contain important provisions that provide that Primary Care Trusts must assign a person to a contractor's list of patients where that person cannot find a contractor (or a new contractor) who will accept them as a registered patient.

471. Under the proposals in the Bill, the Secretary of State's section 7 and 8 direction-giving powers, as they apply to Primary Care Trusts and Strategic Health Authorities, will be repealed. This clause inserts new sections 98A, 114A, 125A and 168A into the NHS Act 2006 to provide new powers of direction, limited in scope to primary care services, to be exercised by the Secretary of State in respect of the Board and the Board in respect of clinical commissioning groups. These delegated powers are intended to ensure that administrative flexibility within primary care is retained as the move is made to the new NHS structures:

472. New sections 98A(1), 114A(1), 125A(1) and 168A(1) provide that the Secretary of State may direct the Board to exercise his functions relating to primary medical services, primary dental services, primary ophthalmic services and pharmaceutical services respectively on his behalf. Sections 98A(2), 114A(2), 125A(2) and 168A(2) provide that the Secretary of State may direct the Board as to how it exercises any functions relating to primary medical services, primary dental services, primary ophthalmic services and pharmaceutical services, including those functions that the Secretary of State has directed the Board to carry out.

473. New section 98A(3) provides that the Board may direct a clinical commissioning group to exercise the Board's functions relating to the provision of primary medical services on its behalf and section 98A(4) provides that the Board may direct the clinical commissioning group as to how it exercises any function relating to primary medical services, including those functions that the Board has directed the clinical commissioning group to carry out. It is envisaged that the Board would be able to involve clinical commissioning groups in commissioning and managing primary medical care services to enable it to take advantage of local intelligence and the relationships between individual practices and the clinical

commissioning group of which they are members. It is envisaged that clinical commissioning groups will play some part in monitoring primary medical service contractors and that they may have a role in commissioning some enhanced primary medical services on behalf of the Board.

474. New section 125A(3) provides that the Board may direct a clinical commissioning group, a Special Health Authority or other prescribed body to exercise the Board's functions relating to the provision of primary ophthalmic services on its behalf. New section 125A(4) provides that the Board may direct the clinical commissioning group, Special Health Authority or other prescribed body as to how a clinical commissioning group, a Special Health Authority or any such other prescribed body is to exercise of any function in relation to the provision of primary ophthalmic services including those functions that the Board has directed it to carry out. The directions given will be a matter for the Board but may, for example, include directions to another body to make payments on its behalf.

475. New section 98A(5) permits regulations to set out functions that the Board cannot direct a clinical commissioning group to exercise on behalf of the Board. For example, it would not be appropriate for the Board to empower a clinical commissioning group to enter into contracts for the provision of mainstream primary medical services or to empower a clinical commissioning group to terminate primary medical services contracts on behalf of the Board.

476. Similarly, new section 125A(5) permits regulations to set out functions, or functions of such description, that the Board cannot direct a clinical commissioning group, a Special Health Authority or such other body as may be prescribed to exercise on the Board's behalf.

477. New sections 98A(6) and 125A(6) permit the Board to provide information to a clinical commissioning group, or to a Special Health Authority or other such prescribed body. However, the supply of information is limited to that which the Board consider is necessary to enable or assist the relevant organisation to exercise the function that the Board has directed it to carry out. For instance, the ability to exchange limited information in this way is essential if the clinical commissioning group is to be an effective partner in managing primary medical service contracts. It is also essential that, for example, a clinical commissioning group is required to feed back what it learns in exercising these functions and that the Board can act on this feedback: new sections 98A (7) and (8) and 125A (7) and (8) make appropriate provision for this.

478. No power has been taken permitting the Board to direct a clinical commissioning group in relation to primary dental services or pharmaceutical services, as the clinical commissioning group is to have no role in the provision or management of these contracted services.

Reason for delegating the power

479. The details set out in previous directions under sections 7 and 8 have normally related to administrative, operational and technical matters, such as fees and allowances or specific Primary Care Trust responsibilities linked to the primary care service such as helping individuals find a GP. Other examples could include directing the Board about such matters as maintaining pharmaceutical lists or setting up Local Pharmaceutical Schemes. All of these matters tend to require more detail than would usually be included in primary legislation.

Reason for the selected procedure

480. These direction-giving powers replace existing direction-giving powers in sections 7 and 8 of the NHS Act 2006. The directions given by virtue of these replacement provisions are expected to be those required to replace the directions currently given to Primary Care Trusts or Strategic Health Authorities under section 7 or 8. The current directions would need to be replaced following the abolition of Primary Care Trusts and Strategic Health Authorities and to take into account the fact that the Board would assume responsibility for the commissioning of primary care. Detailed documents concerning matters such as those contained in the NHS (General Medical Services – Premises Costs) (England) Directions 2004 go beyond that which is normally set out in regulations. In respect of those delegated powers set out in new section 98A(5) and 125(A)(5), which relate to the prescription of services which cannot be delegated by the Board under sections 98A(3) and 125A(3), the negative resolution procedure is appropriate, and is consistent with the procedure that applies to other regulation-making powers that relate to primary medical services and primary ophthalmic services.

Clause 47: Charges in respect of certain public health functions

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*

Parliamentary procedure: *Affirmative*

481. This clause inserts new section 186A into the NHS Act 2006 and provides for the making of charges in relation to steps taken under the proposed duty on the Secretary of State to take steps to protect public health (new section 2A). Subsection (4) confers on the Secretary of State the power to make regulations providing for the making and recovery of charges in respect of the taking of steps by a local authority under section 2A (by virtue of regulations under section 6C(1)) and steps under section 2B in relation to the improvement of the health of people in their area. Subsection (5) enables the Secretary of State to make provision as to how such charges may be calculated.

482. Local authorities are currently able to provide services under existing powers, some of which could be considered to fall under the new health improvement duty. If a service or other step is considered to be appropriate for improving public health it should be carried out under new section 2B and not under alternative powers.

483. However, as the Bill is drafted, services under section 2B are services which form part of the comprehensive health service provided for in section 1(1) of the NHS Act 2006. As such they would be subject to the prohibition on charging in section 1(3) of the Act (that is, that services provided as part of the health service should be free of charge unless legislation provides otherwise). The Department's position is that it should in principle be possible, subject to the affirmative resolution procedure, for a local authority to charge for some services or steps where appropriate, for example providing training to businesses.

484. In order to allow local authorities to charge for certain services, the Department proposes the new regulation-making power. This would enable the Secretary of State to specify the circumstances when a local authority may charge for a service or other intervention taken under section 2B. This power might be exercised in a number of ways, for example by prescribing specific services or circumstances where a charge may be made and/or by prescribing conditions for charging.

<u>Reason for delegating the power</u>

485. The effect of the Bill is that public health services provided or arranged by local authorities under section 2B will be part of the health service and therefore subject to the prohibition of charging in section 1(3) of the NHS Act 2006. However, the new power would allow the Secretary of State to specify circumstances where local authorities could charge for services where appropriate. The Bill also gives powers to the Secretary of State to provide for the making and recovering of charges in respect of the taking of prescribed steps by a local authority under section 2A by virtue of regulations under section 6C(1). This ensures that charges can be made in relation to delegated health protection functions where appropriate. The Department would intend to involve the Local Government Association in discussions on the type of services to be included. The power would allow the necessary flexibility to amend the circumstances and conditions where charging is appropriate without needing to amend primary legislation. It would also provide flexibility to deal with new services or changes to services where charging may be appropriate. This approach is similar to other provisions of the NHS Act 2006 under which charges may be imposed by way of regulations, for example prescription charges under section 172.

Reason for the selected procedure

486. Regulations made under this power would be subject to the affirmative resolution procedure as there is likely to be significant interest in the charging provisions. Other powers in the Act which enable charging of a patient or service user are subject to the negative resolution procedure. However, the Department has proposed the affirmative resolution procedure for this power because of the transfer of functions from NHS bodies to local authorities which are independent, elected bodies. The Department considers the procedure appropriate given that the power covers any step taken by a local authority under section 2B, so a potentially wide range of services or other activity.

Clause 48: Pharmaceutical services expenditure

487. This clause inserts new Schedule 12A to the NHS Act 2006, as set out in Schedule 3 to the Bill.

Schedule 3: Pharmaceutical remuneration

Paragraph 2: Pharmaceutical remuneration to be apportioned among clinical commissioning groups

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Determinations*
Parliamentary procedure: *None*

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

488. Paragraph 2 of the Schedule requires the NHS Commissioning Board, in the manner it sees fit, to determine the elements of pharmaceutical remuneration which it apportions amongst clinical commissioning groups in relation to the relevant financial year (sub-paragraph (1)) and to notify each group of its determination. The determination must be treated as expenditure of the group for that year. The Board may deduct the amount of that determination from the overall sum it would otherwise pay the clinical commissioning group under section 223 H(1) and must take account of the effect of this Schedule when paying that overall sum.

489. Sub-paragraph (7) of paragraph 2 enables the Secretary of State to direct the Board not to include certain elements of pharmaceutical remuneration within its determination under sub-paragraph (1). This new power would enable the Secretary of State to direct the Board as to elements of pharmaceutical remuneration which should remain the responsibility of the Board and not be apportioned among clinical commissioning groups.

490. Under the proposals, the Board would retain an appropriate level of discretion as to how it apportioned those elements of pharmaceutical remuneration for which clinical commissioning groups would be responsible. Nonetheless, there would continue to be elements of pharmaceutical remuneration which would remain the responsibility of the Board and therefore would not be appropriate to apportion amongst clinical commissioning groups. An example of this is the cost of dental prescriptions, which the members of clinical commissioning groups will not be responsible for generating.

Reason for delegating the power

491. Delegated powers are needed because the determination for each clinical commissioning group and the elements of pharmaceutical remuneration that are to remain the responsibility of the Board will need to be determined in respect of each financial year. They may also need to be amended in-year to reflect new developments (for example, if a new payment commences during the relevant year). It is appropriate for the Board to have the first power (the power to determine the apportionment of pharmaceutical remuneration amongst clinical commissioning groups) because of its responsibility for holding clinical commissioning groups to account for stewardship of NHS resources.

Reason for the selected procedure

492. Because of the administrative nature of these determinations and directions, the Department considers no Parliamentary procedure necessary.

Paragraph 3: Other pharmaceutical remuneration

Power conferred on: *Secretary of State.*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

493. Paragraph 3 of the Schedule provides that the Board may require a person to reimburse elements of pharmaceutical remuneration which are not designated elements under paragraph 2 or other remuneration of a prescribed description. The Board would, for example, be able to require reimbursement from an NHS foundation trust for the costs of the drugs prescribed by one of its employees which are dispensed in the community by a pharmaceutical contractor. However, the Department considers that there needs to be some control over the ability of the Board to recover costs for services that it pays for, so that for example there is no unintended recovery of costs by the Board, where the Secretary of State has determined that no recharging should take place. (For example, prescriptions written in another part of the United Kingdom and dispensed in England are budgeted for as part of the NHS in England). It is therefore considered appropriate to be able to control the powers of the Board in this particular type of situation. The intention is that the power to prescribe what is “other remuneration”

would be used to make provision preventing the Board from recovering costs from a third party under paragraph 3, if they are costs of a prescribed description.

Reason for delegating the power

494. A delegated power is appropriate, because the costs that the Board would not be able to recover would need to be specified in some detail, and those details could need updating from time to time. .

Reason for the selected procedure

495. Bearing in mind the value of transparency over what costs the Board may and may not recover from others, the Department considers the negative resolution procedure appropriate for the regulations that would be made under paragraph 3.

Paragraph 4: Exercise of functions

Power conferred on: *NHS Commissioning Board, with consent of the Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

496. Paragraph 4 deals with the exercise of the functions of the Board regarding pharmaceutical services remuneration. This power enables the Board, with the consent of the Secretary of State, to direct that a Special Health Authority or another person can carry out defined functions of the Board in relation to pharmaceutical remuneration specified in the directions. This would enable certain existing arrangements to continue. It is envisaged that some of the functions conferred on the Board by the Schedule will continue to be carried out by the NHS Business Services Authority, for example payment of fees to and reimbursement of drug costs incurred by pharmaceutical contractors in their provision of services.

Reason for delegating the power

497. Providing a delegated power avoids the need to set out in primary legislation the details of the administrative arrangements that might be made by the Board. It also means those

arrangements can be modified from time to time without the need for primary legislation. The power should rest with the Board, because it relates to carrying out functions of the Board. However, the consent of the Secretary of State would be needed, because of his role in determining the functions of Special Health Authorities.

Reason for the selected procedure

498. The Department considers a Parliamentary procedure unnecessary, as the directions would concern administrative arrangements.

Clause 52: Amendments related to Part 1 and transitional provision

499. This clause introduces three Schedules, which include the following delegated powers.

Schedule 4: Part 1: Amendments of the National Health Service Act 2006

500. This Schedule makes amendments to the NHS Act 2006 that are generally consequential on the new organisational structure for NHS commissioning provided for elsewhere in the Bill.

Parts 1 to 3

501. Parts 1 (The Health Service in England), 2 (NHS Bodies) and 3 (Local Authorities) of the Schedule propose a series of amendments to Parts 1 (Promotion and Provision of the Health Service in England), 2 (Health Service Bodies) and 3 (Local Authorities and the NHS) of the NHS Act 2006. These consequential amendments are the result of the changes to the architecture proposed in the Bill. They include modifications to a number of powers: the Secretary of State's power to give directions about the exercise of functions by NHS bodies; the power to make regulations about direct payments for healthcare; the power to establish Special Health Authorities by order; the power to make intervention orders; the power to make regulations establishing schemes for meeting losses and liabilities of certain health bodies; the power for local authorities to make payments towards expenditure by other bodies; and powers for the Secretary of State to make regulations or give directions to NHS bodies to transfer staff, or make their staff available, to local authorities and other public bodies.

502. None of the modifications would make any substantive change to these existing powers, except to change the bodies in relation to which they are exercised. In many cases, the amendments serve only to replace references to Strategic Health Authorities and Primary Care Trusts with references to the NHS Commissioning Board and clinical commissioning groups. In some others, the references to Strategic Health Authorities and Primary Care Trusts are removed, but without replacement by references to the Board or clinical commissioning groups, as the power is not to apply to such bodies in the new framework. For this reason a detailed discussion of the powers has not been provided. Below is a summary of the proposed amendments.

Part 1

Paragraph 5

503. Section 8 of the NHS Act 2006 enables the Secretary of State to give directions to certain NHS bodies about how they exercise their functions. Paragraph 5 of Schedule 4 to the Bill amends the section to remove the references to Primary Care Trusts and Strategic Health Authorities. References to the NHS Commissioning Board and clinical commissioning groups are not inserted as they are not to be subject to a Secretary of State power of direction.

Paragraphs 10 to 13

504. Section 12B of the NHS Act 2006 enables the Secretary of State to make regulations making provision about the use of direct payments, for example about the circumstances in which direct payments may be made or stopped, the conditions that apply to the making of the payment, and the calculation of the payment amount. References in this section to Primary Care Trusts making or stopping direct payments, requiring the repayment of a direct payment, providing support in relation to direct payments and recovering as a debt a sum repayable under conditions imposed by the regulations would be replaced with references to the NHS Commissioning Board or a clinical commissioning group. Subsection (5) of section 12B, which provides that a service can be considered to have been provided or arranged by the Secretary of State or Primary Care Trust where a direct payment has been made, and that a Primary Care Trust's role in providing mental health after-care services can be displaced, would be

amended likewise. The power, under section 12A of the NHS Act 2006, for Primary Care Trusts to make direct payments for mental health after-care services if the regulations under section 12B so provide, would be removed, and subsection (9) of section 12C amended to reflect this. The combined effect is to enable the making of regulations to provide for the Board and clinical commissioning groups to make direct payments in relation to services which they arrange.

Part 2

Paragraph 14

505. Section 28 of the NHS Act 2006 allows the Secretary of State to establish Special Health Authorities. Subsection (5) of that section provides that when a Special Health Authority is abolished, the criminal liabilities may be transferred to an NHS body. Under this paragraph of the Schedule the definition of "NHS body" in subsection (6) of section 28 would be omitted. A new definition, which removes the reference to Strategic Health Authorities and Primary Care Trusts, and includes the NHS Commissioning Board and clinical commissioning groups, is inserted into section 275 of the Act by paragraph 137 of Schedule 4 to the Bill.

Paragraph 17

506. Section 66 of the NHS Act 2006 enables the Secretary of State to make intervention orders where an NHS body (other than a foundation trust) is not performing its functions adequately or at all, or where there are significant failings in the way it is being run. Section 67 makes provision regarding the effect of an intervention order – for example, it might provide for the removal or suspension of members or employee members. This paragraph of the Schedule removes Strategic Health Authorities and Primary Care Trusts from the lists of bodies whose members can be made subject to an intervention order. References to the NHS Commissioning Board and clinical commissioning groups are not inserted, as they are subject to separate powers provided for in Part 1 of the Bill.

Paragraph 19

507. Section 71 of the NHS Act 2006 contains a regulation-making power for the Secretary of State, enabling him to establish schemes whereby specified bodies can make provision to meet losses and liabilities (for example the Clinical Negligence Scheme). This paragraph of the Schedule changes the list of bodies (in subsection (2) of section 71) to whom these schemes can apply. It replaces Strategic Health Authorities and Primary Care Trusts with the NHS Commissioning Board and clinical commissioning groups and adds a new body (a company formed by the Secretary of State or the NHS Commissioning Board under section 223 of the NHS Act 2006 which is wholly or partially owned by the Secretary of State or the NHS Commissioning Board). The new body is a "qualifying company" for the purposes of clauses 294 and 295 of the Bill (property and staff transfer schemes), that is, a company which is eligible to receive property and staff from Primary Care Trusts and Strategic Health Authorities on their being abolished by the Bill. Paragraph 18 also removes Strategic Health Authorities and Primary Care Trusts from, and inserts the NHS Commissioning Board in, the list of persons or bodies who may administer the schemes in subsections (3) and (6) of section 71.

Paragraph 20

508. Section 73 of the NHS Act 2006 makes provision relating to directions and regulations made under specified sections of the Part, listed in subsection (1). This paragraph of the Schedule removes sections 14, 15, 19 and 20 from the list, since these deal only with Strategic Health Authority functions and directions and Primary Care Trust functions.

Paragraph 24

509. Schedule 6 to the Act also makes provision for the Secretary of State to make regulations and give directions to Special Health Authorities about transferring staff to, making staff available to and furnishing information to, amongst other bodies, Strategic Health Authorities. This paragraph of the Schedule removes the references to Strategic Health Authorities.

Part 3

Paragraph 26

510. Section 76 of the NHS Act 2006 gives local authorities a power to make payments towards expenditure by a body in connection with its performance of certain prescribed functions. Paragraph 24 of this Schedule replaces Strategic Health Authorities and Primary Care Trusts with the NHS Commissioning Board and clinical commissioning groups among the bodies to whom local authorities may make payments.

Paragraph 30

511. Section 81, subsection (3) of the NHS Act 2006 allows the Secretary of State to give directions to specified NHS bodies to make the services of their staff available to local authorities and other public bodies, in certain circumstances. This paragraph of the Schedule removes Strategic Health Authorities and Primary Care Trusts from the list of specified NHS bodies. (References to the Board and clinical commissioning groups are not inserted as those bodies are not to be subject to Secretary of State powers of direction).

Parts 4 to 7

512. Parts 4 to 7 of the Schedule refer to medical services, dental services, ophthalmic services and pharmaceutical services respectively.

513. Medical services are generally dealt with in the NHS Act in sections 83 to 98, dental services in sections 99 to 114, ophthalmic services in sections 115 to 125 and pharmaceutical services in sections 126-163. These sections set out the legislative basis under which medical, dental, ophthalmic and pharmaceutical services are commissioned and provided. The amendments proposed to these provisions are largely consequential upon the abolition of Primary Care Trusts, the new provisions for the establishment of the NHS Commissioning Board and clinical commissioning groups, and the new provisions that underpin the creation of Public Health England. The existing sections 83 to 163 of the NHS Act contain a significant number of delegated powers and, while most of these powers are retained under the proposals in the Bill, the Bill also provides for a small number of repeals and a small number of new delegated powers. These are identified in the following paragraphs. Most relate to the powers of the Secretary of State. These powers are a mixture of regulation-making powers and powers of direction. The memorandum first summarises some minor changes and then discusses some more substantial changes to delegated powers.

Summary of minor changes

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

Directions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure*: None*

514. The following delegated powers are subject to limited changes but only insofar as they relate to the body who is to be subject to the regulations made or the directions issued by the Secretary of State under existing powers. These are listed in the following table (where Primary Care Trust has been abbreviated to PCT, and Strategic Health Authority to SHA):

Schedule reference	NHS Act 2006 reference	Details
Paragraph 31(3)	Section 83(3)	Replace PCT with the Board
Paragraph 33	Section 86(1)	Replace PCT with the Board
Paragraph 34	Section 87(3)(d)	Replace PCT with the Board
Paragraph 35(1)	Section 89	Replace PCT with the Board
Paragraph 36	Section 91	Replace PCT with the Board
Paragraph 38(2)	Section 93(1)	Replace SHA with the Board
Paragraph 39(4)	Section 94(6)	Replace PCT with the Board
Paragraph 42(4)	Section 97(6)	Replace PCT with the Board
Paragraph 43(4)	Section 99(3)	Replace PCT with the Board
Paragraph 45	Section 102(1)	Replace PCT with the Board
Paragraph 46	Section 103(3)(d)	Replace PCT with the Board

Schedule reference	NHS Act 2006 reference	Details
Paragraph 47	Section 104	Replace PCT with the Board
Paragraph 48	Section 106	Replace PCT with the Board
Paragraph 50(2)	Section 108(1)	Replace SHA with the Board
Paragraph 51(4)	Section 109(6)	Replace PCT with the Board
Paragraph 54(4)	Section 113(6)	Replace PCT with the Board
Paragraph 55(2) & (5)	Section 115(1) & (5)	Replace PCT with the Board
Paragraph 57	Section 118(1)	Replace PCT with the Board
Paragraph 58	Section 119(1)	Replace PCT with the Board
Paragraph 59	Section 120(3)(d)	Replace PCT with the Board
Paragraph 60	Section 121	Replace PCT with the Board
Paragraph 61	Section 123	Replace PCT with the Board
Paragraph 63(4)	Section 125(7)	Replace PCT with the Board
Paragraph 64(2)	Section 126(1)	Replace PCT with the Board
Paragraph 65(2)	Section 127(1)	Replace PCT with the Board
Paragraph 66(2) & (4)	Section 128(1) & (5)	Replace PCT with the Board
Paragraph 67(1)	Section 129(1)	Replace PCT with the Board
Paragraph 68	Section 130	Replace PCT with the Board
Paragraph 69(2)	Section 131(1)	Replace PCT with the Board
Paragraph 70(2)	Section 132	Replace PCT with the Board
Paragraph 71(4)	Section 133(2)	Replace PCT with the Board
Paragraph 73	Section 136(1)	Replace PCT with the Board
Paragraph 75	Section 138	Replace PCT with the Board
Paragraph 76(2)	Section 140	Replace PCT with the Board
Paragraph 78(2)	Section 148(1)	Replace PCT with the Board
Paragraph 79(2)	Section 150A	Replace PCT with the Board
Paragraph 87	Section 160	Replace PCT with the Board
Paragraph 90(3)	Section 164(4A)	Replace PCT with the Board
Paragraph 91(2)	Section 166	Replace PCT with the Board
Paragraph 92(5)	Section 167(6)	Replace PCT with the Board

Schedule reference	NHS Act 2006 reference	Details
Paragraph 94(3)	Schedule 12(2)	Replace PCT with the Board
Paragraph 94(4)	Schedule 12(3)	Replace commissioning body with commissioner and PCT with the Board

Reason for delegating the power

515. These powers are existing regulation-making and direction-giving powers in the NHS Act. It is not considered that these powers are any more wide-ranging in scope by virtue of the amendments in this Bill than the existing powers.

Reason for the selected procedure

516. These powers are existing regulation-making powers, which are subject to the negative resolution procedure, or direction-giving powers. It is considered that the negative resolution procedure is still appropriate having regard to the matters to be covered in regulations made by the Secretary of State. It is also considered that where the existing power is a direction-giving power, directions by the Secretary of State remain the appropriate method of delegation.

Paragraph 39

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

517. Sub-paragraph (3) of this paragraph of the Schedule inserts a new paragraph (ca) into subsection (3) of section 94 (Regulations about section 92 arrangements) of the NHS Act clarifying, for consistency with section 84(4)(b), that a Personal Medical Services agreement can include services performed outside England. As with the similar general medical services provision, it is not the intention that the Board will commission services on a widespread basis outside England, but it will be the case that, for example, a GP practice working on the border with Wales or Scotland may have patients who do not reside in England.

Reason for delegating the power

518. This new power is inserted into an existing regulation-making power in section 94 of the NHS Act. It is not considered that this amendment significantly broadens the scope of the existing powers.

Reason for the selected procedure

519. The delegated power in section 94 is currently subject to the negative resolution procedure. It is considered that this remains the appropriate Parliamentary procedure, being in keeping with existing equivalent powers and appropriate having regard to the matters to be legislated for.

Paragraph 51

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

520. Sub-paragraph (3) of this paragraph of the Schedule inserts a new paragraph (ca) into subsection (3) of section 109 (Regulations about section 107 arrangements) of the NHS Act clarifying, for consistency with section 100(3)(b), that a Personal Dental Services agreement can include services performed outside England. As with the similar general dental services provision, it is not the intention that the Board will commission services on a widespread basis outside England, but it will be the case that, for example, a dental practice working on the border with Wales or Scotland may have patients who do not reside in England.

Reason for delegating the power

521. This new power is inserted into an existing regulation-making power in section 109 of the NHS Act. It is not considered that this amendment significantly broadens the scope of the existing powers.

Reason for the selected procedure

522. The delegated power in section 109 is currently subject to the negative resolution procedure. It is considered that this remains the appropriate Parliamentary procedure, being in keeping with existing equivalent powers and appropriate having regard to the matters to be legislated for.

Paragraph 55

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

523. Sub-paragraph (7) of this paragraph of the Schedule extends the scope of the regulation-making power in subsection (9)(b) of section 115 of the NHS Act so that it applies to all of the categories of persons described in section 115(2)(a) to (e). The amendment to this power removes an unintentional restriction in the existing power which only applies to the categories of persons currently described in section 115(2)(a) to (d). The amendment allows the delegated power to apply to such other descriptions of persons as may in the future be prescribed in regulations and will therefore ensure that the scope of the power remains up to date.

Reason for delegating the power

524. This is an existing regulation-making power which is currently delegated and it seems right to continue to delegate this power. The amendment is correcting an omission which does not significantly change the power.

Reason for the selected procedure

525. The negative resolution procedure remains appropriate. It applies to the existing regulation-making power in section 115(9) of the NHS Act and the changes made by the Bill are not such as to make a different procedure appropriate.

Paragraphs 67 and 70

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

526. Sub-paragraphs (4) in each of these paragraphs of the Schedule amend sections 129 and 132 of the NHS Act so as to require that regulations about the preparation of lists of persons providing pharmaceutical services are prepared by reference to the area in which the premises from which the services are provided are situated.

527. It is expected that the Board will prepare such lists in relation to the geographical areas of pharmaceutical needs assessments as are published by Primary Care Trusts currently and as will be published by Health and Wellbeing Boards in future.

Reason for delegating the power

528. These powers generally replace existing regulation-making powers in sections 129 and 132 of the NHS Act. It is not considered that the powers which are being inserted by this Bill are any more wide-ranging in scope than the existing powers.

Reason for the selected procedure

529. The powers being inserted by this Bill mostly replace existing regulation-making powers in the NHS Act which are subject to the negative resolution procedure. It is therefore considered that the negative resolution procedure will also be appropriate for these new powers.

Paragraphs 77 and 94

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

530. Paragraph 77 of the Schedule amends section 144 of, and paragraph 94 amends Schedule 12 to, the NHS Act so that new Local Pharmaceutical Schemes can be established by the Secretary of State, instead of by Strategic Health Authorities, which are abolished by provision elsewhere in the Bill.

531. Paragraph 94(2)(d) of the Schedule inserts a new sub-paragraph (2C) into paragraph 1 of Schedule 12 to the NHS Act. This creates a new delegated power which enables regulations to prescribe the only circumstances in which the NHS Commissioning Board is able to provide local pharmaceutical services under a Local Pharmaceutical Scheme.

Reason for delegating the power

532. It is expected that the Board will be a provider of local pharmaceutical services in emergency circumstances, such as an outbreak of pandemic flu, where there is no other suitable provider or where it is advisable to bring existing providers who are unaffected by the outbreak within an arrangement which the Board oversees. This power would therefore be only used in exceptional circumstances. Normally, the Board would be expected to rely on other pharmaceutical providers stepping in to cover any local shortfall in provision. But where this is not possible or where it is advisable to bring existing providers who are unaffected by the outbreak within an arrangement which the Board oversees, it is desirable that the Board should itself have the power to be a provider – usually as a matter of last resort where alternative options are not available.

Reason for the selected procedure

533. It is not considered that the new power being inserted by this Bill significantly broadens the nature of the existing powers in Schedule 12 to the NHS Act. It is therefore considered that the negative resolution procedure remains appropriate having regard to the matters to be legislated for.

Part 8

534. Part 8 of the Schedule deals with charging in relation to primary care services.

Paragraphs 97 and 98

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

535. In Part 8 of the NHS Act the regulation-making powers in section 180 (Payments in respect of cost of optical appliances) and section 181 (section 180: Supplementary) are subject to minor amendment as set out in these two paragraphs of the Schedule, which include the amendment of certain references to the Secretary of State or relevant body to the NHS Commissioning Board in section 180(1). The regulation-making power is amended to include a new subsection (6A) which contains a new power for the Secretary of State to prescribe in regulations other bodies to whom directions may be issued by the Board in respect of the exercise of the Board's functions under regulations made under section 180.

Reason for delegating the power

536. A new direction-giving power has been included in subsection (6A) of the existing regulation-making power in section 180 of the NHS Act, which has been structured to allow bodies to be prescribed in regulations. This delegated power is considered necessary because the Board may wish to direct other bodies to undertake activities such as making payments and other functions associated with providing primary ophthalmic services. There are a number of bodies that could undertake functions in this area and listing those bodies which may be directed on the face of the Bill would require primary legislation to be amended each time a body needed to be added or deleted, which would run counter to the flexibility given to the Secretary of State to make regulations in these sections.

Reason for the selected procedure

537. The existing regulation-making powers in section 180 of the NHS Act are subject to the negative resolution procedure. It is considered that the negative resolution procedure is also

appropriate for the new regulation-making power in subsection (6A) having regard to the matters to be legislated for.

Directions

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure*: None*

538. Paragraph 97 of the Schedule inserts a new subsection (6A) into section 180 of the NHS Act which allows the Board to direct a Special Health Authority or any other body prescribed in regulations to exercise the Board's functions under regulations under that section.

Reason for delegating the power

539. This new direction-giving power relates to operational matters which it is reasonable to delegate rather than having on the face of legislation as the directions may go into considerable detail. Day-to-day operational responsibility is a matter for the Board and it is reasonable for it to be able to direct other bodies to carry out functions on its behalf.

Reason for the selected procedure

540. These powers relate to operational matters that are carried out within the context of wider regulations. It is usual practice for matters of this sort to be carried out through directions rather than regulations.

Part 10

Paragraph 110

541. This paragraph amends section 213 which confers a power on the Secretary of State to transfer trust property by order between ‘relevant health service bodies’ and removes the reference to a Primary Care Trust. The power in section 213 of the NHS Act, exercised by

order, continues to be conferred on the Secretary of State but the amendment ensures that the Secretary of State is also able to transfer trust property to and from trustees for the NHS Commissioning Board and for a clinical commissioning group as relevant 'health service bodies'.

Paragraph 111

542. This paragraph amends section 214 of the NHS Act, which contains a power for the Secretary of State to transfer all trust property by order from any special trustees to certain health service bodies. The amendment does not affect the Secretary of State's powers in section 214; instead it makes provision for the NHS Commissioning Board and clinical commissioning groups as bodies to whom all trust property can be transferred and removes the references to Primary Care Trusts.

Paragraph 115

Power conferred on: *NHS Commissioning Board (in relation to clinical commissioning groups)*
Power exercised by: *Directions*
Parliamentary procedure*: None*

543. This paragraph amends the power in section 222 of the NHS Act. Section 222 contains a power for the Secretary of State to exclude, by way of directions, specified descriptions of activities that NHS bodies (other than Local Health Boards) may undertake in order to raise money. The amendment takes account of the establishment and responsibilities of the new health service bodies. This paragraph amends the direction-giving power to enable the NHS Commissioning Board (rather than the Secretary of State) to give directions in relation to clinical commissioning groups. The Secretary of State retains his existing power to give directions in relation to other NHS bodies (other than Local Health Boards), although this is updated to take account of the abolition of Primary Care Trusts and Strategic Health Authorities.

<u>Reason for delegating the power</u>

544. The direction-giving power is extended to the NHS Commissioning Board to enable the Board to specify what descriptions of activities in relation to a clinical commissioning group are excluded activities for the purposes of raising money under section 222. The power is delegated, as now, because fundraising and related activities are varied in nature and circumstance and it may not be possible to prescribe all the necessary detail in primary legislation.

Reason for the selected procedure

545. Use of the existing direction-giving power is not subject to any Parliamentary procedure, and the Department proposes to take the same approach to the power for the Board. The Department considers that the content of directions would concern detailed matters on which Parliamentary debate would not be warranted.

Paragraph 118

546. This paragraph amends section 226 of the NHS Act, which contains a power for the Secretary of State to give directions to Strategic Health Authorities and Special Health Authorities with regard to their financial duties. The amendment removes the reference to Strategic Health Authorities, since these would be abolished by the Bill.

Paragraph 118

547. This paragraph amends section 227 of the NHS Act, which contains a power for the Secretary of State to give directions to ensure that Strategic Health Authorities and Special Health Authorities operate within their resource limits. The amendment removes the reference to Strategic Health Authorities, since these would be abolished by the Bill.

Paragraph 122

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

548. This paragraph amends section 236 of the NHS Act 2006, which deals with payments to doctors who have examined patients with a view to deciding whether to recommend their detention in hospital under the Mental Health Act 1983.

549. The duty to pay fees would in future fall on the "prescribed clinical commissioning group". By virtue of section 275(1) of the NHS Act 2006, that would mean the clinical commissioning group prescribed in regulations by the Secretary of State.

550. The paragraph therefore empowers the Secretary of State to use regulations to determine which clinical commissioning group would be responsible in any given case. This would enable the Secretary of State to align clinical commissioning groups' duty under this section with their other duties under the NHS Act 2006, the distribution of which between clinical commissioning groups would itself be subject to regulations.

Reason for delegating the power

551. For the distribution of the duty under section 236 to be determined on the face of the legislation would risk misalignment between that duty and the other functions of clinical commissioning groups. The Department's view is that it is more sensible for this to be left to regulations.

Reason for the selected procedure

552. The Department's view is that the use of the negative resolution procedure is appropriate, being consistent with the use of that procedure for other regulations distributing functions between clinical commissioning groups, including those under section 3 (as amended).

Part 11

Paragraph 125

553. This paragraph amends section 246 of the NHS Act 2006 which enables the Secretary of State to vary Schedule 17 to the NHS Act by order. The power itself is not amended but a

consequential amendment is made to this section to reflect the fact that section 12A(4) is being omitted.

Part 12

Paragraph 128

554. This paragraph amends section 256 which contains a direction-giving power for the Secretary of State to prescribe conditions relating to payments under section 256. The amendment replaces references to Primary Care Trusts with references to clinical commissioning groups and the NHS Commissioning Board to ensure they have powers to make payments towards expenditure on community services.

Paragraph 130

555. This paragraph amends section 258 of the NHS Act. Section 258 confers a regulation-making power on the Secretary of State to provide for any functions exercisable by Primary Care Trusts, Strategic Health Authorities, Special Health Authorities or Local Health Boards in relation to the provision of certain facilities to be exercisable by the body jointly with one or more NHS body (other than an NHS foundation trust). The amendment replaces the references to Strategic Health Authorities and Primary Care Trusts with references to the NHS Commissioning Board and clinical commissioning groups.

Paragraph 131

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

556. This paragraph makes changes to section 259 (Sale of Medical Practices) of the NHS Act 2006 to introduce a new delegated power. Section 259 of the NHS Act 2006 describes the persons who are prohibited from selling the goodwill in a medical practice. The section is structured to capture any medical practice that has provided primary medical care services to the NHS during its entire existence, starting with provision under the NHS Act 1946.

Subsection (2) captures general medical services provision under former provisions whilst subsection (3) captures the provision of personal medical services under former provisions. Subsection (4) captures post April-2004 provision under both the NHS Act 1977 and the 2006 consolidation. New subsection (4A) captures the effect of the ending of direct provision of primary medical services by Primary Care Trusts under the provisions in this Bill. However, the ban does not apply where the person no longer provides or performs the services mentioned, and has never carried on the practice "in a relevant area".

557. The current definition of "relevant area" is in subsection (5) and links to the area of the organisation for whom the person provided or performed services (that is, a Primary Care Trust area or an area of a former Executive Council or Health Authority). Following the move of primary medical services commissioning to the Board the logic would be that the relevant area would in future be England. However, this would substantially extend the restriction on the sale of goodwill without any proper justification. For example, if a person provided general medical services under a contract in Surrey and then moved to Cumbria and provided there NHS services that are not caught by the ban (for example, out of hours services), that person would not currently be caught by the ban as regards the Cumbrian medical practice; if on the other hand the "relevant area" was the whole of England, he would be caught and indeed anyone who had ever provided services to a registered list of patients pursuant to a GMS contract or a PMS agreement with the Board would be caught.

558. The Department wishes to discuss this with those who represent general practitioners and these discussions need to consider what might be a suitable definition of "relevant area" for the purposes of section 259. The discussions might consider whether a local authority area would be appropriate. Paragraph 131(4) provides the space for these considerations by inserting a regulation-making power in respect of this aspect of the definition of "relevant area".

<u>Reason for delegating the power</u>

559. Defining the areas that need to be covered in the definition of "relevant area" in a way that provides a historical audit trail of organisations is made more complex by the removal of specific local geographical areas defined by reference to local NHS bodies. There is no wish to extend the extent of the "relevant area" that applies to a particular contractor but until the final shape of the new NHS architecture is in place it is not possible to determine how best to

maintain the localism associated with this provision of section 259. There will be a number of issues to discuss with the representatives of general practice as the new NHS architecture proposed in the Bill is implemented and this issue is best left to those discussions. This requires a delegated power to implement the outcome of those consultations.

Reason for the selected procedure

560. As the current definition is on the face of primary legislation it is appropriate that the delegated power is subject to a Parliamentary procedure. Given the technical nature of the provisions, the Department considers that the negative resolution procedure is appropriate. This is consistent with the existing delegated power in section 259(4) and with the wider delegated regulatory powers that apply in Part 4 (Medical Services) of the NHS Act 2006.

Paragraph 137

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

561. This paragraph makes a consequential amendment to section 275 of the NHS Act 2006, which amends the meaning of "NHS body" in section 75(8) to include the NHS Commissioning Board and each clinical commissioning group.

562. The Secretary of State has the power under section 75 to make regulations to make provision for, or in connection with, enabling NHS bodies and local authorities to enter into arrangements in relation to the exercise of prescribed functions if the arrangements are likely to lead to an improvement in the way in which those functions are exercised. For example, this provision would allow NHS clinical commissioning groups and local authorities to establish pooled budgets to allow joint commissioning of services.

Reason for delegating the power

563. The amendment does not create a new delegated power but updates an existing one to take account of the changed arrangements for NHS commissioning.

Reason for the selected procedure

564. The negative resolution procedure, as for the existing powers, remains appropriate, as there is nothing in the amendments to those powers which necessitates a change of Parliamentary procedure.

Schedule 5: Part 1: Amendments of other enactments

565. This Schedule includes the following changes to delegated powers.

Paragraph 11: Health Services and Public Health Act 1968

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

566. Under the Health Services and Public Health Act 1968, the Secretary of State has power to provide, or make arrangements for the provision of, such instructions as appear conducive for persons employed or contemplating employment in hospital authorities or certain activities connected with health and welfare. Section 63(5A) of the Act enables the Secretary of State to make regulations providing for these functions to be exercisable jointly between relevant health service bodies. This paragraph of the Schedule removes references to Strategic Health Authorities and Primary Care Trusts. These references are not replaced with references to clinical commissioning groups or the NHS Commissioning Board.

Paragraphs 85, 88 and 89: Crime and Disorder Act 1998

567. These paragraphs amend provisions on delegated powers in the Crime and Disorder Act as follows.

Section 38

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

568. Paragraph 85 amends section 38 of the Crime and Disorder Act 1998, which places a duty on Strategic Health Authorities and Primary Care Trusts to co-operate with the local authority to secure youth justice services are available for their area. The Secretary of State may by order extend, restrict or otherwise alter the definition of "youth justice services". This provision amends the section to remove references to Strategic Health Authorities and Primary Care Trusts, and replace them with references to clinical commissioning groups. In all other respects these powers remains the same, and so the Department does not consider it necessary to amend the associated Parliamentary procedures.

Section 41

Power conferred on: *Secretary of State*
Power exercised by: *Order and Directions*
Parliamentary procedure: *Negative*

569. Paragraph 88 amends section 41 of the Act, under which the Secretary of State may, by order, add to, subtract from or alter any of the functions of the Youth Justice Boards established under section 41 of the Crime and Disorder Act 1998, and may issue them with guidance and direction. The paragraph removes references to Strategic Health Authorities and Primary Care Trusts, and replaces them with references to clinical commissioning groups. In all other respects these powers remain the same, and so the Department does not consider it necessary to amend the associated Parliamentary procedures.

Section 42

Power conferred on: *Secretary of State*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

570. Section 42(3) allows the Secretary of State to issue guidance relating to the youth justice provisions of the Crime and Disorder Act 1998, and requires Strategic Health Authorities and Primary Care Trusts to act in accordance with it when carrying out their duties. Paragraph 89 amends that section to remove references to Strategic Health Authorities and Primary Care Trusts, and replace them with references to clinical commissioning groups. In all other respects these powers remains the same, and so the Department does not think it necessary to amend the associated Parliamentary procedures.

Paragraph 110: Community Care (Delayed Discharges etc) Act 2003

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

571. Section 9 of the Community Care (Delayed Discharges etc) Act 2003 allows the Secretary of State to make regulations relating to the provision of panels appointed by Strategic Health Authorities in England and by Local Health Boards in Wales to assist in the resolution of disputes between two or more public authorities about matters relating to delayed discharges. This paragraph removes references to Strategic Health Authorities. These references are not replaced, as under the proposals in the Bill neither clinical commissioning groups nor the NHS Commissioning Board will be responsible for providing panels for dispute resolution.

Paragraph 120: Criminal Justice Act 2003

Power conferred on: *Secretary of State*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

572. Section 325(8) of the Criminal Justice Act 2003 allows the Secretary of State to issue guidance to “responsible authorities” on the discharge of the functions conferred by section 325 (Arrangements for assessing etc risks posed by certain offenders). This paragraph inserts

references in section 325 to local authorities (in their capacity as a person exercising functions as part of the health service) and clinical commissioning groups as “responsible authorities”, and removes references to Strategic Health Authorities and Primary Care Trusts. In all other respects these powers remains the same, and so the Department does not think it necessary to amend the associated Parliamentary procedures.

Paragraphs 153-4 and 159: Health and Social Care Act 2008

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

573. Paragraphs 153 and 154 replace references to Primary Care Trusts and Strategic Health Authorities in sections 30 and 39 of the Health and Social Care Act 2008 with references to the NHS Commissioning Board and clinical commissioning groups. Section 30 allows the Secretary of State to make regulations defining which bodies the Care Quality Commission must notify when applying for the urgent cancellation of a person’s registration. Section 39 allows the Secretary of State to make regulations defining which bodies the Care Quality Commission must notify in respect of regulated activities. The amendments do not alter the scope of either regulation-making power, and simply replace references to bodies being abolished with references to new bodies in the proposed new NHS architecture.

574. The consequential amendment made to section 59 of the Health and Social Care Act 2008 excludes the NHS Commissioning Board and clinical commissioning groups from reference in subsection (1) to “English NHS bodies”. This means that the Secretary of State will not have the power to give the Care Quality Commission additional functions relating to improving the economy, efficiency and effectiveness, or the management or operations of the NHS Commissioning Board or clinical commissioning groups.

Paragraph 177: Health Act 2009

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*

Parliamentary procedure: *Negative*

575. Section 8 of the Health Act 2009 concerns duties on providers of NHS services to publish a Quality Account in accordance with regulations. This paragraph removes references to Primary Care Trusts, as they are to be abolished under the proposals in the Bill. These references are not replaced with references to clinical commissioning groups, as it is not the intention that clinical commissioning groups will provide services themselves.

Schedule 6: Part 1: Transitional Provision

Paragraph 7: Exercise of Secretary of State's functions in relation to Primary Care Trusts

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless given by regulations – see clause 298(13) – in which case negative)*

576. During the initial period (the period beginning with the commencement of clause 22 and ending with the date specified by the Secretary of State for the purposes of new section 14A), the Secretary of State may (under paragraph 4) direct the Board to exercise any of the functions of the Secretary of State that relate to Primary Care Trusts. This does not include any powers or duties to make orders or regulations held by the Secretary of State as those are not thought to be appropriate functions for the Board to carry out on behalf of the Secretary of State.

Reason for delegating the power

577. The Secretary of State can currently direct a Strategic Health Authority to exercise any of the Secretary of State's functions relating to the health service that are specified in the directions (under section 7 of the NHS Act 2006). In the same way the provision in paragraph 2 of the Schedule would allow the Secretary of State to direct the Board, at any time during the initial period, to exercise any of his functions that relate to Primary Care Trusts and are specified in the direction. The exercise of this power would be limited to the initial period.

Reason for the selected procedure

578. Directions are considered appropriate as this mirrors the current provision for the Secretary of State to direct a Strategic Health Authority to exercise any of his functions relating to the health service. These powers would be able to be used only in the initial period. Directions in writing provide a clear record as to what functions the Secretary of State has delegated to the Board in the initial period.

Paragraph 8: Conditional establishment of clinical commissioning groups

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

579. This paragraph of the Schedule makes time-limited provision for the conditional establishment of clinical commissioning groups as a transitional measure during the initial period. This will run from the date that clause 22 is commenced, from when the Board can begin determining applications for establishment, until the date that the Secretary of State specifies for the purposes of new section 14A (see paragraph 1(2) of Schedule 6). Regulations under sub-paragraph 5(1) may be made authorising the Board to grant initial applications to establish clinical commissioning groups where the Board is not satisfied as to matters set out under new section 14C(2) of the NHS Act 2006. The regulations may authorise the Board to impose conditions on the grant of the initial application, and may authorise the Board to direct the clinical commissioning group not to exercise specified functions or give directions about the exercise of any of its functions. If the regulations authorise the Board to direct a clinical commissioning group not to exercise specified functions, they may also authorise or require the Board to exercise any of those functions on behalf of the clinical commissioning group, or arrange for another group to exercise those functions on behalf of the first group. The regulations may also make provision requiring the Board to keep any conditions imposed or directions given under review. They must make provision authorising the Board to vary or remove any conditions imposed, or directions given, by virtue of the regulations.

580. Sub-paragraph 5(6) enables regulations to modify the application of the NHS Act 2006 to clinical commissioning groups established on the grant of an initial application on a conditional basis under these regulations. These regulations may, in particular, provide for the Board's power to dissolve a clinical commissioning group (in new section 14Z19(7)) to be exercisable where a clinical commissioning group established subject to conditions fails to comply with those conditions. The regulations may also make provision about the factors that the Board must or may take into account when exercising these powers, and the procedures to be followed. Sub-paragraphs (11) and (12) provide that, as from the day after that on which a conditionally established clinical commissioning group ceases to be subject to any conditions or directions (because they have been either removed or, as the case may be, revoked), it is deemed to have been established under new section 14C.

Reason for delegating the power

581. Regulations made under new section 14C would enable the Secretary of State to set out the overall framework within which the Board would consider applications for establishment. These transitional provisions, which would provide for the conditional establishment of clinical commissioning groups, complete the framework of regulatory provision for the establishment process. The use of secondary legislation would enable precise details to be set out.

Reason for the selected procedure

582. Setting out these matters in regulations will ensure that the process of granting applications for establishment is transparent. The Bill already sets out (at new section 14C(2)) the principal matters as to which the Board should be satisfied before granting an application for a clinical commissioning group to be established. The Department's view is that, when these conditions are not met, a rules-based system is necessary to determine when a clinical commissioning group can be established subject to conditions. Furthermore, such conditional establishment would be only for a limited time-period, whilst the clinical commissioning groups in question are supported to develop up to the standards required for full establishment. The Department considers that negative resolution the appropriate procedure.

Paragraph 9: Exercise of functions of clinical commissioning groups during initial period

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None*

583. Under the proposals in the Bill, there would be an initial period from the date that clause 22 is commenced, and the Board accordingly begins determining applications for the establishment of clinical commissioning groups, until the date that the Secretary of State specifies for the purposes of new section 14A (see paragraph 1(2) of Schedule 6). During this period the Board may direct that a clinical commissioning group that has been established under new section 14C may exercise only such of its functions as are specified by the Board.

584. Clinical commissioning groups would essentially have two types of function during this time: carrying out commissioning functions on behalf of Primary Care Trusts, who will retain commissioning responsibility until they are abolished under clause 31 (intended to be in April 2013, on which see paragraph 8 of Schedule 6); and taking on preparatory work to enable them to carry out their functions fully at a later stage (developing local plans, undertaking assessments of need and other matters, on which see paragraph 7 of Schedule 6). Clearly these two broad types of function may overlap.

585. This power of direction is necessary to avoid concurrent exercise of commissioning functions by Primary Care Trusts and clinical commissioning groups. It will also enable the Board to retain control over what powers each clinical commissioning group exercises prior to their taking on the full exercise of functions at the end of the initial period.

<u>Reason for delegating the power</u>

586. It is anticipated that the Board will need powers to make different provision in respect of different clinical commissioning groups. It is proposed that the Board should have a direction-giving power to ensure that it can exercise effective co-ordination over which organisation does what over this time. These restrictions would also be in place for a limited time.

Reason for the selected procedure

587. Having regard to the limited timeframe, and the likely content of the directions, no Parliamentary procedure is thought necessary.

PART 3: REGULATION OF HEALTH AND ADULT SOCIAL CARE SERVICES

588. Monitor is currently the Independent Regulator for NHS Foundation Trusts. This legislation proposes to turn Monitor into a regulator for health care services. The intention is that Monitor will have three core functions: dealing with anti-competitive behaviour; setting or regulating prices; and supporting the continuity of services. To support its functions, Monitor will have the power to license providers of NHS-funded health care. The delegated powers sought under Part 3 of the Bill reflect the fact that Monitor will be an independent regulator and hence accountable for the way in which it carries its functions. The Bill proposes delegated powers exercisable by Monitor consistent with this, including issuing the national pricing tariff (with the agreement of the NHS Commissioning Board) and guidance on various matters. Monitor would also have delegated powers relating to its enforcement role in relation to licence conditions and under regulations on the role of NHS commissioners made by the Secretary of State.

589. Although Monitor would be an independent regulator, the Secretary of State retains ultimate accountability for the effective operation of the health service. Part 3 therefore proposes delegated powers for him to intervene in the running of Monitor, if there is evidence of significant failure, as well as to regulate commissioners in relation to procurement, patient choice and competition and on key aspects of the licensing regime (for example, which providers would be exempt from the requirement to hold a licence; how to calculate the maximum amount of monetary penalties for non-compliance). The Secretary of State would also have powers: to require information from Monitor; to limit the amounts Monitor could require providers and commissioners to contribute towards a financial mechanism to help secure continuity of services in the event of a provider becoming unsustainable; and, to set a limit on the amount Monitor could borrow to contribute to the mechanism. The Secretary of State would also set the “objection percentages” in relation to key aspects of the proposals in the national pricing tariff and in relation to modifications to standard licence conditions. He would have delegated powers in relation to the detail of the health special administration

regime. The delegation of these various powers also reflects the fact that the requirements would need to change over time and hence would not be appropriate for primary legislation. The Secretary of State would also have delegated powers to extend Monitor's functions to adult social care services and in relation to the preparation of accounts. The latter is to enable the preparation of consolidated accounts. Part 3 also proposes delegated powers for the Minister for the Civil Service and the Competition Commission. These relate to detailed operational matters e.g. pension arrangements for the Chair of Monitor (Minister for the Civil Service) and procedural matters (Competition Commission). The Bill also includes powers for the Lord Chancellor and Lord Chief Justice in relation to rules (company insolvency rules) to support the operation of the health special administration regime

CHAPTER 1: MONITOR

Clause 58: Monitor
Schedule 8: Monitor

590. This clause gives effect to Schedule 8, which includes the following delegated powers.

Paragraph 8: Superannuation

Power conferred on: *Minister for the Civil Service*
Power exercised by: *Directions*
Parliamentary procedure*: None*

591. Paragraph 8 makes provision for the Minister for the Civil Service to direct Monitor to pay to the Minister such sums as the Minister may determine in respect of any increase attributable to sub-paragraphs (2) and (3) of that paragraph. These provisions apply to persons taking the position as chair of Monitor who are active or deferred members of a pension scheme under the Superannuation Act 1972. The Minister for the Civil Service may determine that the person's office as chair is to be treated for the purposes of the scheme as service in the employment by reference to which the person is a member. The power of direction is intended to ensure that where a person is an active or deferred member of such a scheme, that person can continue in such a scheme and that appropriate pension contributions are paid

in respect of persons who serve as chair of Monitor. Paragraph 8 replaces a similar power in paragraph 5 (superannuation) of Schedule 8 to the NHS Act 2006.

Reason for delegating the power

592. The power is to make provision, where necessary, to secure that the chair of Monitor could continue as a member of a pension scheme under the Superannuation Act 1972 where that person is an active or deferred member of such a scheme. It would not be desirable to write such detailed and individual provision into primary legislation.

Reason for the selected procedure

593. Given the administrative content of the direction, the Department does not consider a Parliamentary procedure necessary. (The existing power is not subject to a Parliamentary procedure.)

Paragraph 17: Accounts of NHS foundation trusts

Power conferred on**:** *Secretary of State (with the approval of the Treasury in some cases)*
Power exercised by: *Directions*
Parliamentary procedure*: None*

594. This paragraph gives the Secretary of State power to direct Monitor, with the approval of the Treasury, to prepare the consolidated accounts of foundation trusts in respect of such period as is specified in the direction. The directions may specify the methods and principles according to which the accounts should be prepared (including the format), and the content. The Secretary of State could also require Monitor to send the consolidated accounts, accompanied by such other reports and information as the Secretary of State may direct, to the Comptroller and Auditor General within time limits set by the Secretary of State in directions following consultation with Monitor.

595. The Comptroller and Auditor General is to examine, certify and report on any consolidated accounts received by him. The Secretary of State may direct the Comptroller and

Auditor General to send a copy of any such reports on the consolidated accounts to him and to lay copies of the accounts before Parliament.

596. The Secretary of State will remain accountable to Parliament and the Treasury for the Department's Departmental Expenditure Limit. From 2011-12, under the Treasury's alignment legislation (Constitutional Reform & Governance Act 2010), the Department's annual Resource Account will, for the first time, consolidate the individual accounts of all NHS organisations, including foundation trusts. This is a significant change in Government accounting practice. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all those bodies that are consolidated into the Department's Resource Account must also be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that the accounts of NHS foundation trusts are prepared in accordance with the requirements set by the Treasury. This is so they are fit for purpose, are consistent across the sector and have been audited to a consistent and appropriate standard so they can be consolidated into the Department's statutory Departmental Resource Accounts.

597. It is possible that Parliament might request in-year financial statements from the Department. Provision is therefore required so that the Secretary of State can require Monitor to prepare an in-year consolidated account in respect of all NHS foundation trusts and to direct that such an interim account is audited if required.

Reason for delegating the power

598. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

599. For the initial period after the Bill is in place, it is appropriate for Monitor to have the power to direct foundation trusts about their accounts. However, from a date to be specified by the Secretary of State, all the powers, duties and responsibilities exercised by Monitor in respect of the preparation of a consolidated foundation trust account, or in relation to individual

foundation trust accounts, during or at the end of any financial year, would instead be exercised by the Secretary of State. This is discussed in the commentary on clause 152 (Accounts: variations to initial arrangements).

Reason for the selected procedure

600. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006). There is a power for the Secretary of State to direct that copies are laid before Parliament, so Parliament can scrutinise the actual accounts rather than the process for preparing them.

Paragraphs 18-20: Accounts of Monitor

Power conferred on: *Secretary of State (with the approval of the Treasury in some cases)*
Power exercised by: *Directions*
Parliamentary procedure*: None*

601. These paragraphs give the Secretary of State power, with the approval of the Treasury, to direct Monitor as to the content and form of its accounts, and the methods and principles according to which they must be prepared. Annual accounts must be prepared for each financial year and must be sent to the Secretary of State and the Comptroller and Auditor General within such period as the Secretary of State directs. With Treasury approval, the Secretary of State can also direct Monitor to prepare interim accounts which may cover any periods other than the financial year as directed by the Secretary of State. A copy of the interim accounts must be sent to the Secretary of State and to the Comptroller and Auditor General if the Secretary of State so directs.

602. The Comptroller and the Auditor General must examine, certify and report on any interim accounts of Monitor sent to him. The Secretary of State may direct the Comptroller and Auditor General to send a copy of the report on accounts to him and to lay copies of the accounts and report before Parliament.

603. The Secretary of State will remain accountable to the Treasury for the Department's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all bodies that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that the accounts of Monitor are prepared in accordance with the requirements set by the Treasury.

Reason for delegating the power

604. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

Reason for the selected procedure

605. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006).

Paragraph 21: Reports and other information

Power conferred on**:** *Secretary of State*
Power exercised by: *Requirement*
Parliamentary procedure*: None*

606. Sub-paragraph (4) requires Monitor to provide the Secretary of State with such reports (in addition to its annual report, which is dealt with earlier in paragraph 21) and information relating to the exercise of its functions as the Secretary of State may require. It also requires Monitor to provide information about NHS foundation trusts that it has in its possession to the

Secretary of State on request. Use of the power will support the Secretary of State in discharging his responsibility to account for Monitor and NHS foundation trusts.

Reason for delegating the power

607. The information required may need to be specified in some detail and is likely to change from time to time. For both reasons, it is desirable to seek a delegated power.

Reason for the selected procedure

608. The Department does not consider a Parliamentary procedure necessary for the use of this power to require information.

Clause 61: Power to give Monitor functions relating to adult social care services

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

609. This clause confers a power on the Secretary of State to make provision, by regulations, for specified functions of Monitor also to be exercisable in relation to adult social care.

Reason for delegating the power

610. The Department of Health, working with the Department for Communities and Local Government, is considering the proposed role for Monitor in regulating adult social care with respect to potential anti-competitive behaviour and/or provider failure, ensuring that such a role does not duplicate existing functions.

611. Subject to the outcome of the joint review by the Department of Health and the Department for Communities and Local Government, the Government anticipates that these regulations would be limited to potential anti-competitive practice and/or provider failure.

612. The reason for delegating this power is to ensure that there is an option, in future, to allow for regulations to provide for the inclusion of adult social care services within the remit of Monitor's functions if the conclusion is that this would be the appropriate option for the social care sector in the future.

613. The regulation-making power gives flexibility for the Secretary of State to decide which of Monitor's functions should be exercisable in relation to adult social care services. The adult social care market is more mature than that of health care and therefore different provisions are likely to be required.

Reason for the selected procedure

614. Given the potential impact of extending Monitor's regulatory functions to the adult social care sector and the need to make consequential amendments to the provision of the Bill as a result of such an extension, the Department considers the affirmative resolution procedure appropriate.

Clause 66: Information

Power conferred on*: Secretary of State*
Power exercised by*: Requirement*
Parliamentary procedure*: None*

615. This clause gives the Secretary of State a power, for the purposes of exercising a function under Part 3 of the Bill, to request Monitor to provide the Secretary of State with such information as the Secretary of State may specify. Monitor must comply with such a request. It also gives Monitor the power to use information acquired in connection with any of its functions for any of its other functions.

Reason for delegating the power

616. A delegated power is needed because the information the Secretary of State might vary over time.

Reason for the selected procedure

617. The Department does not consider a Parliamentary procedure necessary because of the administrative nature of the requirements.

Clause 67: Failure to perform functions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless given by regulations – see clause 298(13) – in which case negative)*

618. This clause confers powers on the Secretary of State to direct Monitor in situations of serious failure by Monitor to carry out any of its functions.

619. The power enables the Secretary of State to direct Monitor if the Secretary of State considers that Monitor is failing or has failed to discharge any of its functions, or is failing or has failed to discharge any of its functions properly. The direction can require Monitor to discharge those functions in a manner and within a period specified in the direction. If Monitor fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State. The failure must be significant and the Secretary of State must publish his reasons for the intervention. It would not be possible for the Secretary of State to intervene in a "particular case": instead, he would need to demonstrate that there is a more widespread failure. This is a safeguard to protect regulatory independence. (See the discussion of failure powers in relation to new section 13Z1, inserted by clause 20).

Reason for delegating the power

620. It would not be possible to set out in primary legislation exactly what intervention would be necessary in what circumstances, so this power provides the Secretary of State with flexibility to respond accordingly to failures by Monitor and at speed. These powers might be needed, not necessarily because of any fault on the part of Monitor, but because of

circumstances outside its control, for example, a serious infection affecting many of its staff and therefore its ability to perform its duties.

Reason for the selected procedure

621. The power would concern the way in which an existing function should be exercised, rather than a matter of principle (such as what functions there should be). The directions concerned could be given either in writing (subject to no Parliamentary procedure) or through regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided based on the type of intervention that is necessary.

CHAPTER 2: COMPETITION

Clause 71: Requirements as to procurement, patient choice and competition
Clause 72: Requirements under section 71: investigations, declarations and directions
Clause 73: Requirements under section 71: undertakings

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

622. Clause 71 enables the Secretary of State to make regulations imposing requirements on the NHS Commissioning Board and clinical commissioning groups in relation to arranging the provision of NHS services. The purpose of the requirements is to:

- ensure that commissioners adhere to good procurement practice;
- protect and promote patients' rights to make choices in respect of NHS treatment and services; and
- ensure that commissioners do not engage in anti–competitive behaviour which is against the interests of people who use such services.

623. The regulations may, in particular, impose requirements relating to competitive tendering and the management of anticipated conflicts between the interests involved in

commissioning services and the interests involved in providing services. The regulations may also provide for Monitor to have powers in relation to the requirements imposed by the regulations to investigate complaints and deal with breaches of the regulations. The regulations may also provide for the requirements to be imposed by the regulations not to apply in relation to certain arrangements as set out in the regulations.

624. Clause 72 also makes provision for the regulations to confer certain powers on Monitor in relation to requirements imposed under clause 71. Those powers include being able to enable Monitor:

- to investigate complaints made about failure by the NHS Commissioning Board or clinical commissioning groups to comply with the regulations;
- to initiate investigations into the compliance by the Board or clinical commissioning groups with the requirements relating to anti-competitive behaviour when Monitor has reasonable grounds to suspect a breach;
- to require the Board and clinical commissioning groups to provide information and provide explanations of that information in connection with any investigation;
- where there is a breach of the regulations that is sufficiently serious, to declare that an arrangement for the provision of services is ineffective but only in circumstances specifically provided for in the regulations, subject to any restrictions provided for in those regulations and only where there has been a failure to comply with the requirements in the regulations.

If a commissioner fails to comply with a requirement imposed by the regulations and this causes loss or damage, then this is actionable, except in so far as the regulations restrict the right to bring such an action. The regulations may provided for a defence to such an action and also prevent a person who has brought such an action under the Public Contract Regulations (SI 2006/5) from bringing such an action under these regulations in respect of the whole or part of the same loss or damage.

625. Clause 73 makes provision for the regulations to confer a power on Monitor to accept undertakings in lieu of enforcement action under clause 72. Monitor would be able to accept undertakings that a commissioner will take the sort of action described either in paragraphs (a) to (e) of clause 72(6) or in the regulations themselves. Clause 73 and Schedule 9 place further

requirements on Monitor with regard to consulting and publishing a process for accepting undertakings, publishing undertakings and issuing certificates of compliance where these have been met. In particular, if a commissioner fails to comply fully or partially with an undertaking, Monitor may take action including giving directions under clause 72(6) (see further below).

Reason for delegating the power

626. The Bill contains detailed provision about what requirements the regulations may impose and the powers Monitor has associated with those requirements. The power to impose those requirements has been left to delegated legislation to avoid placing too much detail on the face of the Bill. It is also important that these requirements can be changed as necessary based on evidence on the procurement practice of NHS commissioners to ensure that appropriate requirements are in place.

Reason for the selected procedure

627. The Department considers the negative resolution procedure appropriate. It ensures transparency, while also providing flexibility to amend the regulations speedily if necessary.

Directions

Power conferred on: *Monitor*
Power exercised by: *Directions*
Parliamentary procedure: *None*

628. Regulations made under the powers described above may confer on Monitor powers to direct commissioners:

- to take certain measures to prevent failure to comply with the regulations, to mitigate or remedy such failures;
- to remedy a failure or to comply with a requirement;
- not to carry out functions in a particular way as specified in the regulations, or
- to vary or withdraw invitations to tender or arrangements for the provision of services, in certain circumstances.

Reason for delegating the power

629. The power to give directions needs to be delegated, because it would not be possible to set out in primary legislation exactly what action should be taken in each circumstance. It is appropriate for the direction-giving power to be delegated to Monitor, as the regulator.

Reason for the selected procedure

630. The directions would make provision for operational matters for Monitor, as the regulator.

Clause 74: Guidance

Power conferred on: *Monitor*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

631. Clause 74 requires Monitor to publish guidance on commissioners' compliance with the requirements imposed by the regulations and also guidance on how Monitor will exercise the powers conferred under the regulations. The obligations on commissioners are set out in the regulations and the guidance is intended to assist commissioners in having a clear understanding of what is required of them and how Monitor will consider matters brought under the regulations.

Reason for delegating the power

632. Giving Monitor a delegated power to publish guidance about how commissioners are to comply with the regulations and how it will enforce them gives Monitor the flexibility to update the guidance to take account of experience of applying and enforcing the regulations to respond to any developments.

Reason for the selected procedure

633. The guidance would be about compliance with regulations that would be subject to negative resolution procedure. The Department considers it unnecessary for the guidance itself to be subject to a Parliamentary procedure.

CHAPTER 3: LICENSING

Licensing requirement

Clause 80: Requirement for health service providers to be licensed

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

634. Where two or more legal entities are involved, in different capacities, in providing a service, regulations may set out who will be treated as the service provider for the purposes of licensing. The power enables the Secretary of State expressly to exclude employees and to resolve any uncertainties. It is intended that the regulations will provide that it will be the legal person responsible for ensuring the service complies with the licensing requirements laid out in this (and any other relevant) legislation. This power is based on section 10(2) of the Health and Social Care Act 2008, where the same provision is made in relation to registration with the Care Quality Commission.

Reason for delegating the power

635. This power is delegated because it is intended to be used to clarify the requirement to hold a licence, which may need to change from time to time.

Reason for the selected procedure

636. The negative resolution has been selected, bearing in mind the importance of transparency about the rules that will affect providers and the fact that this power concerns a technical element of the licensing process (that is, the legal entity which will need to hold the licence).

Clause 82: Exemption regulations
Clause 83: Exemption regulations: supplementary

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

637. Subsection (1) of clause 82 provides that the Secretary of State may make regulations specifying exemptions from the requirement to hold a licence. All providers of health care services for the English NHS would be required to hold a licence, unless they or the service they provide have been exempted from such requirement by regulations made by the Secretary of State.

638. There are broad parameters for the way in which the exemptions can be set. For example, the Secretary of State can specify that a particular exemption can apply generally, for example to a whole group of providers, or more specifically, for example to a subsection of that group. Exemptions can be granted subject to conditions and subsection (3) sets out some examples of things an exempted provider may be required to do via such conditions. More detail is given in the discussion of the direction-giving power below.

639. Exemptions would be designed to target licensing at those parts of the health sector where it is necessary, such as large providers, and providers of services required to be subject to continuity of service conditions. Monitor should also ensure that regulatory burden is not imposed where it is not needed, keeping the system targeted and proportionate.

640. The Secretary of State also has the power to revoke exemption regulations. Regulations can be made under subsection (1) and (2) of clause 83 to revoke exemptions in relation to either an individual provider or a whole group of providers. Before making regulations, the Secretary of State must consult Monitor, the NHS Commissioning Board, the Care Quality Commission and Healthwatch England about the proposed withdrawal, and give notice of the proposal.

Reason for delegating the power

641. The exemption regime would be likely to develop over time, as new regulatory approaches become necessary in order to deal with changes in the provider and service landscape. For example the introduction of a national tariff that applies to services offered by a previously exempted provider type may necessitate the introduction of a licence requirement for those providers.

642. Given this potential need for adjustment, it seems prudent to allow the exemption regime to be defined and adapted in regulations rather than using the less flexible approach of prescription in primary legislation. This approach to prescribing the exemptions is consistent with that adopted in other regulated sectors, such as electricity.

Reason for the selected procedure

643. This is a power to grant exemptions from the general requirement to hold a licence and the negative resolution procedure therefore seems appropriate. It is the same procedure which applies to the granting of exemptions under section 5 (exemptions from prohibition on unlicensed supply etc. of electricity) of the Electricity Act 1989 (c.29), which demonstrates consistency across different sectors (see section 106(2) (regulations and orders) of that Act).

Directions

Power conferred on: *Secretary of State/Monitor*
Power exercised by: *Direction*
Parliamentary procedure: *None*

644. Subsection (3) of clause 82 provides that an exemption can be made subject to a condition requiring a person subject to an exemption to comply with directions given by Monitor. For example, Monitor might require providers to notify any change of circumstances that is relevant to the reasons for an exemption.

645. Under subsection (3) of clause 83, the Secretary of State can, by direction, withdraw an exemption for a particular provider within a group of providers, whilst the exemption remains in place for the rest of that group. When the exemption withdrawal is not at the provider's request, the Secretary of State must consult Monitor, the Board, the Care Quality Commission and Healthwatch England about the proposed withdrawal, and give notice of the proposal.

Reason for delegating the power

646. It would not be possible to set out in primary legislation every sort of exemption that might be appropriate, or every circumstance in which it might be appropriate to withdraw an exemption from an individual provider within a group.

Reason for the selected procedure

647. Exemption directions and the withdrawal of an exemption for one particular provider within a group are detailed operational matters, so the Department considers no Parliamentary procedure necessary.

Licensing procedure

Clause 92: Register of licence holders

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure *Negative*

648. The information contained in the register of licence holders will be available to the public at Monitor's offices for inspection or by asking for a copy. However, this clause gives the Secretary of State power to prescribe in regulations any circumstances or pieces of information that should not be available to the public in this way.

Reason for delegating the power

649. These regulations will deal with administrative details relating to information kept on the register and it is therefore appropriate to leave this to secondary legislation.

Reason for the selected procedure

650. The negative resolution procedure is appropriate because the power is to be used to deal with administrative details.

Licence conditions

Clause 93: Standard conditions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure*: None*

651. This clause gives the Secretary of State a right of veto over the first set of standard licence conditions. The Secretary of State can exercise this right by directing Monitor not to determine that the standard conditions will be the draft standard conditions.

Reason for delegating the power

652. It would be inappropriate to set the licence conditions out in primary legislation, as they would be a matter for Monitor as the independent regulator. The Secretary of State's power to veto the first set of licence conditions is contingency provision, to ensure that the conditions are appropriate. It would be difficult to specify in primary legislation all the circumstances in which it would be appropriate for the Secretary of State to veto the licence conditions.

Reason for the selected procedure

653. The Department considers a Parliamentary procedure unnecessary for this Secretary of State power of veto, because it is a power to ensure that the first set of licence conditions to be

set by Monitor are appropriate. It is a matter appropriate to be left for the discretion of the Secretary of State.

Clause 95: Limits on Monitor's functions to set or modify licence conditions

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

654. Subsection (2) limits Monitor to setting licence conditions for the purposes of specific regulatory functions, as specified in paragraphs (a) to (h). Paragraph (h) provides that Monitor can set licence conditions for such purposes as the Secretary of State may specify by regulations for the purpose of enabling Monitor to discharge its overarching duties under clause 59.

Reason for delegating the power

655. This power is intended to future-proof the legislation, to ensure the flexibility to enable Monitor to use licence conditions outside the parameters specified in subsection (2)(a) to (g), if this will enable it to discharge its overarching duties.

Reason for the selected procedure

656. This power is expressly limited by reference to Monitor's overarching duties which are prescribed on the face of the Bill. As such, these duties will have been subject to significant scrutiny and parliamentary procedure. This is also true of the processes set out on the face of the Bill for setting and modifying standard and special conditions. The negative resolution procedure for making regulations to enable the delivery of these duties through setting licence conditions therefore seems appropriate.

Clause 97: Conditions relating to the continuation of the provision of services etc.

Power conferred on: *Monitor*
Power exercised by: *Guidance*

Parliamentary procedure: *None*

657. This clause provides that Monitor must publish guidance to cover situations in which a provider's licence includes a condition made under subsection (1) (i), (j) or (k) of clause 96. The conditions in subsections (1)(i), (j) and (k) are intended to enable Monitor to support commissioners in ensuring continuity of NHS services. They would enable Monitor, amongst other things, to require the provision of information to commissioners; to enter premises; or to require a licence holder to co-operate with anyone Monitor has appointed to assist in the management of the licence holder's affairs, business and property. Clause 97 provides that Monitor must publish guidance about the exercise by commissioners of their functions and the conduct by providers of their affairs, business and property at any time during which a condition made under clause 96(1) (i), (j) or (k) applies. Subsection (5) provides that commissioners would have to have regard to the guidance.

Reason for delegating the power

658. Monitor is the most appropriate organisation to provide guidance on what is required from commissioners and providers in relation to licence conditions under clause 96(1)(i), (j) and (k). The content of the guidance is likely to change over time, making it inappropriate to be included in primary legislation.

Reason for the selected procedure

659. The principle of commissioners and providers co-operating with Monitor to support providers at risk of becoming unsustainable and to help secure continued access to NHS services is set out in the Bill. Monitor's guidance would set out more detail about what would be required. It is not the usual practice to require guidance on complying with licence conditions to be subject to any Parliamentary procedure

Clause 98: Modification of standard conditions

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

660. Subsection (7) provides for the Secretary of State to prescribe, through regulations, an objection percentage and a share of supply percentage in relation to the modification of licensing conditions. Subsection (9) also provides for such regulations to be able to lay down a method for determining the share of supply of services of a licence holder.

661. Monitor may modify the general conditions applicable to all licences, or to licences of a particular description, but before any modifications can be made, Monitor must give notice to specified persons or bodies. Each relevant licence holder must be informed and have an opportunity to object. If both the objection percentage and the share of supply percentage of relevant licence holders who have given notice of objection is less than the percentages prescribed by the Secretary of State, then Monitor can adopt the proposed modification.

662. The objection percentage is the proportion of affected providers who are objecting. When this proportion is weighted according to the share of supply of those providers, it is known as the share of supply percentage. This process is designed to balance the desirability of providers having a say in the design of the licence with Monitor's role to ensure that necessary licence conditions are imposed, for example to support access to services, or to update licence conditions to ensure that regulation does not become out of date.

Reason for delegating the power

663. The first reason for delegating the power is that it is a technical subject and a thorough market study and provider engagement exercise will need to be carried out before determining what the initial thresholds for the objection and share of supply percentages will be.

664. In addition, in other regulated sectors it has been found to be advantageous to be able to adjust the objection/share of supply percentages in response to changing conditions in the regulated sector, for example, changes in provider and service landscape. This is likely to be as relevant in health as in other regulated markets.

Reason for the selected procedure

665. The choice of affirmative resolution procedure follows the precedent set out in existing legislation governing other regulatory regimes, such as section 11A(7) of the Electricity Act 1989 (see section 11A (11)).

Clause 99: Modification references to the Competition Commission
Schedule 10: References by Monitor to the Competition Commission

666. This clause gives effect to Schedule 10, which includes the following delegated powers.

Paragraph 8: Competition Commission's power to veto changes

Power conferred on: *Competition Commission / Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure*: None*

667. Paragraph 8 provides that in certain circumstances, the Competition Commission could direct Monitor not to make proposed changes to licence conditions. The paragraph applies where Monitor has made a reference to the Competition Commission either because a licence holder or applicant for a licence has refused consent to the inclusion of a special condition in a licence; or where there have been sufficient objections to proposals from Monitor for modifications to standard licence conditions to require a reference. If a reference is made, the Competition Commission would report on the matter and Monitor would have to notify the Commission and others how it intends to change its original proposals (for a special licence condition for an individual provider or for modifications to standard licence conditions) in response to the Commission's report. Paragraph 8 would enable the Commission to direct Monitor not to make some or all of its proposed changes. The Commission could do this up until four weeks after a notice of the reference is received. It is appropriate for this power to be time-limited, so that issues are resolved as quickly as possible. In general, four weeks should be sufficient. However, in exceptional circumstances, there could be a case for extending that period: the Bill therefore gives the Secretary of State power by direction to extend the four week period by 14 days.

Reason for delegating the power

668. It is not possible to set out in primary legislation the circumstances in which Monitor should not make proposed changes to licence conditions, and doing so would deny the Competition Commission the power to take a decision that is appropriate in the light of all the circumstances applying at the time. It is therefore appropriate for the Competition Commission to have the first power mentioned above. It is not possible to set out in primary legislation the circumstances in which it would be appropriate to extend the normal four week period, so it is appropriate for the Secretary of State to have the second power mentioned above.

Reason for the selected procedure

669. No Parliamentary procedure seems appropriate, given that the first power relates to the Competition Commission's exercise of its functions, and that the second is an administrative step.

Clause 100: Modification of conditions by order under other enactments

Power conferred on: *Office of Fair Trading, Competition Commission or the Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *None, except for orders made by the Secretary of State under sections 160 or 161 of, or Schedule 7 to, the Enterprise Act 2002, which are subject to negative resolution*

670. This clause gives these authorities the power to modify licence conditions by order, under various specified provisions of the Enterprise Act 2002. These provisions mean that the modifications can be made if:

- a provider of licensable services has or may have ceased to be a distinct enterprise, or a provider of licensable services will or may cease to be a distinct enterprise (that is, in a merger situation); or
- a restriction or distortion of competition, arising from a feature of a market, is related to the commissioning or provision of services for the purposes of the NHS.

Reason for delegating the power

671. This is an extension of existing powers of the competition authorities under the Enterprise Act 2002 to modify licence conditions to remedy adverse effects identified. The inclusion of a provision of this type is consistent with other regulatory regimes.

Reason for the selected procedure

672. This approach to making the necessary modifications follows the precedent set in other regulatory regimes and as the relevant orders will be made under the Enterprise Act 2002 the procedures laid down in that legislation will apply.

Enforcement

Clause 103: Discretionary requirements

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

673. This clause makes provision for the Secretary of State to prescribe the manner in which turnover in England of a provider is to be calculated for the purposes of the limit on the amount of a variable monetary penalty.

Reason for delegating the power

674. The method for calculating the turnover of a provider in England is technical detail which is best left to secondary legislation. This also follows a precedent set under section 36(8) of the Competition Act 1998.

Reason for the selected procedure

675. The method for calculating the turnover of a provider in England is technical detail, but given that it will be central to calculating the limit on the amount of a financial penalty the affirmative resolution procedure is appropriate. This also follows a precedent set in relation to section 36(8) of the Competition Act 1998.

Clause 104: Enforcement undertakings

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

676. This clause allows the Secretary of State to prescribe additional types of action that can be accepted by Monitor in an enforcement undertaking given by a person who has breached licence conditions, or certain other requirements under this Chapter. This is in addition to the three types of action specified in the primary legislation:

- action to stop the activity in breach of the licence, or make sure it does not happen again;
- action to restore the position to what it was before the breach occurred, so far as is possible; and
- action to compensate licence holders or commissioners affected by the breach, which could be payment of money.

Reason for delegating the power

677. This power builds flexibility into the enforcement powers, by enabling the Secretary of State to make regulations extending the scope of the enforcement undertakings which Monitor could accept from a provider.

Reason for the selected procedure

678. This power gives the Secretary of State the power to prescribe additional actions for providers to take which Monitor can accept in enforcement undertakings, thereby extending the enforcement powers of Monitor. This power is based on the power in section 50(3)(d) of the Regulatory Enforcement and Sanctions Act 2008. Orders under Part 3 of that Act are subject to the affirmative resolution procedure.

Clause 106: Guidance as to use of enforcement powers

Power conferred on: *Monitor*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

679. Monitor is required to publish guidance on the use of its enforcement powers by this clause. Guidance is intended to provide licensees with certainty as to the enforcement action Monitor will take in particular circumstances.

Reason for delegating the power

680. Requiring Monitor to publish guidance, rather than specifying the detail of how enforcement powers will be used in primary legislation, creates the flexibility to update this guidance when necessary, for example to allow Monitor to adapt procedures to take into account experience of operating the licence regime.

Reason for selected procedure

681. As this is just guidance no Parliamentary procedure seems necessary.

Transitional provision

Clause 110: Duration of transitional period

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Affirmative*

682. Clause 109 gives Monitor specific intervention powers over all foundation trusts. These would provide continuity and a safety net during a challenging period, to allow time for the governors of foundation trusts to build capability in holding their boards to account. They would also allow Monitor to continue to protect the taxpayers' investment in foundation trusts This clause provides for Monitor to retain those powers until 31 March 2016, or for two years after authorisation where a foundation trust is authorised on or after 1 April 2014. It also

enables the Secretary of State to extend the transitional period by order. The extension could be in relation to all or some foundation trusts and could be for a maximum of two years at any one time.

Reason for delegating the power

683. This is a reserve power to enable the Secretary of State to extend the period during which Monitor's transitional intervention powers would apply. It is appropriate to delegate the power, since it may not need to be used, and if it is used, it would be necessary to decide in the light of circumstances at the time for how long the extension should last and in relation to which foundation trusts it should apply.

Reason for the selected procedure

684. The affirmative resolution procedure is appropriate to ensure that Monitor's powers to intervene in the running of NHS foundation trusts (which are powers that it would not have in relation to any other providers of NHS services) can be extended only with Parliament's agreement.

CHAPTER 4: PRICING

Clause 114: The national tariff

Power conferred on: *Monitor*
Power exercised by: *Publishing the national tariff*
Parliamentary procedure: *None*

685. This clause enables Monitor to publish, in "the national tariff" document:

- the services provided for the purposes of the NHS in England (in line with the structure agreed with the NHS Commissioning Board) for which national prices will apply;
- the methodology that has been employed by Monitor to produce the specified national prices of those services;

- the resultant national prices;
- variations to the national price;
- the methodology to be used for determining local modifications of prices under clauses 122 and 123; and
- rules on the process for determining local prices for services not specified as being covered by the national tariff.

686. The national tariff document may also include rules under which providers and commissioners can make local variations to the national prices, rules stating which national price is paid for services specified in different ways (for example, separately and as part of a bundle of services) in the national tariff and guidance on the application of the various rules. The national tariff may also include rules relating to how providers should be paid by commissioners for the services they provide.

Reason for delegating the power

687. The elements of the tariff document will require regular updates, for example if the NHS Commissioning Board and Monitor agree to extend the tariff to other services or to take into account efficiencies achieved in the provision of services. The need for flexibility to produce new editions of the document make this unsuitable for primary legislation.

Reason for the selected procedure

688. No Parliamentary procedure is considered necessary, since the national tariff exists at present in a non-statutory form and will be a detailed document, published nationally whose content will change regularly, probably annually at first.

Clause 115: The national tariff: further provision

***Power conferred on**: Monitor*
***Power exercised by**: Directions*
***Parliamentary procedure:** None*

689. Subsections (5) and (6) give Monitor powers of direction in relation to commissioners of health care services for the purposes of the NHS. Such power is intended to be used where a commissioner either agrees to pay a price which is different from the price payable under the national tariff, or the commissioner fails to comply with rules contained in the national tariff. Monitor may direct the commissioner to take steps to stop the breach, to secure that the breach does not continue or recur, or to secure that the position is restored (as far as reasonably practicable) to what it would have been if the breach had not occurred.

Reason for delegating the power

690. This power relates to enforcement action by Monitor: putting the requirements Monitor would set into primary legislation would remove its enforcement role.

Reason for the selected procedure

691. A Parliamentary procedure is considered inappropriate, as this power is about specific enforcement action to be taken by Monitor in relation to specific cases.

Clause 118: Responses to consultation

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

692. Subsection (2) provides for the Secretary of State to prescribe, through regulations, objection percentages for commissioners and for licence holders and a share of supply percentage for licence holders in relation to the methodologies used for setting prices for the purposes of the national tariff.

693. Monitor would be responsible for setting and publishing a national tariff for NHS services, but before publishing the tariff, Monitor would need to send a notice to each clinical commissioning group, each licence holder and such other persons as it considers appropriate, so that they have an opportunity to comment on the national tariff document and to object to the proposed methodology for setting national prices. If both the objection percentage of

commissioners and the objection percentage and the share of supply percentage of relevant licence holders who have given notice of objection is less than the percentages prescribed by the Secretary of State, then Monitor would be able to proceed and publish the national tariff.

694. The objection percentage is the proportion of commissioners or affected licence holders who are objecting. When this proportion is weighted according to the share of supply of those licence holders, it is known as the share of supply percentage. Subsection (6) provides that the regulations may include provision prescribing the method used for determining a licence holder's share of supply in England of the services concerned. This process is designed to balance the desirability of commissioners and providers having a say in the design of the tariff with Monitor's role to ensure that appropriate tariff prices are adopted.

Reason for delegating the power

695. Delegating the power gives the Secretary of State flexibility to adjust the prescribed percentages in the future. This is important as the optimal percentage may change as the commissioner and provider landscape changes.

Reason for the selected procedure

696. The use of affirmative resolution in prescribing the percentages necessary for a reference to be made is consistent with other regulated industries. Affirmative resolution ensures that Parliament is content with a key aspect of the new system, that is, providing appropriate opportunities for calculating prices and the resultant prices to challenge those proposals, without creating a provider-led pricing system.

Schedule 12: Procedure on references under section 118

697. Clause 118 also introduces Schedule 12, which contains the following delegated powers.

Paragraph 11: Procedural rules

Power conferred on: *Competition Commission*

Power exercised by: *Rules*
Parliamentary procedure: *None*

698. This paragraph provides that the Competition Commission can devise its own rules of procedure for determining any references made to it under clause 118 about pricing methodologies proposed by Monitor.

Reason for delegating the power

699. The power is delegated because it relates to the Competition Commission's own rules of procedure.

Reason for the selected procedure

700. A Parliamentary procedure would be inappropriate given that this power relates to the Competition Commission's own rules of procedure. The lack of a Parliamentary procedure is consistent with the Competition Commission's powers under other legislation for groups established by it to carry out investigations to set their own rules of procedure.

Paragraph 12: Costs

Power conferred on: *Competition Commission*
Power exercised by: *Order*
Parliamentary procedure: *None*

701. This paragraph provides that the Competition Commission must order either Monitor or those who objected to a particular pricing methodology to pay the costs the Commission incurred in connection with the reference to it.

Reason for delegating the power

702. It is appropriate for the parties to a reference to the Competition Commission to meet the costs incurred by the Commission. As an objective body, which decides the matter under

consideration, the Commission is best placed to decide which party should be liable to pay such costs.

Reason for the selected procedure

703. The Bill provides for reimbursement of the Competition Commission's costs in determining any reference on pricing methodologies and for who should reimburse those costs. It is appropriate for the Competition Commission, as an objective body who has decided the matter under consideration, to decide who should be liable to meet such costs. It is not usual for Parliament to be concerned with the payment of costs in quasi-judicial matters such as this.

Paragraph 13: Power to modify time limits

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *None*

704. This paragraph provides that the Secretary of State can, by order, vary any of the time periods specified in the Schedule.

Reason for delegating the power

705. This is intended as contingency provision, to be used in specific cases, if there is a strong case for extending or shortening a time period specified in the Schedule.

Reason for selected procedure

706. Decisions on whether to vary time periods would relate to the circumstances of particular cases. This degree of detail on a procedural matter would be inappropriate for a Parliamentary procedure.

Clause 120: Changes following determination on reference under section 118

Power conferred on: *Competition Commission*
Power exercised by: *Direction*
Parliamentary procedure: *None*

707. This clause providers that where the Competition Commission concludes that a pricing methodology proposed by Monitor is not appropriate, it should remit the matter to Monitor and can direct Monitor not to make particular changes proposed by Monitor to the proposed methodology.

Reason for delegating the power

708. The Bill provides for the Competition Commission to be arbiter where specified proportions of commissioners or providers object to a pricing methodology proposed by Monitor. The power to direct Monitor not to make particular changes to a methodology gives effect to this aspect of the Commission's role and ensures that Monitor makes only changes that are consistent with the Commission's findings.

Reason for the selected procedure

709. The power relates to pricing methodologies, which is a detailed operational matter. The Bill provides for the final decision on this to be a matter for the Competition Commission. It would therefore seem inappropriate and unnecessary to require a Parliamentary procedure for directions given by the Commission to ensure that changes to a methodology by Monitor are consistent with its findings.

Clause 121: Power to veto changes under section 120

Competition Commission

Power conferred on: *Competition Commission*
Power exercised by: *Directions*
Parliamentary procedure*: None*

710. This clause provides that, where Monitor proposes changes to its original proposals for methodologies for setting prices, following a report by the Competition Commission on a reference by Monitor to it, the Commission may direct Monitor not to make the changes in question, or not all of them. The Commission can do this up until four weeks after a notice of the reference was received.

Reason for delegating the power

711. This gives the Competition Commission the power to ensure that changes proposed by Monitor are in line with any changes specified in the Commission's report. It is appropriate for the Commission to have this power, as it would be best placed to judge whether proposed changes reflect the determination made by the Commission and set out in its report. The proposed power mirrors the position in relation to references to the Competition Commission to carry out investigations under other sectoral legislation (for example under section 14A of the Electricity Act 1989).

Reason for the selected procedure

712. Given the content of the direction, the Department considers that no Parliamentary procedure is warranted.

Time limits

Power conferred on: *Secretary of State*
Power exercised by: *Direction*
Parliamentary procedure*: None*

713. Subsection (3) of clause 121 also gives the Secretary of State the power to extend the four-week period during which the Competition Commission can direct Monitor not to make its proposed changes to its original proposals for pricing methodologies by fourteen days.

Reason for delegating the procedure

714. It would be impractical to set out in primary legislation the circumstances in which the time limit should be extended.

Reason for the selected procedure

715. This is a minor matter, for which a Parliamentary procedure would be inappropriate.

Clause 122: Local modifications of prices: agreements

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure*: None*

716. Clause 122 provides that in certain circumstances, Monitor can approve agreements reached between the commissioner and provider of a service to modify the national tariff price payable for that service. The clause also provides for the Secretary of State to issue a direction to Monitor to remove such a price modification that Monitor has approved, where the Secretary of State believes the price modification would contravene an EU obligation.

Reason for delegating the power

717. A delegated power is needed, so that there is a mechanism for responding if the need arises to a price modification that is seen as contravening an EU obligation. As the Secretary of State is responsible for ensuring the NHS system complies with EU obligations, it is appropriate to delegate this power to him.

Reason for the selected procedure

718. As this power relates to the responsibility of the Secretary of State to ensure that the NHS complies with relevant EU obligations it does not seem appropriate, or necessary, to apply any Parliamentary procedure.

Clause 123: Local modifications of prices: applications

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure*: None*

719. Clause 123 provides that in certain circumstances, Monitor can approve a proposal from a provider of a service to modify the national tariff price payable for that service, where the provider has sought, but failed to secure the agreement of the relevant commissioner to the proposed modification. The clause also provides for the Secretary of State to issue a direction to Monitor to remove such a price modification that Monitor has approved, where the Secretary of State believes the price modification would contravene an EU obligation.

Reason for delegating the power

720. As the Secretary of State is responsible for ensuring the NHS system complies with EU obligations, it is appropriate to delegate this power to him.

Reason for the selected procedure

721. As this power relates to the responsibility of the Secretary of State to ensure that the NHS complies with relevant EU obligations it does not seem appropriate, or necessary, to apply any Parliamentary procedure.

CHAPTER 5: INSOLVENCY AND HEALTH SPECIAL ADMINISTRATION

Clause 127: Health special administration regulations
Clause 128: Transfer schemes
Clause 129: Indemnities

Power to make regulations about health special administration orders

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

722. Clause 127 requires the Secretary of State to make regulations, referred to as “health special administration regulations”, to make further provision about the health special administration procedure. The Secretary of State is required to consult Monitor and other appropriate persons before making health special administration regulations

723. The health special administration regulations may apply any provisions of Part 2 of the Insolvency Act 1986 (administration) or any related provision of that Act and any other relevant enactment that relates to administration or insolvency under that Act. The purpose is to allow the application, in a modified form, of the provisions of that Act and other relevant enactments to create a health special administration regime that would apply to companies providing particular NHS health care services. Clause 127(3) provides that the court may make a health special administration order where the Secretary of State presents a petition for the winding up of a company in the public interest. This is consistent with special administration regimes in other sectors. Clause 127(5) provides that the health special administration regulations may include provisions for Monitor to publish and maintain a register of companies within the scope of the health special administration procedure. This will enable third parties, including creditors, to identify those companies against which a health special administration order may be made as an alternative to standard corporate insolvency procedures. The health special administrator will be obliged to work with commissioners to identify and secure the continuity of essential NHS services and Monitor will be required to publish guidance for commissioners which must be approved by the Secretary of State and the NHS Commissioning Board. The regulations to be made under this clause will be subject to public consultation and the affirmative resolution procedure.

724. Clause 127 also makes provision for the health special administration regulations to modify Chapter 6 of the Bill, the Insolvency Act 1986 or any other relevant enactment that relates to administration or insolvency under that Act. This is a Henry VIII power which enables the Secretary of State to make provision to modify an enactment about insolvency in consequence or in connection with provisions made for the health special administration regime.

<u>Reason for delegating the power</u>

725. These powers concern technical details which are likely to change over time and hence which would be inappropriate to include in primary legislation.

726. The Henry VIII power is considered necessary because insolvency legislation is inherently complex and a health special administration regime is new. Unforeseen complexities may arise in the development of the new arrangements. Also, the law relating to insolvency is constantly evolving. Hence, it is important to provide for amendments to primary legislation, should this be necessary to create a workable health special administration regime. Comparable powers were taken in the Banking Act 2009 in relation to bank insolvency and bank administration.

Reason for the selected procedure

727. In view of the significance of creating a special administration regime for health, the regulation-making power would be subject to the affirmative resolution procedure. This procedure also applies to power to make regulations about special insolvency procedures for investment banks in section 233 (insolvency regulations) of the Banking Act 2009 (see section 235 of that Act).

Power to make insolvency rules

Power conferred on: *Lord Chancellor with the concurrence of the Secretary of State, and in the case of rules affecting court procedure the Lord Chief Justice, in relation to England and Wales. In relation to Scotland, the Secretary of State*
Power exercised by: *Rules*
Parliamentary procedure: *Negative*

728. Clause 127 also expressly provides for the power to make insolvency rules under section 411 of the Insolvency Act 1986 (company insolvency rules) to apply for the purpose of giving effect to the health special administration regime.

Reason for delegating the power

729. The power to make rules already exists in section 411 of the Insolvency Act 1986. Those rules are made subject to the negative resolution procedure. The rules would cover technical details, needed to make the health special administration regime workable, that might change over time. This is consistent with other special administration regimes.

Reason for the selected procedure

730. As clause 127 provides for an extension of an existing power, the procedure laid down in that legislation will apply. Rules made under this power are subject to the negative resolution procedure.

Clause 130: Modification of this Chapter under Enterprise Act 2002

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

731. This clause provides that the powers of the Secretary of State to modify or apply, by order, enactments under sections 248, 254 and 277 of the Enterprise Act 2002 includes power to make consequential changes to this Chapter of the Act or regulations made under powers set out in this Chapter.

732. Sections 248 and 277 of the Enterprise Act 2002 provide for consequential amendments and section 254 provides a power to apply insolvency law to foreign companies.

Reason for delegating the power

733. The purpose of this power is to ensure that any future modifications made under sections 248, 254 and 277 of the Enterprise Act 2002 can also be applied to the health special administration arrangements. As the nature of any such modifications is not known, provision cannot be made in primary legislation.

Reason for the selected procedure

734. The Enterprise Act 2002 provides that the Secretary of State can modify or apply enactments under sections 248, 254 and 277 of that Act by order. As clause 130 provides for an extension of that power, the procedure laid down in that legislation will apply.

CHAPTER 6: FINANCIAL ASSISTANCE IN HEALTH SPECIAL ADMINISTRATION CASES

Clause 135: Power to impose charges on commissioners

***Power conferred on**: Secretary of State*
***Power exercised by:** Regulations*
***Parliamentary procedure:** Negative*

735. This clause gives the Secretary of State the ability to make regulations that would allow Monitor to require commissioners to pay charges to fund a financial mechanism to support the continuity of services where providers become unsustainable. In this event, commissioners, in consultation with Health and Wellbeing Boards and the local community, would identify the services to which either the unsustainable provider regime, in the case of a foundation trust, or the health special administration regime, in the case of a company providing certain services, would apply. The financial mechanism would provide funds to support continued access to these services.

736. The regulations would either prescribe the amount payable by commissioners, or lay down criteria or a method for determining the amount of the charge. The clause also sets out what must be contained in any such regulations.

737. Before making any such regulations, the Secretary of State must consult Monitor and the NHS Commissioning Board.

Reason for delegating the power

738. The methodology to be set will be technical and require more detail than would usually be included in primary legislation. The amount to be charged, or the criteria or method for determining the charge, may also need to be varied from time to time.

Reason for the selected procedure

739. The primary legislation will lay down the general principle that commissioners can be required to pay charges, with the regulations only prescribing the amount to be paid, or the criteria or method against which the amount is to be determined. The negative resolution procedure therefore seems appropriate.

Clause 137: Power of Secretary of State to set limit on levy and contributions

Power conferred on*: Secretary of State, with the approval of the Treasury*
Power exercised by: *Order*
Parliamentary procedure: *Affirmative*

740. This clause gives the Secretary of State the power to limit the amount Monitor is able to raise through levies on providers and contributions from commissioners towards the financial mechanism, with the consent of the Treasury. It is the intention that this power would be used only in exceptional circumstances, when the size of the financial mechanism needed to cover the risk of providers becoming unsustainable is too large.

Reason for delegating the power

741. It would not be desirable to write into primary legislation limits on the amounts Monitor can raise because: it is not certain that it will be necessary to set any limits; any limits set might require more detail to specify them than would be desirable to include in primary legislation; and any limits set might need to change over time.

Reason for the selected procedure

742. It is envisaged that this power would be used only in exceptional circumstances, where the risk of providers becoming unsustainable meant that without the exercise of the power, there would be very high charges on providers and commissioners. Such circumstances seem likely to arise only where providers at risk of becoming unsustainable supplied a significant proportion of NHS-funded services. If this did occur, it would be a serious situation and it seems appropriate to provide that Parliament should debate the exercise of the Secretary of

State's power. A similar power under section 178 of the Pensions Act 2004 is also subject to the affirmative resolution procedure.

Clause 139: Responses to consultation

***Power conferred on**: Secretary of State*
***Power exercised by:** Regulations*
***Parliamentary procedure:** Affirmative*

743. This clause sets out the process for considering objections to the proposed methodology for determining the amount providers would be required to contribute to the financial mechanism. If there are objections, the proposed methodology can only be adopted if the percentages of objections are less than the prescribed objection percentages. Where this is not the case, if Monitor wants to adopt the proposed methodology, it must refer it to the Competition Commission for investigation. The Commission will then decide whether the proposed methodology should stand, or whether Monitor should be required to revise it. The reason for the objection percentages is the need to strike the right balance between enabling genuine concerns about the methodology to be considered, without creating undue scope for providers who do not want to pay the proposed levies to delay the process of imposing them.

744. The clause allows for the objection percentage and the share of supply percentage that must be reached, in order to stop Monitor adopting the proposed methodology, to be prescribed by the Secretary of State by regulations.

Reason for delegating the power

745. Delegating the power gives the Secretary of State flexibility to adjust the prescribed percentages in the future. This is important as the optimal percentage will vary as the provider landscape changes.

Reason for the selected procedure

746. The way in which charges are calculated will be a key issue for foundation trusts and companies who supply NHS services. The objection percentages need to strike the right

balance between considering serious concerns properly and not creating scope for providers to paralyse the system by raising ill-founded objections, including those motivated solely by self-interest. Given the importance of the issues here, it seems right for Parliament to approve the objection percentages.

Clause 142: Borrowing

***Power conferred on**: Secretary of State*
***Power exercised by:** Order*
***Parliamentary procedure:** Negative*

747. This clause gives Monitor the ability to take out loans or arrange overdrafts to contribute to the financial mechanism to be established by it under this Chapter.

748. In the event of a shortfall in funds raised through the mechanism and the sums needed to support unsustainable providers, it is proposed that the Secretary of State would be able to provide financial assistance to Monitor to increase the money available for this purpose.

749. It is proposed that Monitor would have the power to borrow from a deposit-taker such sums as it may from time to time require to support unsustainable providers, as well as to give security for any money borrowed by it. (The proposed power is based on section 115 (borrowing) of the Pensions Act 2004) Monitor could not however borrow if the effect would be to take the aggregate amount outstanding in respect of the principal of sums borrowed by it for this purpose over limits that the Secretary of State specified by order.

Reason for delegating the power

750. It would not be appropriate to set the limit in primary legislation since it could be subject to change in the light of changing circumstances and may need to change quickly in response to particular circumstances.

Reason for the selected procedure

751. The negative resolution procedure seems appropriate, to ensure transparency while also recognising that the content of the regulations would concern administrative details.

Clause 143: Shortfall or excess of available funds, etc.

***Power conferred on**: Secretary of State*
***Power exercised by:** Order*
***Parliamentary procedure:** Negative*

752. This clause gives the Secretary of State the power to direct Monitor to transfer funds to the Secretary of State if a financial mechanism has become dormant or is being wound up.

753. In this event the funds would be reinvested in the NHS.

Reason for delegating the power

754. The power would be exercised in specific circumstances which it would be difficult to define in primary legislation.

Reason for the selected procedure

755. The Bill sets out the principle that funds that Monitor does not use for the purpose for which they were raised and intended – that is, supporting the continuity of NHS services provided by an organisation that has become unsustainable – should return to the NHS. The Department does not envisage that the details of this would be controversial. However, the negative procedure would give Parliament the opportunity to debate specific exercises of this power, should it so wish.

PART 4: NHS FOUNDATION TRUSTS & NHS TRUSTS

756. This Part amends Chapter 5 of Part 2 of the NHS Act 2006, which makes provision for NHS foundation trusts. It removes various restrictions and regulation specific to foundation trusts, increases foundation trusts' decision-making powers, and clarifies their governance arrangements. This Part also repeals Chapter 3 of Part 2 of the NHS Act and other legislation

on NHS trusts. The intention is that NHS trusts, which can be directed by the Secretary of State and have been controlled by central and regional management, will cease to exist, which means many existing delegated powers over providers would be given up. Under Part 3 of the Bill, Monitor's powers to intervene in providers would, after an initial period, be based on continuity of NHS services and Monitor's powers to intervene differently in foundation trusts would be repealed.

757. Autonomy for all providers under the Bill's provisions would be matched by measures in the legislation to clarify foundation trusts' internal governance arrangements, giving governors greater powers to hold boards of directors to account. The delegated powers being sought in this legislation would:

- generally reduce the Secretary of State's role (by transferring to Monitor his roles in major foundation trust transactions, such as mergers, and foundation trust failure arrangements);
- increase transparency over how the Secretary of State fulfils his functions (by giving him direct powers on information, including accounts, giving clarity on how he would manage the taxpayer investment); and
- ensure the primary legislative changes being made to increase local autonomy work effectively (through powers to change the voting arrangements for new decision-making powers being given to foundation trusts and arrangements for Monitor to host an independent panel that can advise governors).

758. The delegated powers being sought are themed as follows.

759. Governance: these powers would allow the Secretary of State to take steps to mitigate any unintended consequences of changes made by the Bill. The Secretary of State would be able to make regulations about the membership of the new panel to advise governors to ensure its continuing independence and to vary the new voting arrangements for directors, governors or members introduced on the face of this Bill.

760. Accounts and finance: these powers provide for a more transparent approach in the relationship between the Secretary of State and foundation trusts. The Bill retains the Secretary of State's ability to give financial assistance, and gives the Secretary of State duties

to set out in legislation terms relating to this assistance which, in the past, he has been able to decide without this transparency. The Bill also gives the Secretary of State powers to set the form and timing of foundation trust accounts both to bring arrangements in line with revised and developing Government accounting needs and to reflect the proposed changed role of Monitor as a health sector regulator.

761. Mergers, acquisitions, separations and dissolutions: these powers allow Monitor to make the orders effecting mergers, acquisitions, separations and dissolutions involving foundation trusts, including necessary transfers of assets and liabilities, where due process has been followed. For mergers, where this power transfers from the Secretary of State, Monitor would lose its current powers of discretion in considering the establishment of a new foundation trust.

762. Foundation trust failure arrangements: transferring to Monitor the powers of the Secretary of State to operate the regime for unsustainable providers in relation to foundation trusts. The Bill amends some provisions in Chapter 5A of Part 2 of the NHS Act 2006 to provide for the appointment of "trust special administrators" for NHS trusts, foundation trusts and Primary Care Trusts in England. The proposed provisions are intended to form part of a wider process for dealing with the poor performance and failure of such NHS bodies. The provisions are designed to provide a transparent way of tackling this problem while safeguarding services.

763. In the main, the reason for delegating these powers instead of detailing them on the face of the Bill is that they transfer existing powers or relate to operational matters such as form and frequency of production of accounts. The power in clause 155 (Voting) would change provisions in primary legislation. It is proposed that this is subject to the affirmative resolution procedure. The others are proposed for negative resolution or for no procedure.

Governance and management

Clause 151: Accounts: initial arrangements

Power conferred on: *Monitor, in some cases with the approval of the Secretary of State*
Power exercised by: *Directions*

Parliamentary procedure: *None*

764. This clause deals with the ability to direct foundation trusts on the form, content, timing and other matters relating to the production of their accounts. It amends paragraphs 24 and 25 of Schedule 7 to the NHS Act 2006 primarily to require the regulator (Monitor) to seek the approval of the Secretary of State rather than of the Treasury on foundation trust accounting matters.

765. From 2011-12, under the Treasury's alignment legislation (Constitutional Reform and Governance Act 2010), the Department's annual Resource Account will, for the first time, consolidate the individual accounts of all NHS organisations, including foundation trusts. This is a significant change in Government accounting practice. The Department's Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all those bodies that are consolidated into the Department's Resource Account must also be prepared in accordance with the same Treasury accounting framework. Powers are therefore needed to ensure that the accounts of foundation trusts are prepared in accordance with the requirements set by the Treasury, subject to any divergence agreed between the Department and the Treasury. The Secretary of State therefore needs to be assured that the accounting directions given by Monitor are in line with this framework and would produce accounts consistent with those of all other bodies consolidated into the Department's Resource Account.

766. Subsection (1) replaces the power at paragraph 24(1) for Monitor to direct foundation trusts on the form of their accounts with the approval of the Treasury. The new provision requires that Monitor seek the approval of the Secretary of State rather than of the Treasury.

767. Subsection (2) amends paragraph 25(1) and requires Monitor to seek the approval of the Secretary of State rather than of the Treasury when directing on the form of foundation trust accounts.

768. Subsection (4) requires Monitor to seek the approval of the Secretary of State rather than of the Treasury in preparing directions on the accounting principles to be followed by foundation trusts and information to be reported in the accounts.

769. Subsection (3) adds a new power to allow Monitor to direct foundation trusts to produce accounts for any period other than for a financial year and to direct that these accounts are audited as required by Monitor. This power is intended to allow Monitor to require the production of in-year accounts by foundation trusts, for example quarterly, should these be required by the Department, the Treasury or Parliament.

770. In order for the Department to complete its accounts to the required deadline it will need accounts from all those bodies that are consolidated, including foundation trusts, within a specified period. Subsection (6) allows the regulator to direct the period within which the foundation trust must submit its accounts. This is to ensure sufficient time for the Department to produce its own resource accounts in line with cross-Government financial reporting deadlines.

771. Subsection (7) allows Monitor to direct on the period within which foundation trusts must submit accounts and auditor's reports produced as result of a direction given under subsection (3).

Reason for delegating the power

772. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

773. For the initial period after the Bill is in place, it is appropriate for Monitor to have the power to direct foundation trusts about their accounts. However, where the NHS Act currently requires Treasury approval for such Monitor directions, the Bill replaces that requirement with one for Secretary of State approval. This takes account of the fact that the accounts need to be consistent with, and consolidated into, the Department's own accounts.

Reason for the selected procedure

774. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard

practice to use directions for this purpose (as with other bodies established under the NHS Act 2006). There is a power for the Secretary of State to direct that copies are laid before Parliament, so Parliament can scrutinise the actual accounts rather than the process for preparing them.

Clause 152: Accounts: variations to initial arrangements

Power conferred on: *Secretary of State with the approval of the Treasury*
Power exercised by: *Directions*
Parliamentary procedure: *None*

775. The clause provides for the transfer of the powers and duties relating to the production of foundation trust accounts from Monitor to the Secretary of State. Under the proposals in the Bill the transfer is needed because in the long term the changes to the role of Monitor mean it would not be appropriate for Monitor to have a specific role in foundation trust accounts when it does not have a similar role for other regulated providers of health care. The intention is to replace the initial accounting arrangements set out in the previous clause with the arrangements in this clause.

776. This clause amends paragraphs 24 and 25 of Schedule 7 to the NHS Act 2006 (as amended by the previous clause) to substitute the Secretary of State for Monitor in respect of the powers and duties relating to the form, content, timing and other matters concerning the accounts of foundation trusts. The new provisions also require the Secretary of State to seek the approval of the Treasury in those cases where Monitor had been required to seek the approval of the Secretary of State.

Reason for delegating the power

777. The reasons set out above in relation to the previous clause apply equally here. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

778. After the commencement of this clause, the direction-giving power would be held by the Secretary of State, rather than Monitor, and approval, where necessary, would be needed from the Treasury rather than from the Secretary of State. This recognises that in the long term it would not be appropriate for Monitor to have a specific role in foundation trust accounts when it does not have a similar role for other regulated providers of health care.

Reason for the selected procedure

779. The reasons set out above in relation to the previous clause apply equally here.

Clause 153: Annual report and forward plan

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative*

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

780. The current position is that the power to determine the content of foundation trusts' annual reports (over and above those set in primary legislation) is held by Monitor and is not subject to any Parliamentary procedure. This clause gives the Secretary of State power, by order, to amend primary legislation so that the ability to set requirements for annual reports transfers from Monitor to him. If such a transfer is made, it also provides that the Secretary of State must set any such requirements in regulations.

Reason for delegating the power

781. Giving the Secretary of State a delegated power to decide whether and when to transfer the power to determine the content of foundation trusts' annual reports from Monitor means that the decision can take account of all the relevant circumstances. For the time being, it is desirable for the power to remain with Monitor: particularly while foundation trusts are relatively new, this allows requirements for annual reports to evolve flexibly, for example, in the light of

what helps governors to fulfil their role. However, in the longer term it may be inappropriate for Monitor, as health sector regulator, to have a permanent role in defining the content of the annual reports of foundation trusts.

782. If and when responsibility for setting requirements for annual reports transfers from Monitor, it is desirable that there should still be a delegated power to set such requirements: this means that when necessary they can be updated in a timely fashion, without having to wait for primary legislation. However, in the interests of transparency, and of providing foundation trusts with the same clarity and constancy of reporting requirements as exists for charities, it is desirable that this power should be exercised by the Secretary of State through regulations, rather than, as now, administratively.

Reason for the selected procedure

783. The order-making power would change primary legislation, but only within the narrow limits set by subsection (3) of this clause. The negative resolution procedure therefore seems appropriate.

784. The negative resolution procedure also seems appropriate for any regulations setting new requirements on the content of foundation trusts' annual reports introduced by the Secretary of State. Although such requirements are currently set administratively (by Monitor), this would make for greater transparency.

Clause 155: Voting

Power conferred on: *Secretary of State.*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

785. The Bill introduces a range of new provisions on voting by directors, governors and members in foundation trusts in addition to those in the NHS Act 2006. As Monitor would relinquish its direct supervision of foundation trusts, the Bill gives foundation trusts a corresponding ability to take their own decisions. For example, whereas at present Monitor must approve any changes to a foundation trust's constitution, the Bill gives foundation trusts

the ability to amend their constitutions without Monitor's approval provided the governors and directors agree to the amendment. Likewise, the Bill allows foundation trusts to enter into transactions such as mergers, acquisitions and separations with the agreement of the trust's governors. In addition, the Bill gives the membership of foundation trusts the right to vote on constitutional amendments that affect the role of the governors. The Bill makes specific provisions about the majorities required in each case. For example, for amendments to constitutions, a majority of the governors and directors voting must approve the amendment in order for it to take effect. A simple majority is also required for a trust to undertake a merger, acquisition or separation, as is the case for votes by the membership on constitutional amendments affecting the role of governors.

786. The Department believes it is right to set out these new voting arrangements in primary legislation. That is consistent with the autonomy that it wants foundation trusts to have, and signals that it does not intend to get involved with their functioning on a day-to-day basis. The Department believes that these new voting requirements would work well, and does not expect that there would need to be changes to them.

787. The Department does not expect to need to change the voting arrangements set out in the Bill, but it recognises that local accountability for these decisions is new, and that provisions for voting in existing foundation trust constitutions vary. The new voting thresholds are new and untested and it is possible that changes might be needed. For that reason, this clause gives the Secretary of State the power to alter them by regulations.

788. The power would be restricted to the new provisions introduced by the Bill on voting by governors on proposed mergers, acquisitions, and separations; voting by governors on "significant transactions"; voting by governors and directors on changes to the trust's constitution; and voting by the membership on changes to the constitution that affect the powers or duties of directors. Under this power, the Secretary of State could, for example, change the size of a majority required for approving mergers or for making changes to a trust's constitution from a simple majority to a two-thirds majority, or require that the majority required is of those eligible to vote rather than of those actually voting. Existing provisions on voting which are unaffected by this Bill, such as the majority of governors required to remove a non-executive director set out in paragraph 17(2) of Schedule 7 to the NHS Act 2006, would be beyond the scope of this power as such provisions are already well established.

Reason for delegating the power

789. The Department does not expect to need to change the voting arrangements set out in the Bill. However, if the need to do so arises, desirable changes might be delayed if they could be made only by primary legislation. This clause therefore gives the Secretary of State power to change the new voting arrangements by regulations. This is consistent with the existing provisions of section 59 of the NHS Act 2006, which allow the Secretary of State to set out regulations to make provisions about the conduct of elections for the membership of the board of governors of foundation trusts. Section 59 already gives the Secretary of State, among other things, the power to set out regulations that provide for the nomination of candidates, systems and methods of voting, and the allocation of places on the board of governors. The new power proposed by this Bill would allow the Secretary of State to make similar provisions to ensure that new voting arrangements for foundation trusts are workable and effective in practice.

Reason for the selected procedure

790. The Department considers that the affirmative resolution procedure would be appropriate, because the regulations would change primary legislation.

Foundation trust status

Clause 159: Panel for advising governors

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

791. This clause allows Monitor to appoint a panel to advise governors of foundation trusts. It gives the panel the ability to regulate its own procedure and to establish procedures for determining questions referred to it by governors, including the ability to decide for itself whether, and to what extent, to carry out an investigation on matters referred to it. The Bill does not set out detailed provisions about the size of the panel, eligibility for membership, processes for appointment to, and removal from the panel: these would be for the panel to

determine. However as the panel is a new feature of the provider landscape, the clause gives the Secretary of State a power to make regulations about membership of the panel. Giving the power to the Secretary of State would ensure the panel's continuing independence from Monitor, and enable changes to the panel's procedures in the event that the arrangements provided for by the panel proved problematic in practice. For example, if the panel decided to appoint members for life, this power would enable the Secretary of State to introduce term limits or to make regulations about removal from office.

Reason for delegating the power

792. The power is delegated so that the Secretary of State would be able to make provision if the need arose, in the contingency that the panel did not behave in a responsible way, causing major concern that the panel was unable to resolve itself. For example, the size of the panel might become too large, or the panel might adopt inappropriate terms of office or look into matters beyond its remit.

Reason for the selected procedure

793. The negative resolution procedure is considered appropriate, to ensure transparency.

Finance

Clause 160: Financial powers etc

Power conferred on: *Secretary of State*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

794. The Secretary of State already has a power, under subsection (3) of section 42 of the NHS Act 2006, to decide the terms that may be applied to existing or new public dividend capital. Subsection (7) of this clause provides an illustrative list of the powers of foundation trusts to which such terms could apply, and subsection (8) inserts new section 42A into the NHS Act. Under this new section, the Secretary of State must issue guidance on the powers

conferred on him by sections 40 and 42. The intention (reflected, for example, in subsections (2) and (6) of new clause 42A) is that the taxpayer investment in foundation trusts would be subject to conditions drawn up with regard to principles applied by commercial lenders on loans to corporate bodies. These conditions would replace the statutory, foundation-trust-specific, controls that apply at present. This would provide consistency between public and commercial capital, and between foundation trusts and other providers of NHS services. The requirement on the Secretary of State to publish guidance would increase transparency in setting out the terms that may be applied to financing, the criteria that would be applied in determining whether to provide financing and the consequences of failing to meet these terms.

Reason for delegating the power

795. The ability to determine the terms that apply to the public dividend capital of foundation trusts is already within the delegated powers of the Secretary of State under subsection (3) of section 42 of the NHS Act 2006. This clause does not extend the delegated power, but introduces a new requirement for the Secretary of State to publish guidance on the way in which he would use the existing power.

Reason for the selected procedure

796. The existing power is not subject to a Parliamentary procedure, so it seems unnecessary for the guidance on the use of the power to be subject to one.

Functions

Clause 163: Information

Power conferred on: *Secretary of State*
Power exercised by: *Requirement*
Parliamentary procedure: *None*

797. This clause requires a foundation trust to disclose to the Secretary of State such information, in such form, and at such time or within such period, as the Secretary of State may require, if the Secretary of State considers that information necessary for the purposes of the

Secretary of State's functions in relation to the health service. This power to collect information directly from foundation trusts would replace the current system, whereby Monitor collects information under powers relating to the terms of authorisation of foundation trusts which would be removed by the Bill. (As explained above, there is also a power in Schedule 8, paragraph 21(4)(b), to require Monitor to provide such information that it has in its possession as the Secretary of State may require).

Reason for delegating the power

798. The Secretary of State and the Department require information to enable the effective and efficient management of the Department's financial position against the Departmental Expenditure Limit, Parliamentary Estimates and other controls, and also for the effective and efficient management of other Departmental business. In addition, the Department has a responsibility to provide information on bodies for which it is accountable to meet requirements that may be set by the Treasury and others for both financial and non-financial matters. The information required by the Department to fulfil these functions changes regularly over time, so it would be impractical to set the requirements in primary legislation.

Reason for the selected procedure

799. The power relates to the collection of routine information required by the Secretary of State to discharge his functions effectively and efficiently. Such information would vary over time in line with wider Government policy. The Department considers that a Parliamentary procedure is not necessary, given the administrative nature of these requirements.

Mergers, acquisitions, separations and dissolution

Clause 168: Dissolution

Power conferred on: *Monitor*
Power exercised by: *Order*
Parliamentary procedure: *None*

800. This clause requires Monitor, in certain circumstances, to make an order effecting the dissolution of a foundation trust. Such an order could be made only when Monitor is satisfied that the foundation trust has no liabilities and that the necessary steps have been taken to prepare for the change. Any such orders would be laid before Parliament to keep both Houses informed of any such dissolution.

Reason for delegating the power

801. This power is part of the amendment of current provisions which transfer the powers to create, change or dissolve a foundation trust, including as a result of merger, acquisition or separation, from the Secretary of State to Monitor. In this case, the existing power in section 65E of the NHS Act 2006 for the Secretary of State to make an order effecting the dissolution of a foundation trust would be adapted and transferred to the regulator. This relates to the policy to enable dissolution of a foundation trust when circumstances have led to a foundation trust existing which is no longer operating services. Consistent with the approach for mergers and separations involving foundation trusts, the power to issue the order is proposed for Monitor. The decision for such a change would be taken by the foundation trust itself with Monitor undertaking a minimal administrative function to implement it. The effect of subsection (11) of the next clause is that, for the purposes of orders under sections 57 or 57A of the NHS Act 2006, the Statutory Instruments Act 1946 applies to Monitor as if it were a Minister of the Crown.

Reason for the selected procedure

802. The power relates to the administrative arrangements necessary to effect dissolution of a foundation trust. This could happen only when all necessary steps to prepare for the change have been taken. The Department suggests that no Parliamentary procedure is necessary.

Clause 169: Supplementary

Power conferred on: *Monitor*
Power exercised by: *Directions*
Parliamentary procedure: *None*

803. This clause moves the power to issue an order effecting the merger of a foundation trust or trusts from the Secretary of State to Monitor and introduces a similar power in the case of separation of a foundation trust which the Bill would allow. The order would specify any properties and liabilities transferring to new foundation trusts in such a change, as determined by the application made by the foundation trust or trusts. This clause removes Monitor's approval role in effecting a merger involving a foundation trust, the current step which precedes the Secretary of State making an order under the NHS Act 2006. Under the new delegated power, Monitor would have to make such orders to effect a merger or separation when it is satisfied that the necessary steps have been taken to prepare for the change. The orders made under this provision would provide conclusive evidence of the incorporation of the new foundation trust or trusts being established. The effect of subsection (11) of this clause is that, for the purposes of orders under sections 57 or 57A of the NHS Act 2006, the Statutory Instruments Act 1946 applies to Monitor as if it were a Minister of the Crown.

Reason for delegating the power.

804. The delegation of the power to Monitor to make orders effecting mergers removes the Secretary of State from involvement in the administrative process of a foundation trust merger. In conjunction with the removal of Monitor's discretion over mergers, it contributes to the Government's policy to reduce the bureaucracy involved in organisational changes being made by foundation trusts. The decision to undertake a merger would be taken by the foundation trusts themselves with Monitor undertaking a minimal administrative function to implement their decisions, so long as legal process has been followed.

805. The new power for Monitor to effect a separation is needed because, as with a merger, the ability of a foundation trust to separate into two or more trusts would involve the creation of new foundation trusts and it needs to be clear which property and liabilities are to be transferred to it. In the case of an acquisition, the trusts involved can agree the transfer of assets and liabilities without the need for any statutory step.

Reason for the selected procedure

806. The power relates to the administrative arrangements necessary to effect mergers and separations of foundation trusts. This could happen only when all necessary steps to prepare

for the change have been taken. The Department considers that a Parliamentary procedure is unnecessary.

Failure

Clause 171: Trust Special Administrators

Power conferred on: *Monitor*
Power exercised by: *Order*
Parliamentary procedure: *None (but laid before Parliament under section 272(6A) of the NHS Act 2006, as amended by the Bill)*

807. This, and subsequent provisions on the foundation trust failure regime, transfer the Secretary of State's existing powers to Monitor with regard to foundation trusts only. Subsection (3) removes the power in section 65D of the NHS Act 2006 to de-authorise a foundation trust (turning it back into an NHS trust). This clause provides instead for Monitor to be able by order to appoint a trust special administrator to exercise the functions of the chair and directors of a foundation trust and subsequently produce recommendations on the future of the organisation and its services. Monitor must be satisfied that the foundation trust is, or is likely to become, unable to pay its debts before issuing the order. The order would specify the date on which the appointment is to take effect.

Reason for delegating the power

808. The power needs to be delegated because the intervention would, by its nature, be particular to an individual foundation trust. Transfer of this and other powers relating to the trust special administrator from the Secretary of State to Monitor is consistent with Monitor's role in securing continued access to NHS services.

Reason for the selected procedure

809. The existing power to appoint a trust special administrator in relation to an NHS trust, held by the Secretary of State, is not subject to a Parliamentary procedure and the Department considers a Parliamentary procedure unnecessary when the power transfers to Monitor. The

power may need to be exercised promptly, to take swift action to deal with a poorly performing organisation. The order would not remove or alter the foundation trust's statutory power or duties but would be concerned with its detailed operation and management. Monitor would be obliged to lay the order before Parliament to inform Parliament that the regime has been triggered and to give the regime greater transparency. In addition, there would be an obligation on Monitor to publish the name of the person appointed.

Clause 172: Objective of trust special administration

***Power conferred on**: Monitor*
***Power exercised by**; Guidance*
***Parliamentary procedure**: None*

810. This clause inserts new section 65DA into the NHS Act 2006. The new section sets out the objective of a trust special administration regime and provides that commissioners may determine that this objective is to apply to a service only if they are satisfied that the criterion set out in subsection (3) of the new clause is met. In determining whether that criterion is met, the commissioners must have regard, amongst other things, to such matters as may be specified in relation to foundation trusts in guidance published by Monitor (subsection (4)). Before publishing the guidance, or revised guidance, Monitor must obtain the approval of the Secretary of State and of the Commissioning Board (subsection (6)).

Reason for delegating the power

811. A delegated power is needed, as it would not be desirable for the guidance to be set out in primary legislation. Its content is likely to need revision over time, and it might include practical examples to assist commissioners. It is appropriate for Monitor to have the power to produce the guidance, since it relates to Monitor's role in securing continued access to NHS services.

Reason for the suggested procedure

812. The Department considers no Parliamentary procedure necessary, since the guidance would deal with administrative matters within the framework established by the Bill.

Clause 174: Action following final report

New section 65KC: Action following Secretary of State's rejection of the final report

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *None*

813. This clause gives the Secretary of State the power to issue an order to extend the twenty working day time period for the trust special administrator to complete a revised final report in response to a notice under new section 65KB from the Secretary of State rejecting the final report. The Department envisages that the power would be exercised in cases where, for example, the administrator falls ill, or needs more time to comply with statutory consultation requirements.

Reason for delegating the power

814. A delegated power is needed because it is not possible to predict all the circumstances in which it may be necessary to extend the time available.

Reason for the selected procedure

815. The Department considers a Parliamentary procedure unnecessary, as the order would deal with detailed administrative arrangements relating to an individual foundation trust, within the basic structures and principles set out in primary legislation.

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New section 65LA: Trusts to be dissolved

Power conferred on: *Monitor*
Power exercised by: *Order*
Parliamentary procedure: *None (but laid before Parliament under section 272(6A) of the NHS Act 2006 as amended by the Bill)*

816. This clause transfers a power currently held by the Secretary of State to Monitor in relation to foundation trusts only. The current provision would be amended for foundation trusts so that Monitor is able to make an order should the action recommended as the outcome of the trust special administration be that the foundation trust should be dissolved. The order would dissolve the foundation trust and would transfer or provide for the transfer of the property and liabilities of the trust to either another foundation trust or the Secretary of State or to be split between the two. The liabilities may include criminal liabilities.

Reason for delegating the power

817. The provision of this power to Monitor is consistent with its role in securing continued access to NHS services. The decision to dissolve a foundation trust would be taken by Monitor, but since the consequences of that decision would fall upon the Secretary of State, he would be given a role in approving a dissolution decision before it took effect through his role in considering the trust special administrator's report under new section 65KB or new section 65KD.

Reason for the selected procedure

818. The power transferred to Monitor would be similar to the current power exercised by the Secretary of State to dissolve an NHS trust, and the Department therefore considers that, like that power, it should not be subject to a Parliamentary procedure.

Amended section 65L: Trusts coming out of administration

Power conferred on: *Monitor*
Power exercised by: *Order*
Parliamentary procedure: *None (but laid before Parliament under section 272(6A) of the NHS Act 2006 as amended by the Bill)*

819. This clause would give Monitor a power similar to that currently held by the Secretary of State in relation to NHS trusts. This power would enable Monitor, by order, to end the period of administration, which applies if the recommended outcome of the trust special administration is not to dissolve the foundation trust. It would enable Monitor to make an order specifying the

date when the appointment of the trust special administrator and the suspension of the chair and directors of the trust would come to an end. Such an order would bring to an end the administration instituted by an order under section 65D, which itself is subject to no Parliamentary procedure.

820. The foundation trust's suspended directors would be restored to office at the end of the period of administration. Monitor would have the power (under section 65L) to remove and appoint directors following administration, a power which the Secretary of State currently has in relation to NHS trusts coming out of administration and which Monitor already has in other circumstances where a foundation trust is struggling (under section 52(4) of Chapter 5 of Part 2 of the NHS Act 2006). As with other powers in this section, the order would not be subject to any Parliamentary procedure.

Reason for delegating the power

821. It would not be practical to set out in primary legislation the provisions that would be made in the order. The provision of this power to Monitor is consistent with its role in securing continued access to NHS services and the power would be similar to the Secretary of State's current power in relation to NHS trusts.

Reason for the selected procedure

822. The power transferred to Monitor would be similar to the current power exercised by the Secretary of State in relation to NHS trusts, which is not subject to a Parliamentary procedure. The Monitor power, like the Secretary of State power, would deal with administrative procedures, so the Department suggests that a Parliamentary procedure is not needed.

PART 5: PUBLIC INVOLVEMENT AND LOCAL GOVERNMENT

CHAPTER 1: PUBLIC INVOLVEMENT

823. This Chapter deals with creating a new national body, Healthwatch England (HWE), which would be established as a statutory committee of the Care Quality Commission (CQC), and with local Healthwatch organisations (LHW), which would be set up as statutory

organisations, replacing Local Involvement Networks (LINks) and expanding on the role they currently exercise.

824. These and related changes would largely be made by way of amendments to provisions on patient and public involvement in the Local Government and Public Involvement in Health Act 2007 (the 2007 Act) and provisions in the Health and Social Care Act 2008 (the 2008 Act) and the NHS Act 2006.

825. The amendments would create a small number of new delegated powers, including modifications to reflect the replacement of LINks with LHW and the coming into being of HWE.

New powers

826. New powers would be conferred enabling the Secretary of State to make regulations regarding the membership of LHW and HWE, to give directions to HWE, local authorities and LHW, to prescribe by regulations descriptions of complaints for the purposes of arrangements for the provision of independent advocacy services, to make regulations about indemnity in relation to such arrangements, to dissolve LHW by order, to make transfer schemes and to make determinations in relation to LHW accounts. These new powers are discussed further below.

Modifications of existing delegated powers

827. In addition, the following delegated powers in the 2007 Act would be modified with consequential alterations. These changes are summarised here, and are not discussed further below. In deciding to maintain the delegation of these powers the Department has been guided by the desirability of not putting detailed technical provisions on the face of the Bill and the need to ensure flexibility in responding to changing circumstances.

828. Section 221(4) enables the Secretary of State to make regulations to amend section 221 of the 2007 Act to add to the activities for which local authorities must make contractual arrangements. These activities relate to patient and public involvement in health and social care. The Bill amends section 221 to add to the current list of activities. However, the power to make regulations to add to those activities is not being amended.

829. The Bill makes changes to each of the following sections. These changes are consequential on the replacement of LINks with LHW (for example, references to “local involvement network” are replaced with references to “Local Healthwatch organisation”); on the new power for local authorities to contract directly with LHW; and on the new power to make regulations on the membership of LHW:

- Section 223 as amended would require the Secretary of State to make regulations, which provide that arrangements made under section 221(1) must include prescribed provision or require prescribed provision to be included in those arrangements.
- Section 224 as amended would enable the Secretary of State to impose duties by regulations on a responsible person (which includes a person prescribed by regulations) as regards responding to requests for information made by LHW and dealing with reports or recommendations made by LHW.
- Section 225 as amended would require the Secretary of State to make provision by regulations for the purpose of imposing on a services-provider (which includes a person prescribed by regulations) a duty to allow authorised representatives of LHW to enter and view, and observe the carrying-on of activities on, premises owned or controlled by the services-provider.
- Section 226 as amended would enable the Secretary of State to make provision by regulations as respects determining the time by which an overview and scrutiny committee of a local authority must acknowledge receipt of a referral of a social care matter by LHW.
- Section 227 as amended would concern annual reports relating to LHW and would require arrangements under section 221 to include provision requiring that copies of those annual reports are to be made publicly available in such manner as the person preparing it, after having had regard to any guidance issued by the Secretary of State, considers appropriate. It would also require arrangements under section 221 to include provision that the annual reports must address such matters as the Secretary of State may direct and that copies must be sent to such persons if any (in addition to those listed in section 227) as the Secretary of State may direct.
- Section 229 as amended would apply in relation to new provisions inserted into the 2007 Act by the Bill. It defines “local authority” and provides power for regulations to

make incidental, supplementary, consequential, transitory or transitional provision or savings.

Healthwatch England

Clause 178: Healthwatch England

Subsection (2)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

830. This clause inserts sub-paragraph (1A) into paragraph 6 of Schedule 1 to the 2008 Act. This provides that a committee of the Care Quality Commission known as "the Healthwatch England committee" is to be appointed in accordance with regulations. It also inserts sub-paragraph (1C) which says that the regulations may include provisions about the removal or suspension of members of HWE and the payment of remuneration and allowances to members.

Reason for delegating the power

831. Delegating the power ensures flexibility for changes to be made to the membership of HWE in line with changing circumstances and operational experience. It allows detailed administrative arrangements to be set up and kept up to date within the basic framework and principles set out in the primary legislation. Rules about membership and procedure need to be able to develop over time to reflect changing circumstances. Delegating the power avoids placing large amounts of detail on the face of the Bill, which might then require frequent amendment to meet changing circumstances. If these matters were detailed on the face of the Bill, changes could only be made by way of primary legislation and could result in unnecessary delay and consumption of Parliamentary time.

Reason for the selected procedure

832. The procedure is in line with the procedure for other bodies such as the Care Quality Commission, of which HWE is a committee. Using the negative resolution procedure allows for routine administrative matters to be dealt with in a timely manner.

Subsection (4)

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

833. Subsection (4) of clause 178 inserts new section 45A into the 2008 Act. Subsection (8) of new section 45A provides that Healthwatch England in performing functions under section 45A must have regard to such aspects of Government policy as the Secretary of State may direct. This power could be used where the Secretary of State wants HWE to give priority to an aspect of policy, or to take account of a change of emphasis, when exercising its functions. It is a fall-back power, which the Department expects to use sparingly.

Reason for delegating the power

834. It would not be appropriate to specify in primary legislation the aspects of Government policy to which HWE must have regard, since these may change over time.

Reason for the selected procedure

835. The nature of the power (directing HWE to have regard to an aspect of Government policy) does not seem to warrant making it subject to a Parliamentary procedure. In addition, the power might need to be exercised at short notice and a lack of Parliamentary procedure is in line with provision for other public bodies such as the Care Quality Commission.

Subsection (5)

Power conferred on: *Secretary of State*
Power exercised by: *Directions*

Parliamentary procedure: *None (unless in regulations – see section 165 of the 2008 Act as amended by clause 288(2) of the Bill – in which case, negative)*

836. This subsection inserts subsection (1A) into section 82 of the 2008 Act which enables the Secretary of State to give a direction to Healthwatch England if the Secretary of State considers that it is significantly failing or has significantly failed to discharge or properly discharge its functions. The direction can direct HWE to discharge those functions in a manner and within a period specified in the direction. If HWE fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State. The failure must be significant and the Secretary of State must publish his reasons for the intervention. It would not be possible for the Secretary of State to intervene in a "particular case": instead, he would need to demonstrate that there is a more widespread failure. (See the discussion of failure powers in relation to new section 13Z1, introduced by clause 20).

Reason for delegating the power

837. It would not be possible to set out in primary legislation exactly what intervention would be necessary in what circumstances, so this power provides the Secretary of State with flexibility to respond accordingly to failures by HWE and at speed. The power might be needed, not necessarily because of any fault on the part of HWE, but because of circumstances outside its control, for example, a serious infection affecting many of its staff and therefore its ability to perform its duties.

Reason for the selected procedure

838. The power would concern a requirement to discharge an existing function and how it should be exercised, rather than a matter of principle (such as what functions there should be). The directions concerned could be given either in writing (subject to no Parliamentary procedure) or through regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided based on the type of intervention that is necessary.

Local Healthwatch organisations

Clause 179: Establishment and constitution
Schedule 15: Local Healthwatch Organisations

839. This clause introduces Schedule 15 to the Bill, which inserts new Schedule 16A into the 2007 Act. The Schedule deals with the following delegated powers.

Paragraph 2: Membership

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

840. Paragraph 2 of the Schedule provides that the Secretary of State may make regulations regarding the membership of LHW. This includes making provisions about: the number of members; conditions of eligibility for membership; the appointment of members (including who has the power to appoint); the terms of appointment; circumstances in which a person ceases to be a member or may be suspended; and the payment of remuneration and other amounts to or in respect of members. Sub-paragraph (3) requires that such regulations must include provision requiring the appointment of LHW members to be conducted with a view to securing that the members are representative of people living in the LHW area and of local service users. Sub-paragraph (5) enables the regulations to impose duties on a responsible person as respects responding to information requests made by a person who has power to appoint members of LHW when discharging their duty to seek to ensure that the membership is representative of people who live in the area and of service users.

Reason for delegating the power

841. Delegation of the power allows detailed administrative arrangements to be set up and kept up to date within the basic framework and principles set out in the primary legislation. Rules about membership need to be able to develop over time to reflect changing circumstances. Delegating the power to the Secretary of State allows for flexibility in making adjustments and adaptations to the composition of LHW in light of emerging future needs and in response to feedback. It avoids placing large amounts of detail on the face of the Bill, which

may then require frequent amendment to meet changing circumstances. If these matters were detailed on the face of the Bill, changes could be made only by primary legislation and could result in unnecessary delay and consumption of Parliamentary time.

Reason for the selected procedure

842. The negative resolution procedure gives Parliament, if it wishes, the opportunity to debate the matters covered, and is in line with provision for other public bodies, such as the Care Quality Commission.

Paragraph 7: Accounts.

Power conferred on: *Secretary of State*
Power exercised by: *Determination/Directions*
Parliamentary procedure: *None*

843. Paragraph 7 of the Schedule concerns accounts and provides that LHW must:

- keep accounts in such form as the Secretary of State may determine
- prepare annual accounts in such form as the Secretary of State may determine
- send copies of annual accounts to the Secretary of State within such period as the Secretary of State may determine.

Subparagraph (4) gives the Secretary of State powers to direct LHW to have their accounts audited in a particular way.

Reason for delegating the power

844. It would be important that LHW maintain accounts in the appropriate format. This might need to change over time. These powers would enable the Secretary of State to ensure that LHW accounts are maintained in the appropriate form at all times, with consistency across LHW in their maintaining of accounts. The form of accounts, the period within which annual accounts must be sent to the Secretary of State and requirements relating to the auditing of

accounts are matters of administrative and procedural detail which are not appropriate for the face of the Bill.

Reason for the selected procedure

845. The Department considers a Parliamentary procedure unnecessary for these determinations and directions. Accounting requirements for public bodies are technical matters and it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006).

Clause 182: Independent Advocacy Services

846. This clause inserts section 223A into the 2007 Act which requires each local authority to make such arrangements as it considers appropriate for the provision of independent advocacy services. New section 223A contains the following delegated powers.

Subsections (2) and (9)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

847. The definition of "independent advocacy services" in subsection (2) of new section 223A includes services providing assistance to persons making or intending to make a complaint of such description as the Secretary of State may by regulations prescribe (relating to the provision of services as part of the NHS) and which is made under a procedure of a description prescribed in the regulations or gives rise or may give rise to proceedings of a description prescribed in the regulations. Subsection (9) of section 223A also enables the Secretary of State by regulations to make provision requiring a person providing independent advocacy services to have cover against the risk of a claim in negligence arising out of the service provision.

Reason for delegating the power

848. There is a precursor to this provision in section 248 of the NHS Act under which the duty to make arrangements for independent advocacy services falls on the Secretary of State. Apart from the power to make regulations relating to cover against a claim in negligence, the regulation-making powers are a re-statement of existing powers, placed in the context of local authorities, instead of the Secretary of State, having the duty to make arrangements for independent advocacy services. Continuing to delegate this power to the Secretary of State allows for the scope of the duty to make arrangements for independent advocacy services to be expanded to reflect changing circumstances and therefore provides for flexibility. Giving the new power, relating to ensuring cover against a claim in negligence, allows the Secretary of State to impose additional requirements on persons providing advocacy services as appropriate and therefore, again, provides for flexibility.

Reason for the selected procedure

849. The negative resolution procedure is in line with that applying to the precursor to aspects of this provision, namely section 248 of the NHS Act. This is a power to set requirements or make provision in areas that do not raise significant issues of principle. Negative resolution procedure nevertheless gives Parliament the opportunity to debate if it wishes to do so.

Subsection (10)

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure*: None*

850. This subsection enables the Secretary of State to direct a local authority about the exercise of its functions under this section.

Reason for delegating the power

851. The Secretary of State may want to direct local authorities to make arrangements for the provision of independent advocacy services to a particular level or in a particular way. For example, a direction might require particular local authorities to arrange for service provision

for persons living in their area who had received services in Wales as part of the health service in England; or in the light of experience a direction might be needed to ensure consistency across local authorities or equity of handling on a particular issue. The nature of such potential issues cannot be predicted in advance, and so cannot be provided for on the face of the Bill. The content of the directions is not likely to be controversial or unduly burdensome to local authorities. Rather, we would expect these powers to be used to provide legal clarity and certainty for local authorities in relation to some of the detail of their responsibilities in relation to independent advocacy services.

Reason for the selected procedure

852. The Department does not consider that a Parliamentary procedure is required for directions issued under this power. Directions that are not subject to Parliamentary procedure are a normal vehicle for giving local authorities technical and procedural instructions of the kind that we would expect to give in any use of this power. They could come into force quickly if the Secretary of State needed to act speedily in a particular situation.

Clause 184: Dissolution and transfer schemes

Dissolution of Local Healthwatch organisations

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *None*

853. This clause inserts section 226A into the 2007 Act, which enables the Secretary of State by order to dissolve a LHW either on an application made by the local authority and HWE or on the Secretary of State's own initiative where the Secretary of State is satisfied that the circumstances require dissolution.

Reason for delegating the power

854. Delegating the power to the Secretary of State is necessary as the need for dissolution is a matter which depends on whether circumstances arise which make dissolution necessary.

Therefore this is not something that can be predicted in advance. It is a fall-back power. The orders would also be highly likely to be applicable only to individual LHW, rather than to LHW as a whole.

Reason for the selected procedure

855. The lack of Parliamentary procedure is in line with provision for certain other public bodies established under the NHS Act 2006. This is a fall-back power which is expected to be exercised only from time to time, in relation only to an individual LHW.

Transfer schemes in relation to Local Healthwatch organisations

Power conferred on: *Secretary of State*
Power exercised by: *Scheme*
Parliamentary procedure: *None*

856. Clause 184 also enables the Secretary of State to make a scheme for the transfer (upon dissolution) from a LHW to another of property, rights and liabilities.

Reason for delegating the power

857. Delegating the power to the Secretary of State is necessary as the need for a transfer scheme is a matter which depends on whether circumstances arise which make a scheme necessary. The schemes would be specific in nature and would be used in individual cases. Each scheme would apply only to the particular LHW and particular property, rights and liabilities specified in the scheme. The details cannot therefore be set out in primary legislation.

Reason for the selected procedure

858. As the schemes would be concerned with administrative and operational details, the Department considers that no Parliamentary procedure is required.

Clause 186: Transitional arrangements

Power conferred on: *Secretary of State*
Power exercised by: *Scheme*
Parliamentary procedure: *None*

859. This clause enables the Secretary of State to make a scheme for the transfer of property, rights and liabilities to LHW from a person with whom the local authority has made arrangements under section 221 of the 2007 Act before the commencement of the provisions of the Bill on public involvement and which come to an end at a time after commencement of these provisions.

Reason for delegating the power

860. This power is necessary to give effect to local authorities' powers to contract directly with LHW under amendments made by the Bill. This would be a fall-back power to deal with a situation where there is overlap between the duration of existing contracts under section 221 of the 2007 Act and the commencement of the Bill's provisions on LHW. Without this power a situation might arise whereby although local authorities had powers to contract with LHW or other persons they were tied into the existing contracts under section 221.

861. Delegating the power to the Secretary of State is necessary as the need for a transfer scheme is a matter which depends on whether circumstances arise which make a scheme necessary. Therefore this is not something that can be predicted in advance. The schemes would be specific in nature and would be used in individual cases as and when the need arose. The schemes would concern administrative matters and would only apply to the particular bodies and particular property, rights and liabilities specified in the scheme.

Reason for the selected procedure

862. As the schemes would be concerned with administrative and procedural detail, the Department considers that no Parliamentary procedure is required

CHAPTER 2: LOCAL GOVERNMENT

Scrutiny functions of local authorities

863. The Secretary of State has the power to make regulations under section 244 of the NHS Act 2006 on health scrutiny functions of local authority overview and scrutiny committees (OSCs). This power would be continued in amended form as a result of this Bill.

864. The regulation-making powers would apply in relation to local authorities rather than OSCs and would extend to the new types of NHS bodies (such as clinical commissioning groups and the NHS Commissioning Board) that the Bill is creating in place of some existing ones.

865. The powers would be extended as set out below and, in some cases, clarified. For example, the Bill would enable regulations under section 244 to be extended to cover all providers of NHS and public health services commissioned by the Commissioning Board, clinical commissioning groups and local authorities (including private providers) so that they could be required to consult local authorities on prescribed matters, such as substantial service reconfiguration. Local authorities could also be enabled to require such providers to attend before them to answer questions and those providers could be required to provide information to local authorities.

866. The Bill would also amend section 116 of the Local Government and Public Involvement in Health Act 2007 which, amongst other things, requires local authorities and Primary Care Trusts to have regard to any guidance issued by the Secretary of State when preparing joint strategic needs assessments. This duty would apply to local authorities and clinical commissioning groups, instead of local authorities and Primary Care Trusts, but in practice it would be the Health and Wellbeing Boards which would discharge this duty and the duty to have regard to guidance in relation to preparation of the joint strategic needs assessments (as it is the Health and Wellbeing Boards that would discharge the duty to prepare these documents.

Clause 187: Scrutiny functions of local authorities
Clause 188: Amendments consequential on section 187

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*

Parliamentary procedure: *Negative*

867. Under section 244 of the NHS Act 2006, the Secretary of State currently has power to make regulations on health scrutiny functions of local authority OSCs. The regulations may make provision:

- as to matters relating to the health service in the local authority's area which OSCs may review and scrutinise, and on which they may make reports and recommendations to local NHS bodies, the Secretary of State and Monitor (as regulator of foundation trusts);
- as to matters on which local NHS bodies must consult OSCs, and information they must provide to OSCs (and information that they may not disclose to OSCs);
- requiring officers of local NHS bodies to attend before OSCs to answer questions.

868. Clause 187 makes the following changes to section 244:

- It amends section 244 so that the regulation-making power applies in relation to local authorities rather than OSCs.
- It inserts into section 244 a new subsection (2ZC) which says that regulations may provide for any provision of section 101 of the Local Government Act 1972 not to apply in relation to the discharge by the local authority of the function of making referrals or to apply with such modifications as may be prescribed.
- It inserts into section 244 a new subsection (2ZD) which says that regulations may authorise a local authority to arrange for its scrutiny functions under section 244 to be discharged by an OSC.
- It replaces references to local NHS bodies with references to relevant NHS bodies and relevant NHS providers and inserts definitions of these terms.
- It enables the regulation-making powers which currently apply in relation to NHS bodies additionally to apply in relation to other providers of NHS services.
- It inserts into section 244 two other new subsections, (2ZA) and (2ZB). These make clear that if regulations make provision as to matters on which local NHS bodies and other providers of NHS services must consult the local authority, the regulations may also set out the circumstances in which a local authority may refer any of those

matters to the Secretary of State, the regulator, or the Board. The regulations may also give powers to issue directions, in relation to matters so referred, to the Secretary of State (in relation to the Board) and to the Board (in relation to a clinical commissioning group).

869. Clause 188 makes changes to a regulation-making power in section 245 consequential on amendments to section 244 of the NHS Act which confers regulation-making powers in relation to health scrutiny functions of local authorities. These and other changes to section 245 would ensure that joint working and other arrangements could continue to be authorised under the new arrangements and that provision could be made so that the arrangements operate more effectively.

Reason for delegating the power

870. These clauses amend powers (existing regulation-making powers) that are currently delegated powers. Those powers, as amended by the Bill, would continue to provide for matters of operational and procedural detail which would not be appropriate for inclusion on the face of the Bill. Further, in some cases, such as the power to provide for the circumstances in which matters may be referred by local authorities, the powers are included simply by way of clarification or continuation of powers that already exist.

Reason for the selected procedure

871. The existing powers are subject to the negative resolution procedure. The Department considers this would remain the appropriate procedure. Although the powers would be extended cover to all providers of NHS and public health services, arranged by the NHS Commissioning Board, clinical commissioning groups or local authorities, they would still be applicable only to services provided as part of the health service. There is nothing in the provisions in the Bill that warrants a change of Parliamentary procedure.

Joint strategic needs assessments and strategies

Clause 190: Joint health and wellbeing strategies

Power conferred on: *Secretary of State*
Power exercised by: *Guidance*
Parliamentary procedure: *None*

872. This clause inserts new section 116A into the Local Government and Public Involvement in Health Act 2007. Subsection (4)(b) of the new section requires the local authority and partner clinical commissioning groups to have regard to guidance issued by the Secretary of State when preparing the Joint Health and Wellbeing Strategy. This mirrors the current duty to have regard to the Secretary of State's guidance when preparing the Joint Strategic Needs Assessment under section 116 of the Local Government and Public Involvement in Health Act 2007.

Reason for delegating the power

873. The power to issue guidance will enable the Secretary of State to guide local authorities and their partner clinical commissioning groups on matters of technical detail and provide examples of best practice and principles which should underpin the process of developing the Joint Health and Wellbeing Strategy. It would not be appropriate to put this level of detail on the face of the Bill and doing so would limit flexibility to amend the guidance in the light of changing needs.

Reason for the selected procedure

874. The level of detail, the non-controversial nature of the powers which largely concern administrative and technical matters and the fact that this would be a power to issue guidance mean that a Parliamentary procedure is not required. This would be consistent with the similar power to issue guidance in respect of joint strategic needs assessments under section 116 of the Local Government and Public Involvement in Health Act 2007.

Health and Wellbeing Boards: establishment

Clause 191: Establishment of Health and Wellbeing Boards

Power conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Negative*

875. Subsection (12) of this clause allows the Secretary of State to make regulations providing that enactments relating to local authority committees appointed under section 102 of the Local Government Act 1972 are either disapplied or applied with prescribed modifications in relation to Health and Wellbeing Boards. Section 102 of the Local Government Act governs the appointment of committees by local authorities, for example, allowing the creation of joint committees between several local authorities, or the creation of sub-committees. Subsection (11) of this clause provides for the Health and Wellbeing Boards to be treated as committees appointed under section 102.

876. Subsection (12) would allow regulations to be made disapplying or modifying, in relation to Health and Wellbeing Boards, legislation relating to committees appointed under section 102 such as legislation relating to the arrangements which such committees can make for the discharge of functions by others. For example, this power could be used to prevent Health and Wellbeing Boards being able to delegate functions to an officer of the local authority.

877. This is intended to ensure that provisions which relate to committees appointed under section 102 do not adversely affect how Health and Wellbeing Boards can operate. This reflects their unusual position of being local authority committees which also involve representatives from, and require the engagement of, other organisations.

Reason for delegating the power

878. The power concerns the detailed arrangements of how Health and Wellbeing Boards would operate. Delegation of the power provides for flexibility to deal with changing circumstances and operational experience within the basic structures and principles set out in the primary legislation. Rules for the operation of the Health and Wellbeing Boards are likely to need development and revision as they become established, procedures are put in place and best practice developed. Delegating the power to the Secretary of State also avoids placing large amounts of detail on the face of the Bill, which may then require frequent amendment to meet changing circumstances.

Reason for the selected procedure

879. The level of detail and the non-controversial nature of the powers which largely concern administrative and technical matters mean that the negative resolution procedure is considered appropriate.

Care Trusts

880. Care Trusts provide opportunities for close integrated working across health and social care services, provisions for which are made through section 77 of the NHS Act 2006. The policy intention is to support the Care Trust model to operate in the reformed NHS system to maintain stability for Care Trusts that currently exist and to enable new ones to form should that be locally agreed.

881. This involves a number of changes to the current delegated powers:

- The clause would end the direct involvement of the Secretary of State in the process of forming or disbanding a Care Trust arrangement. The decision to form or disband a Care Trust would be for local bodies and for them to designate themselves as such.
- To take account of new circumstances, it would become possible for foundation trusts and clinical commissioning groups to be designated as Care Trusts;
- The Secretary of State would retain a revised power to make certain regulations setting out procedural requirements to be followed by local bodies in forming (or revoking the designation of) a Care Trust.

<u>Outline of current delegated powers</u>

882. Section 77 of the NHS Act 2006 outlines the provisions for NHS bodies and local authorities to be designated as Care Trusts, where they already have partnership agreements in place under section 75 of the NHS Act 2006.

883. The provisions include a power for Secretary of State to make regulations (subject to negative resolution procedure). The key regulations are:

The Care Trusts (Applications and Consultation) Regulations 2001 (SI 2001/3788), covering who can enter Care Trust arrangements as well as requirements for application and consultation

- These set out the arrangements for designating (or revoking the designation of) a Care Trust. Currently, those bodies wishing to form a Care Trust must seek and apply (following a particular process) to the Secretary of State for approval. The Secretary of State is able to set out a number of conditions, for example, that designation would be likely to be beneficial in terms of the body designated as Care Trust carrying out the health-related functions of the local authority in conjunction with the functions of the NHS body. The regulations also enable the Secretary of State to set out the functions which can be the subject of partnership arrangements and areas that Care Trusts can cover.
- The regulations require the bodies concerned to carry out a consultation with the people who would be affected by the proposals before applying to the Secretary of State for designation.
- The regulations also specify that the name of the NHS body being designated should be changed through an order (under section 18 or section 25 of the NHS Act 2006) to include the words “Care Trust”.

The National Health Service Trusts (Membership and Procedure) Amendment (No.2) 2001 (England) Regulations (SI 2001/3786) covering membership of boards for those NHS trusts that have sought designation as a Care Trust
The Primary Care Trusts (Membership, Procedure and Administration Arrangements) Amendment (No.2) (England) Regulations 2001 (SI 2001/3787) covering membership of boards for those Primary Care Trusts that have sought designation as a Care Trust.

- These set out requirements for the governance arrangements for the NHS body involved, including a requirement for the governance arrangements of the NHS body forming the Care Trust to include someone with experience of the health related functions of a local authority. They also cover a range of areas in terms of appointment of executive directors and non-executive directors for Care Trusts, details of who can appoint them as well as arrangements for termination of appointments.

Clause 197: Care Trusts

884. The clause removes the direct involvement of the Secretary of State in the process of designating or revoking Care Trusts but retains a revised power for the Secretary of State to make regulations setting out procedural requirements to be followed by local bodies in forming (or revoking the designation of) a Care Trust. This is to ensure the bodies concerned are satisfied that the arrangement would lead to an improvement in the health or care outcomes for their local populations and that the Care Trust exercises its functions effectively. A more detailed explanation of where powers have been removed, amended or retained is given below.

Power to designate or revoke the designation of a body as a Care Trust

Power conferred on: *NHS bodies and local authorities*
Power exercised by: *-*
Parliamentary procedure: *None*

885. The clause removes the power of the Secretary of State to designate or revoke the designation of a body as a Care Trust and transfers the responsibility to the local bodies concerned. At the same time, it removes the requirement for the NHS body to incorporate the words “Care Trust” in its name and for the governance arrangements of NHS bodies forming the Care Trust to include someone with experience of the health related functions of a local authority. In future, these matters would be a local decision, agreed between the local authority and NHS body who have decided to enter into the arrangement.

<u>Reason for delegating the power</u>

886. The decision to become a Care Trust should be a wholly local one without permission needing to be sought from the Secretary of State. It would be up to local bodies to determine if the Care Trust model is appropriate for their circumstances and therefore it seems appropriate to remove this power and transfer the responsibility to the local bodies concerned and for them to designate themselves as such. This is in line with the proposed policy approach around changes to the Secretary of State’s relationship with the NHS (removing himself from day-to-day operations).

Reason for the selected procedure

887. This would be a decision to designate an individual Care Trust, taken at local level by the bodies directly concerned, after consultation and within a framework set by primary legislation agreed by Parliament, so it seems unnecessary to select a Parliamentary procedure.

The Secretary of State's regulation-making power

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

888. The clause envisages that before the NHS body and local authority form a Care Trust, they must satisfy themselves that certain conditions have been met. To support this, the clause envisages powers for the Secretary of State to prescribe in regulations:

- the form and manner in which the local bodies should publish the reasons why they consider that the proposed designation would be likely to promote the effective exercise by the body of prescribed health-related functions of the local authority (new subsection (1A));
- whom the local bodies must consult on the proposed designation (new subsection (1A)) and on any proposed revocation of the designation (new subsection (1B));
- whom the local bodies must notify of the designation (new subsection (1B)) or of the revocation (new subsection 5(B));
- what information the local bodies must publish following a consultation (new subsection 5(C)).

889. Repealing subsection (9)(a), (b) and (c) of section 77 of the NHS Act 2006 as well as amending subsection (9)(d) would remove the direct involvement of the Secretary of State in the process of designating, or revoking designations of, Care Trusts. The proposed changes would have an effect on the scope of the regulation-making power currently provided by subsection (8). This current provision enables Secretary of State to make regulations dealing with matters that are incidental, consequential or supplementary to the formation and break up

of Care Trusts. The regulation-making power enables the Secretary of State to update matters from time to time or to reflect changing circumstances which may have an impact on Care Trusts in the future.

890. The Department also envisages that the regulations would make clear that clinical commissioning groups can discharge only those health-related functions of the local authority that are commissioning functions, and that foundation trusts can discharge only those health-related functions of the local authority that are provider functions.

Reason for delegating the power

891. Key reasons for delegating the power are:

- to enable flexibility in the future as the practical implications of some of the mechanisms become clearer.
- to enable any specific technical detail about the conditions that should be met before NHS bodies and local authorities agree to designate or revoke their designation as Care Trusts.
- to ensure that these decisions are based on effective consultation and evidence according to best practice and that those decisions are done in a transparent and open manner.

Reason for the selected procedure

892. The level of detail and the non-controversial nature of the powers suggest that negative resolution procedure would be appropriate.

PART 6: PRIMARY CARE SERVICES

893. Part 6 makes a number of changes to Parts 4, 5, 7 and 9 of the NHS Act 2006. Minor changes are made to Part 4 (Medical Services), Part 5 (Dental Services) and Part 9 (Charging). Part 7 (Pharmaceutical Services) also sets out a number of minor and technical changes, particularly in relation to control of entry in relation to pharmaceutical lists and the maintenance of lists relating to performers of pharmaceutical services and those assisting in the provision of pharmaceutical services. The delegated powers in Part 6 are in line with those

which have been used in the past and continue to make use of the negative resolution procedure.

Clause 200: Persons eligible to enter into general dental services contracts

Power conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure*: Negative*

894. Section 102 of the NHS Act 2006 (persons eligible to enter into GDS contracts) provides a power to prescribe in regulations the conditions and exceptions subject to which Primary Care Trusts (for which Schedule 4 to the Bill would substitute a reference to the Board) may enter into a general dental services contract with any person meeting the criteria laid down in paragraphs (1)(a) to (c) of that subsection. This clause amends subsection (1)(c) of section 102 so that it refers to "persons" instead of "individuals", the effect of which is slightly to widen the category of persons who meet the conditions referred to in subsection (2) to include a limited liability partnership. It also makes a consequential change to subsection (3) of that section.

Reason for delegating the power

895. These are minor changes to an existing delegated power and do not substantially affect its nature.

Reason for the selected procedure

896. Since the changes to the power are minor, and the power deals with detailed matters within a framework created by primary legislation, it is considered that the negative resolution procedure remains appropriate.

Clause 201: Arrangements under section 107 of the National Health Service Act 2006

Power conferred on: *Secretary of State*

Power exercised by: *Regulations*

***Parliamentary procedure**: Negative*

897. Currently section 108 of the NHS Act 2006 makes provision on persons with whom agreements may be made under section 107 of that Act. Subsection (1) of section 108 enables regulations to prescribe the conditions and exceptions subject to which a Strategic Health Authority (for which Schedule 4 to the Bill would substitute a reference to the Board) may enter into a general dental services contract with any person listed in that subsection who meets the conditions prescribed in regulations made under subsection (2). This clause amends subsection (1)(d) of section 108 so as to change the reference to "individuals" in that provision to "persons", the effect of which is to slightly widen the category of persons who may enter into a GDS agreement to include a limited liability partnership and dental bodies corporate.

Reason for delegating the power

898. This is a minor change to an existing delegated power and does not substantially affect its nature.

Reason for the selected procedure

899. Since the change to the power is minor, and the power is to deal with detailed matters within a framework created by primary legislation, it is considered that the negative resolution procedure remains appropriate.

Clause 202: Payments in respect of costs of sight tests

***Power conferred on**: Secretary of State*

***Power exercised by**: Regulations*

***Parliamentary procedure**: Negative*

900. This clause clarifies the power currently in section 180(3) of the National Health Service Act 2006 (payments in respect of costs of optical appliances) to make payments to specific eligible people who have incurred costs in obtaining sight tests. The power also applies to the cost of optical appliances. The clause makes minor amendments to subsection (3) of section

180 to take account of the creation of the Board and to clarify the persons to whom repayments can be made. (Further amendments are made to section 180 by paragraph 95 of Schedule 4).

Reason for delegating the power

901. These are minor changes to an existing delegated power and do not substantially affect its nature.

Reason for the selected procedure

902. Since the changes to the power are minor, and the power deals with detailed matters within a framework created by primary legislation, it is considered that the negative resolution procedure remains appropriate.

Clause 203: Pharmaceutical needs assessments

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *Negative*

903. This clause makes amendments to sections 24, 24A, 128A and 242A of the NHS Act 2006. These are the provisions that govern responsibility for developing, updating and publishing local pharmaceutical needs assessments (PNAs). This responsibility is transferred from Primary Care Trusts to Health and Wellbeing Boards in local authorities.

904. Subsection (1) amends the regulation-making powers in section 128A of the NHS Act, which makes provision in respect of the arrangements for preparing PNAs and transfers the delegated function from Primary Care Trusts to Health and Wellbeing Boards. PNAs are

closely aligned to Joint Strategic Needs Assessments which, under the proposals in the Bill, would be developed by Health and Wellbeing Boards.

905. Subsections (2) and (3) amend sections 24 and 24A of the NHS Act, which are direction-giving powers, and subsection (5) amends section 242A, which is a regulation-making power. The amendments do not alter the substance of the powers, but remove pharmaceutical services and local pharmaceutical services from the definition of "health service" in those sections so that they are outside the scope of the delegated powers.

Reason for delegating the powers

906. This clause narrows the scope of existing delegated powers, rather than creating new powers.

Reason for the selected procedures

907. This clause narrows the scope of existing delegated powers, but leaves the existing procedures (regulations subject to negative resolution, and directions subject to no Parliamentary procedure) in place.

Clause 204: Control of entry on pharmaceutical lists

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

908. This clause makes the following changes to the current provisions in the NHS Act 2006 that govern entry to a Primary Care Trust's pharmaceutical list for applicants who wish to provide NHS pharmaceutical services (or who wish to change their listing once admitted):

- It amends section 129(2)(c) of the NHS Act so that responsibility for determining applications for market entry in England (inclusion in the pharmaceutical list) in line with the relevant local pharmaceutical needs assessment (PNA) is transferred from Primary Care Trusts to the Board;

- It inserts new subsection (2ZA) into section 129 of the NHS Act which provides that regulations may prescribe that the Secretary of State and such other persons as may be prescribed are not to be included in a pharmaceutical list;
- It amends section 129(2A) so that the Board would determine applications against the PNA relevant to the area of the premises and so that the Board would have discretion whether or not to approve an application. The Board would not be obliged to grant an application when judged against the relevant PNA;
- It also amends subsection (6)(g) of section 129 of the NHS Act to put beyond doubt that regulations under section 129 may provide for the removal of a person from the pharmaceutical list for reasons that are not connected to a person's fitness to practise, and are not the grounds specified in subsection (6)(d), but rather are other prescribed grounds;
- It amends section 130 of the NHS Act, which concerns appeals about decisions on applications for inclusion in a list. The amendments put beyond doubt that appeals are to be heard by the First Tier Tribunal only if they are related to an applicant's fitness to practise, and that the First Tier Tribunal is able to remit any re-determination of such a decision back to the Board if it allows an appeal. Appeals on all other grounds are to be made to the Secretary of State;
- It amends section 136 of and Schedule 12 to the Act relating to local pharmaceutical services consequential to the responsibility for preparing and publishing PNAs" transferring from Primary Care Trusts to Health and Wellbeing Boards based in local authorities.

Reason for delegating the power

909. These are mainly minor changes to existing delegated powers and do not substantially affect their nature.

Reason for the selected procedure

910. Since the changes to the powers are minor, and the powers deal with detailed matters which the framework created by primary legislation requires to be dealt with in regulations, it is considered that the negative resolution procedure remains appropriate.

Clause 205: Lists of performers of pharmaceutical services and assistants etc

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

911. This clause inserts new sections 147A and 147B into the NHS Act 2006. These new sections replace the regulation-making powers previously contained in sections 146, 149 and 150 of that Act. These are in respect of the developing and maintaining by Primary Care Trusts of local pharmaceutical services (LPS) lists for those performing LPS services and supplementary lists for those assisting pharmaceutical contractors in connection with their fitness to practise. New sections 147A and 147B contain a combined power to make regulations in respect of the preparation by the Board of pharmaceutical performers' and assistants' lists.

912. The powers carry forward the ability to require certain persons to be included in lists. For example, an individual pharmacist contractor may also assist a LPS contractor in the performance of services in which case they would need to be included on both the relevant pharmaceutical list and LPS performer list.

913. However, section 147B also includes new provision which enables regulations to be made so that if an LPS performer is approved to be included on the relevant LPS performers' list, then this may also be treated as approval to be included on the relevant assistants' lists and vice versa. This power is needed to reduce bureaucracy for all those who assist in the provision of or perform services.

Reason for delegating the power

914. These powers mostly replace existing regulation-making powers in the NHS Act. It is not considered that the powers which are being inserted by this Bill are any more wide-ranging in scope than the existing powers.

Reason for the selected procedure

915. The powers that would be inserted by the Bill mostly replace existing regulation-making powers in the NHS Act 2006 which are subject to the negative resolution procedure. It is considered that this remains the appropriate procedure for these new powers.

PART 7: REGULATION OF HEALTH AND SOCIAL CARE WORKERS

916. As part of the Government's commitment to reducing bureaucracy and administration costs and simplifying the number of NHS bodies, including arm's length bodies, the Department of Health published a review of its arm's length bodies *Liberating the NHS: Report of the arm's length bodies review* on 26 July 2010. This included recommendations, among other things, to –

- abolish the General Social Care Council (GSCC) and transfer some of its functions to the Health Professions Council; and
- move the Council for Healthcare Regulatory Excellence out of the arm's length body sector to operate on a full-cost recovery basis.

917. The GSCC is an arm's length body established under the Care Standards Act 2000 and responsible for the regulation of social workers and social work students in England. It also approves courses for those who are or who wish to become approved mental health professionals (AMHPs) in England under the Mental Health Act 1983. The GSCC is an executive non-departmental public body (ENDPB) answerable to the Secretary of State for Health.

918. The Health Professions Council (HPC), established by the Health Professions Order 2001, currently regulates fifteen professions. It is independent of Government and answerable to Parliament through the Privy Council. The Bill provides for the abolition of the GSCC and for the HPC to take on its functions in relation to social workers and AMHPs. The Bill provides for the name of the Council to be changed to the Health and Care Professions Council to reflect its wider remit.

919. Section 60 of the Health Act 1999 provides for Her Majesty by Order in Council to regulate, or modify the regulation of, health professionals including those regulated by the HPC

under the Health Professions Order 2001. Similar powers currently exist in sections 124 and 126 of the Health and Social Care Act 2008 which enable the Secretary of State to regulate, or modify the regulation, in England, of social workers and social care workers, and modify the functions of the GSCC in relation to the education and training of AMHPs in England. The Bill revokes these powers and provides for section 60 of the Health Act 1999 to be extended to provide a single power that may be used to regulate, or modify the regulation of, health professionals and, in England, social workers and social care workers, and to modify the functions of the HPC in relation to the education and training of AMHPs in England.

Orders under section 60 of the Health Act 1999

Clause 206: Power to regulate social workers etc. in England
Clause 207: Training etc. of approved mental health professionals in England
Clause 208: Orders regulating social care workers in England: further provision

Power conferred on: *Her Majesty in Council*
Power exercised by: *Order*
Parliamentary procedure: *Affirmative*

920. The first of these clauses extends the scope of section 60 of the Health Act 1999 to enable Her Majesty by Order in Council to regulate, or modify the regulation of, the social work profession in England and social care workers in England. This is a re-cast of the power which is currently conferred on the Secretary of State, in relation to England, in section 124 of the Health and Social Care Act 2008.

921. The second of these clauses extends the scope of section 60 to enable Her Majesty by Order in Council to modify the functions, powers or duties of the Health and Care Professions Council (which would be the new name of the HPC) that relate to the education and training of persons who are or wish to become AMHPs. Again, this is a re-cast of the power which is currently conferred on the Secretary of State, in relation to England, in section 126 of the Health and Social Care Act 2008.

922. Clause 208 amends Schedule 3 to the Health Act 1999 (which makes further provision about what may be included in orders under section 60) in connection with these proposed changes to the scope of section 60.

Reason for delegating the power

923. Section 60 of the Health Act 1999 is a Henry VIII power which is intended to enable changes to be made to the regulation of the health professions in an efficient and timely manner. Prior to the enactment of section 60, the health professions were regulated by means of a number of Acts of Parliament, which contained detailed provision about their regulation and which could be amended only by means of primary legislation. This was problematic as the detailed provisions often needed to be updated to take account of changing best practice in the field of health professional regulation, but it was difficult to secure slots in the Parliamentary legislative timetable to allow for this to happen in a timely manner. Section 60 enables changes to such detailed regulatory provisions to be made by means of an order, whilst ensuring that interested parties are consulted on any draft order and that an appropriate Parliamentary procedure is provided for, given that the power allows for the amendment of primary legislation.

924. The power was used to establish the HPC in 2001 and has proved to be effective in allowing the introduction of a number of changes to improve patient safety, such as modernising fitness to practise procedures and the widening of regulation to include new professional groups (the most recent being practitioner psychologists in 2010).

925. The powers in section 124 and 126 of the Health and Social Care Act 2008 were taken to enable the Secretary of State, in relation to England, to have a similar power to that under section 60. This is by means of a Henry VIII regulation-making power, to regulate or modify the regulation of social workers and social care workers and modify the functions of the GSCC in relation to the education and training of AMHPs in England. The rationale behind taking this power was the same as that for section 60; that is, a need to be able to amend primary and secondary legislation to take account of the changing needs and practices of these professionals and workers, without needing to await an appropriate opportunity to introduce primary legislation.

926. Given that it is intended that the regulation of social workers in England, and functions relating to the approval of courses for AMHPs in England, are to be transferred in this Bill from the GSCC to the HPC (which is, as set out above, established by an order under section 60), it is appropriate to bring the powers to regulate, and modify the regulation of, social workers and social care workers in England, and to modify the functions of the HPC in relation to the education and training of AMHPs, together with the powers to regulate, and modify the regulation of, health professionals in section 60.

Reason for the selected procedure

927. Orders made under section 60, as amended by the Bill, would continue to be subject to the same requirements to consult on the order in draft and the same Parliamentary procedure, that is the affirmative resolution procedure, to which section 60 orders are currently subject. The affirmative resolution procedure is considered to be appropriate because orders under section 60 may amend primary legislation.

The Health and Care Professions Council

Clause 210: Regulation of social workers in England
Clause 212: Functions of the Council in relation to social work in England
Clause 213: Appeals in cases involving social workers in England
Clause 214: Approval of courses for approved mental health professionals
Clause 215: Exercise of function of approving courses, etc.

928. The Bill provides for the HPC to regulate social workers in England and to approve courses for those who are or wish to become AMHPs in England. This would be achieved by means of amendments made to the Health Professions Order 2001. As a consequence of this, the powers in the Health Professions Order 2001 for the Privy Council and the HPC to make delegated legislation would be extended so that these powers would also apply in relation to the regulation of social workers in England, and the approval of courses for those who are or wish to become AMHPs, in England. It is not proposed that the procedures in relation to any of these powers would be changed as a result of their extension, as it is envisaged that the powers would be exercised in the same way as they are exercised currently.

929. The above-mentioned powers to make delegated legislation which are conferred on the Privy Council or the HPC by the Health Professions Order 2001 (and which would be extended as indicated above by clauses in this Part of the Bill) include the powers listed below. The amendments to these powers would not alter the nature of the powers, or the procedures for the exercise of the powers, and so we have not provided a detailed account of each of the powers:

- Power of the HPC to make rules in connection with registration and the register, and the payment of fees (article 7(1));
- Power of the HPC to make rules in connection with applications for renewal of registration (article 10(1));
- Power of the HPC to make rules regarding the removal of a registrant from the register at their request or following a specified period (article 11(1));
- Power of the HPC to make rules requiring registrants to undergo education, training or courses after registration (article 16(3));
- Power of the HPC to make rules requiring registrants to undertake continuing professional development (article 19(1));
- Power of the HPC to make rules requiring individuals who have not practised or have not practised for a specified period to undertake specified education or training (article 19(3));
- Power of the HPC to make rules regarding failure to comply with the standards of conduct, performance and ethics established by the Council in relation to an individual's fitness to practise (article 22(4));
- Power of the HPC to make rules for the appointment of screeners to whom allegations in relation to an individual's fitness to practise may be referred (article 23(1));
- Power of the HPC to makes rules as to the procedure to be followed by the Investigating Committee (article 26(3));
- Power of the HPC to make rules as to the procedure to be followed by the Health and Conduct and Competence Committees (article 32(1));
- Power of the HPC to make rules conferring functions on legal, medical and registrant assessors (articles 34(4), 35(3) and 36(3));
- Power of the HPC to make rules regulating appeals against decisions of the Education and Training Committee (article 37(4));

- Power of the HPC to make rules regarding the constitution of the Education and Training Committee (Schedule 1 paragraph 17(1));
- Power of the HPC to make rules with regard to the constitution of each practice committee (Schedule 1 paragraph 18(1));
- Power of the Privy Council to make on order conferring additional functions on the Council (article 3(3));
- Power of the Privy Council to make an order providing for the constitution of the Council (article 3(7A));
- Power of the Privy Council to make an order in connection with the Council's register (article 6(1) and (3));
- Power of the Privy Council to make an order with regard to the functions of legal assessors (article 40(1));
- Power of the Privy Council to approve by order rules made by the Council (given that rules made by the Council are not to come into force until so approved by the Privy Council with one exception) (articles 41(1) and 42(1));
- Power of the Privy Council to make an order making transitional provision (article 48(2)).

The rule-making power in clause 214(5) is simply a re-statement of an existing power (held by The Care Council for Wales).

The Professional Standards Authority for Health and Social Care

930. The Council for Healthcare Regulatory Excellence (CHRE) was established by section 25 of the National Health Service Reform and Health Care Professions Act 2002 and its functions are set out in sections 25 to 29 of that Act. It is currently responsible for the scrutiny and quality assurance of the nine health professions regulatory bodies in the UK. It is currently funded by the Department of Health and the devolved administrations.

931. In *Liberating the NHS: Report of the arm's length bodies review*, the Government announced its intention to make the CHRE, which under the proposals in the Bill will be renamed the Professional Standards Authority for Health and Social Care (the Authority), self-funding through a compulsory levy on the regulatory bodies it oversees. The Bill provides for the Authority to be funded by the regulatory bodies, while compelling the Secretary of State

and the devolved administrations to pay separately for specific commissions of advice from the Authority. As part of this, the Bill empowers the Privy Council to make regulations requiring the regulatory bodies to pay periodic fees to the Authority.

932. To reflect the change to the Authority's funding, the Bill provides for the Secretary of State's current powers in respect of the Authority to be exercisable by the Privy Council in future. The Bill also confers on the Privy Council the Secretary of State's current powers to make regulations about the investigation of complaints by the Authority; to make regulations about appointments to the Authority and to committees and sub-committees of the Authority; and to make orders and regulations in relation to the Authority's powers to direct the regulatory bodies to make rules.

933. The Bill also gives the Privy Council the power by order to make transitional, transitory or saving provision in connection with the commencement of provision in this Part of the Bill.

Clause 220: Functions of the Authority

Power conferred on: *The Privy Council*
Power exercised by: *Regulations and order*
Parliamentary procedure: *Negative (for regulations); affirmative (for orders)*

934. This clause confers on the Privy Council the current duties of the Secretary of State under section 27 of the NHS Reform and Health Care Professions Act 2002 (the 2002 Act), as part of fulfilling the policy objective of removing Secretary of State control in relation to the Authority.

935. Section 27 of the 2002 Act gives the CHRE powers to direct regulatory bodies to make rules (the CHRE has never used these powers). At present, section 27 confers a duty on the CHRE to send a copy of any directions to the Secretary of State, and requires the Secretary of State to lay a draft of an order setting out those directions before both Houses of Parliament. The section also requires the Secretary of State to make regulations about the procedure to be followed in relation to the giving of directions by the CHRE. (No regulations have been made to date). This clause confers these duties of the Secretary of State on the Privy Council instead.

Reason for delegating the power

936. Draft orders laid by the Privy Council under section 27 would contain directions requiring a regulatory body to make rules, and would specify the date on which the directions were to come into force. The Authority may only give such directions if it considers that it would be desirable to do so for the protection of the public. As it would not be possible to stipulate on the face of the Bill the directions that would be necessary in the event of such concerns, this power provides the flexibility to respond appropriately and in a timely way.

937. The regulations made by the Privy Council under section 27 would contain technical and administrative detail on the procedure to be followed in relation to the giving of directions by the Authority, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these technical and administrative details from time to time.

Reason for the selected procedure

938. Orders made under this section would continue to be subject to the affirmative resolution procedure. Regulatory bodies must comply with all directions contained in such orders, and must make rules as provided for in such directions, so that the way that an independent regulatory body operates is effectively dictated by the Authority where public protection is at risk. To ensure that this power is exercised by the Authority appropriately, and only where necessary, we consider that it is appropriate for the affirmative resolution procedure to apply to such orders.

939. It would be appropriate for regulations made under this section to continue to be subject to the negative resolution procedure, taking account of he administrative nature of the provisions, while ensuring that timely amendments to the regulations can be made when needed.

Clause 221: Funding of the Authority

Power conferred on: *The Privy Council*
Power exercised by: *Regulations*

Parliamentary procedure: *Negative*

940. New section 25A, which is inserted into the 2002 Act by subsection (1) of this clause, provides for changes to the way in which the CHRE (a body established by section 25 of the 2002 Act) is funded. The name of the CHRE would be changed to the Professional Standards Authority for Health and Social Care by the Bill. Certain of the Authority's functions would be funded by a compulsory levy on the regulatory bodies listed in section 25(3) of the 2002 Act. New section 25A(1) confers a duty on the Privy Council to make regulations requiring each of the regulatory bodies to pay periodic fees to the Authority. The Bill requires the regulations to stipulate which of the Authority's functions are to be funded through the levy, and the method of determining the fees to be paid by each of the regulatory bodies. The functions funded by the levy may not include its functions in relation to the accreditation of voluntary registers, or requests for advice, investigations and reports made by the Secretary of State or the devolved administrations. The regulations may also make provision about the time at which fees are to be paid, the interest to be paid in the event of late payment, and the recovery of unpaid fees or interest. The Bill requires the Privy Council, after consulting the Authority and the regulatory bodies, to determine the fee to be paid by each of the regulatory bodies in accordance with these regulations.

Reason for delegating the power

941. The regulations would contain technical and administrative detail on the method for determining the fee to be paid by each regulatory body, on the timing of payment of the fees and on the recovery of fees, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these technical and administrative details from time to time. The Bill requires the Privy Council to consult the Authority, the regulatory bodies and such other persons as it considers appropriate before making regulations under this section.

Reason for the selected procedure

942. The regulations would be subject to the negative resolution procedure. This seems appropriate to the technical and administrative nature of the provisions, while ensuring that timely changes to the regulations can be made when required. Where regulations made under

this clause include provision within the legislative competence of the Scottish Parliament, the regulations would also be subject to the negative resolution procedure in the Scottish Parliament.

Clause 222: Power to advise regulatory bodies, investigate complaints, etc.

Power conferred on: *The Privy Council*
Power exercised by: *Regulations*
Parliamentary procedure: *Affirmative*

943. Subsection (2) of this clause amends section 28 of the 2002 Act (which has not been commenced) to confer the current power of the Secretary of State to make regulations about the investigation by the Authority of complaints made to it about the way in which a regulatory body has exercised its functions on the Privy Council instead. This is part of fulfilling the policy objective of removing Secretary of State control in relation to the Authority.

Reason for delegating the power

944. The regulations would contain detail on the nature of complaints which the Authority must investigate, and the way in which the Authority should conduct such investigations, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these details from time to time.

Reason for the selected procedure

945. Regulations made under this section would continue to be subject to the affirmative resolution procedure. This is considered the appropriate Parliamentary procedure for these regulations, given that they may make provision about matters such as the admissibility of evidence, the compulsion of witnesses and evidence by the Authority and the administration of oaths by the Authority.

Clause 223: Accountability and governance

Appointments

Power conferred on: *The Privy Council*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

946. Subsection (3) of this clause amends the existing powers in paragraph 6 of Schedule 7 to the 2002 Act as part of fulfilling the policy objective of removing Secretary of State control in relation to the Authority.

947. The Bill confers on the Privy Council the powers, currently held by the Secretary of State, under paragraph 6 of Schedule 7 to the 2002 Act to make regulations about the following:

- the conditions which must be fulfilled for appointment as the chair or another member of the Authority;
- the tenure of office of the chair and non-executive members of the Authority;
- the appointment of a member as deputy chair and the circumstances in which that member ceases to hold office or may be removed from office as deputy chair;
- the appointment of, constitution of and exercise of functions by committees and sub-committees of the Authority.

Reason for delegating the power

948. The regulations would contain administrative and technical detail on appointments to the Authority and to committees and sub-committees of the Authority, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these details from time to time.

Reason for the selected procedure

949. Regulations made under this section would continue to be subject to the negative resolution procedure, to retain a Parliamentary procedure appropriate to the administrative

nature of the provisions, while ensuring that timely amendments to the regulations can be made when needed.

Accounts

Power conferred on: *The Privy Council or the Authority*
Power exercised by: *Determination*
Parliamentary procedure: *None*

950. Subsection (6) of this clause amends paragraph 15 of Schedule 7 to the 2002 Act to confer various powers for the Secretary of State to determine certain matters relating to the accounts of the Authority on the Privy Council instead. The matters to be determined are the form of the accounts the Authority must keep, the form of the annual accounts the Authority must prepare, and the period after the end of the financial year within which copies of the annual accounts must be sent by the Authority to specified persons. The matters which are subject to determination remain unchanged but the Bill provides for the Privy Council rather than the Secretary of State to have the power to determine them, as part of the policy objective of removing Secretary of State control in relation to the Authority.

951. Subsection (7) of this clause amends paragraph 16 of Schedule 7 to the 2002 Act to confer on the Privy Council the power to determine by what date in each year the Authority must publish an annual strategic plan and a longer term strategic plan. It also confers on the Authority the power to determine how many years its longer term strategic plan should relate to.

<u>Reason for delegating the power</u>

952. The majority of the above mentioned powers to determine various matters already exist. They deal with administrative matters that may need to change from year to year and so are not suitable to be dealt with on the face of the Bill. The Bill alters the identity of the person who exercises these powers, in order to remove Secretary of State powers to determine matters in relation to the Authority. As far as matters relating to the Authority's accounts are concerned, the policy is to ensure that appropriate scrutiny and accountability of the Authority's finances continues, and it is considered that the Privy Council is the appropriate body to determine

these matters. Equally, we consider that the Authority should be able to determine the length of its long term strategic plans but that the Privy Council should hold it to account for producing its annual and longer term plans on a specific date (but with the flexibility for that date to change between years).

Reason for the selected procedure

953. The matters subject to determination are technical and administrative, and likely to change from year to year. Therefore, it seems inappropriate to require a Parliamentary procedure.

Consequential provision etc.

Clause 227: Consequential provisions and savings, etc.

Power conferred on: *Privy Council*
Power exercised by: *Order*
Parliamentary procedure: *Negative*

954. Subsection (2) of this clause confers on the Privy Council the power by order to make transitional, transitory or saving provision in connection with the commencement of provision in this Part of the Bill.

Reason for delegating the power

955. This order-making power is necessary to make technical transitional provisions which would be too detailed to appear on the face of the Bill and would be needed in connection with the abolition of the General Social Care Council, the transfer of various functions relating to the regulation of social workers in England to the Health Professions Council, and the changes in the functions, funding and governance of the Authority. For example, the power may be used to allow existing members of the Authority to continue in office for a limited time as if they had been appointed under the amended powers of appointment. This power may also be used to provide that cases subject to the General Social Care Council's conduct processes at the time

of the transfer of the regulation of social workers in England to the Health Professions Council would continue under the same processes.

Reason for the selected procedure

956. The power would be used to make the technical provisions needed for transition, and so the negative resolution procedure is considered appropriate. Where an order made under this clause includes provision within the legislative competence of the Scottish Parliament, it would also be subject to the negative resolution procedure in the Scottish Parliament.

The Office of the Health Professions Adjudicator

957. The Office of the Health Professions Adjudicator (OHPA) was established under the Health and Social Care Act 2008 in January 2010, but is not yet operationally active. It was previously expected that, from April 2011, OHPA would take over from the General Medical Council the role of adjudicating on fitness to practise matters relating to doctors under the Medical Act 1983. Subsequently it was to take over from the General Optical Council the role of adjudicating on fitness to practise matters relating to opticians and optometrists under the Opticians Act 1989. In due course, consideration would have been given to providing for it to take on the adjudication role in relation to other health professionals from the remaining health regulators by means of secondary legislation under section 60 of the Health Act 1999.

958. The Government has reviewed the implementation of OHPA and has decided that OHPA should be abolished. The provisions for the abolition of OHPA in this Bill are intended to bring the law back to the position prior to the Health and Social Care Act 2008 and to repeal any delegated powers that were given in relation to OHPA.

959. In consequence of OHPA's abolition the Bill removes provision relating to OHPA from the order-making power in section 60 of, and Schedule 3 to, the Health Act 1999. It also makes a transitional modification to the direction-giving power in paragraph 20(4) of Schedule 6 to the Health and Social Care Act 2008. This is explained further below.

960. In addition the Bill repeals regulation and rule-making powers relating to OHPA provided for by the Health and Social Care Act 2008.

Clause 228: Abolition of the Office of the Health Professions Adjudicator

961. This clause introduces Part 4 of Schedule 16, which amends existing delegated powers as follows.

Paragraph 73: Amendments to the Health Act 1999

Power conferred on*: Privy Council*
Power exercised by*: Order*
Parliamentary procedure*: Affirmative*

962. This paragraph amends section 60 of the Health Act 1999, a Henry VIII order-making power which is used to make modifications to the regulation of the health professions, by amending section 60(1)(f) of, and paragraph 8(2A) of Schedule 3 to, that Act so as to remove references to OHPA. Those provisions would have enabled modification to the constitution, functions, powers or duties of OHPA.

Reason for delegating the power

963. These amendments to the existing affirmative Henry VIII section 60 power are in consequence of the proposed abolition of OHPA and involve removal of the scope of the power to cover OHPA (which would have enabled flexibility), and so restrict rather than extend existing powers.

Reason for the selected procedure

964. The affirmative resolution procedure remains appropriate, as an order would change primary legislation.

Paragraph 77(2)(c): Savings

Power conferred on*: Privy Council*
Power exercised by*: Directions*

***Parliamentary procedure**: None*

965. This paragraph makes a transitional modification of paragraph 20(4) of Schedule 6 to the Health and Social Care Act 2008. That provision provides for the Privy Council to give directions to the OHPA as to the matters to be dealt with in its annual report, which is to be laid before Parliament by the Secretary of State and the Northern Ireland Assembly. The modification provides for the directions to be given to the Secretary of State if the Secretary of State is, on a transitional basis by virtue of this paragraph, discharging the duty of OHPA to produce the annual report.

Reason for delegating the power

966. This modification to an existing delegated power is purely transitional and enables the final annual report of OHPA to be produced in accordance with the Privy Council's directions after OHPA itself has been abolished if necessary.

Reason for the selected procedure

967. No Parliamentary procedure seems warranted, since this is a transitional power relating only to the production of OHPA's annual report. The existing power is not subject to a Parliamentary procedure.

PART 8: THE NATIONAL INSTITUTE FOR HEALTH AND CARE EXCELLENCE

968. The White Paper *Equity and excellence: liberating the NHS* (Department of Health, July 2010) set out the Government's plans to place the National Institute for Health and Clinical Excellence, which is a Special Health Authority, on a firmer statutory footing (that is, in primary legislation), securing its independence and extending its remit to social care. The Health and Social Care Bill seeks to implement the Government's proposals.

969. The new body to be established by the Bill is named the National Institute for Health and Care Excellence (NICE). The Bill confers several new regulation-making powers on the Secretary of State, and direction-giving powers on the Secretary of State and, to a lesser extent, the Board. These largely reflect the Secretary of State's existing powers to give

directions to the Special Health Authority and seek to ensure that NICE is able to adapt and evolve in response to developments in medicines, diagnostics, technologies and social care without the need for further primary legislation. The move away from direction-giving to regulation-making powers ensures greater transparency about NICE's functions, but the Bill retains direction-giving powers or the possibility of direction-giving powers (pursuant to provision in regulations) for issues likely to be subject to continuous evolution. The powers are more specific than those currently exercised by the Secretary of State with regard to the National Institute for Health and Clinical Excellence.

Establishment and general duties

Clause 229 and Schedule 17: The National Institute for Health and Care Excellence

970. This clause introduces Schedule 17, which includes the following delegated powers.

Paragraph 1: Membership, appointment, etc.

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

971. Paragraph 1(5) enables the Secretary of State to make regulations requiring NICE to have a particular number of executive members on its board and for all or any of its executive members (other than the chief executive) to hold posts of specific descriptions.

Reason for delegating the power

972. The power to make regulations in relation to the number and descriptions of specific executive positions ensures that that there is consistency where appropriate with other public bodies and flexibility to amend the number or to ascribe specific roles to reflect functions conferred on NICE. The specialist nature of NICE's work is such that it may be desirable to require executive members to bring specific areas of expertise to their posts.

Reason for the selected procedure

973. The minimum and maximum number of executive members is set out in primary legislation and regulations would specify the number of executive members within these parameters. Additionally, the roles of individual board members would reflect functions conferred on NICE by the Bill or in regulations. The negative resolution procedure is therefore considered appropriate.

Paragraph 8: Procedure

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

974. Paragraph 8(2) enables the Secretary of State to make regulations about procedures to be adopted by NICE for dealing with conflicts of interest of members of NICE or members of its committees.

Reason for delegating the power

975. NICE quality standards and its other guidance, recommendations, advice and information would be developed on the basis of the best available evidence by committees and it is of particular importance to the credibility of NICE's products to ensure that the work is carried out by committees free of conflicts of interest. It would not be appropriate to specify in primary legislation the conflict of interest procedures NICE should have in place as they may need to change over time.

Reason for the selected procedure

976. This is an administrative issue and the negative resolution procedure is considered appropriate.

Paragraph 12: Reports

Power conferred on*: Secretary of State*

***Power exercised by**: Requirement*
***Parliamentary procedure**: None*

977. Sub-paragraph (3) requires NICE to provide the Secretary of State with such reports (in addition to its annual report, which is dealt with in sub-paragraph (2)) and information relating to the exercise of its functions as the Secretary of State may require.

Reason for delegating the power

978. The information required may need to be specified in some detail and is likely to change from time to time. For both reasons, it is desirable to seek a delegated power.

Reason for the selected procedure

979. The Department does not consider a Parliamentary procedure necessary for the use of this power to require information.

Paragraphs 13-15: Accounts

***Power conferred on:** Secretary of State (in some cases with the approval of the Treasury)*
***Power exercised by:** Directions*
***Parliamentary procedure**: None*

980. Paragraph 13(1) requires NICE to keep proper accounts and records in relation to the accounts. Paragraph 13(2) enables the Secretary of State, with the approval of the Treasury, to give directions to NICE as to the content and form of its accounts, and the methods and principles to be applied in the preparation of its accounts.

981. Paragraph 14 requires NICE to prepare annual accounts in respect of each financial year. Paragraph 14(2) enables the Secretary of State to direct NICE regarding the period within which NICE must send copies of the annual accounts to the Secretary of State and the Comptroller and Auditor General.

982. Paragraph 15(1) enables the Secretary of State, with the approval of the Treasury, to direct NICE to prepare interim accounts in respect of a period specified in the direction. Paragraph 15(2) enables the Secretary of State to direct NICE regarding the period within which NICE must send copies of the interim accounts to the Secretary of State and the Comptroller and Auditor General. Paragraph 15(3) enables the Secretary of State to direct the Comptroller and Auditor General to send a copy of the report to the Secretary of State and to lay a copy of the accounts and report before Parliament.

983. The Secretary of State will remain accountable to the Treasury for the Department's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all bodies, including NICE, that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that NICE's accounts are prepared in accordance with the requirements set by the Treasury.

984. It is possible that Parliament may also request in-year financial statements from the Department. It is therefore necessary to have a power to require in-year accounts from the Board and to direct that these are audited if required.

Reason for delegating the power

985. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

Reason for the selected procedure

986. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006). There is a power for the Secretary of State to direct that copies are laid before

Parliament, so Parliament can scrutinise the actual accounts rather than the process for preparing them.

Functions: quality standards

Clause 231: Quality standards

Power conferred on: *Secretary of State and/or the NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure*: None (unless directions by the Secretary of State are given by regulations – see clause 298(13) – in which case negative)*

987. This clause makes provision for the relevant commissioner to direct NICE to prepare a quality standard in relation to the provision of NHS services, public health services or social care (adults' or children's) in England. Under the proposals in the Bill, the Secretary of State will be the relevant commissioner for topics relating to public health services and social care and the NHS Commissioning Board will be the relevant commissioner for topics relating to NHS services. Quality standards will be developed through a process established by NICE that includes public consultation and a quality standard will have statutory effect only once it has been endorsed by the relevant commissioner. Subsection (9) makes provision for Secretary of State and the Commissioning Board to issue a joint direction to NICE where appropriate.

Reason for delegating the power

988. Delegating the power enables the Secretary of State and the Commissioning Board to ensure that the suite of quality standards prepared by NICE reflects evolving priorities, in particular the outcomes framework referred to in new section 13E(4)(a) of the NHS Act 2006 (inserted by clause 20 of the Bill).

Reason for the selected procedure

989. Directions in writing, subject to no Parliamentary procedure, would allow the Secretary of State or the Board to commission NICE in an efficient and timely fashion to prepare a quality

standard. The clause already sets out a number of safeguards that NICE must meet in preparing standards: for example, under subsection (3), it must develop quality standards through public consultation.

990. The Bill also creates the option for the Secretary of State to give directions in regulations, subject to negative resolution procedure. This provides flexibility: for example, if functions were conferred on NICE in regulations made under clause 234(1) it might be convenient to include in the regulations provision in relation to the preparation of related quality standards. The negative resolution procedure is consistent with that for regulations under clause 234.

Clause 232: Supply of quality standards to other persons

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

991. This clause confers on the Secretary of State a regulation-making power to make provision to allow NICE to supply quality standards developed in relation to the NHS, public health service or social care in England to the devolved administrations and other third parties including countries outside the United Kingdom. Subsection (2) states that regulations may confer on NICE the power to make adjustments to the quality standards as appropriate and to impose charges.

Reason for delegating the power

992. The intention is that NICE's quality standards would be developed for the Secretary of State and the Board and that quality standards would have statutory effect only once they have been endorsed by the relevant commissioner (the Secretary of State or the Board). The regulation-making power ensures flexibility to allow NICE to supply quality standards to third parties and to amend them as necessary for that purpose.

Reason for the selected procedure

993. Bearing in mind that the regulations would add to NICE's existing functions in a limited way (by setting out the circumstances in which it may supply quality standards to third parties), the negative resolution procedure seems appropriate.

Functions: advice, guidance etc.

Clause 234: Advice, guidance, information and recommendations
Clause 235: NICE recommendations: appeals

Powers conferred on: *Secretary of State*
Powers exercised by: *Regulations*
Parliamentary procedure*: Negative*

994. These provisions give the Secretary of State regulation-making powers enabling him to confer additional functions on NICE in relation to the giving of advice or guidance, provision of information or the making of recommendations concerning or connected with the provision of NHS services, social care or public health services. The regulations could make provision for the establishment by NICE of a process through which NICE would develop its advice, guidance, information or recommendations and for NICE to consult in the development of its procedures.

995. Regulations might make provision about:

- the persons or bodies that could commission work from NICE;
- the publication or other dissemination of guidance, information or recommendations;
- NICE's ability to charge for its functions;
- appeals against NICE's guidance.

996. It is envisaged that the regulation-making power would confer on NICE functions similar to those it currently carries out including development of guidance on specific drugs and treatments, on public health matters and on best practice across a whole pathway of care. NICE's technology appraisal guidance is currently subject to appeal by interested parties and the regulations may make provision for NICE to establish an appeals process.

997. Subsection (8) makes provision for regulations to require specified health or social care bodies to have regard to NICE's advice, guidance or information or to comply with NICE's recommendations. The intention is to use this provision to replicate the effect of the existing funding direction that requires NHS commissioners to make funding normally available for treatments recommended by NICE technology appraisal guidance.

998. Clause 235 provides that regulations under clause 234 may establish a process through which appeals could be made against NICE's recommendations. The current Special Health Authority is required under directions given by the Secretary of State to have, as part of its appraisal process, a process for hearing appeals against its technology appraisal guidance. The grounds on which an appeal may be made are currently also described in directions. Regulations under clause 234 could make more transparent the grounds on which an appeal could be made against a NICE recommendation.

Reason for delegating the power

999. Delegating the power avoids the need to set out in primary legislation details that may need to change frequently or rapidly in response to constantly evolving developments in medicines, diagnostics, technologies, and the health and social care environments. In this respect, it preserves the flexibility currently provided by the Secretary of State's power to give directions to the Special Health Authority.

Reason for the selected procedure

1000. The negative resolution procedure provides for a higher level of transparency than currently applies to directions given to the Special Health Authority.

Clause 234: Advice, guidance, information and recommendations

Powers conferred on: *Secretary of State or NHS Commissioning Board*
Powers exercised by: *Directions under regulations*
Parliamentary procedure*: None*

1001. Subsections (2) and (3) of clause 234 provide power for regulations to be able to provide that functions conferred by regulations may only be exercisable on direction of the Board or the Secretary of State and may be subject to directions as to their exercise. Clause 234(4) specifically precludes the possibility of regulations enabling the Secretary of State or the Board to direct NICE to make particular recommendations.

1002. The Commissioning Board could be enabled under regulations to direct NICE only to exercise functions concerning or connected with the provision of NHS services. Provision for the Secretary of State to direct NICE to exercise functions could cover matters concerning or connected with the provision of NHS services, public health services or social care in England. This might include social care for children.

Reason for delegating the power

1003. Direction-giving powers that could be provided for in regulations would enable the Secretary of State or the Board to commission particular guidance or other products from NICE within parameters set out in the regulations. The power provides flexibility to respond appropriately to constantly evolving developments in medicines, diagnostics, technologies, health and social care environments.

Reason for the selected procedure

1004. Direction-giving powers that can be provided for in regulations are appropriate to enable the Secretary of State and the Board to commission NICE in an efficient and timely fashion to carry out specific pieces of work without recourse to primary legislation or further regulations

Clause 236: Training

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

1005. This clause gives the Secretary of State a regulation-making power to confer functions on NICE to provide or facilitate the provision of training in connection with the provision of NHS, public health or social care services in England. In its current form, the Special Health Authority hosts the National Prescribing Centre, which supports the NHS to improve prescribing, medicines use and patient care. Part of the Centre's role is to deliver education, training and development on evidence-based therapeutics and medicines management to healthcare professionals. This would continue to be part of NICE's role following its re-establishment. NICE is also well placed to provide training to support implementation of its guidance and recommendations.

Reason for delegating the power

1006. NICE's functions in this area may evolve over time and conferring such functions on NICE in regulations preserves the existing flexibility for its training function to adapt accordingly. (The functions of the current Special Health Authority are mostly conferred on it by directions.)

Reason for the selected procedure

1007. Regulations provide for more transparency than the current system, whereby functions are conferred on the Special Health Authority by directions. The negative resolution procedure seems appropriate, since the parameters within which regulations would be made are described in the Bill itself.

Directions

Power conferred on: *Secretary of State*
Power exercised by: *Directions of Secretary of State or the NHS Commissioning Board under regulations*
Parliamentary procedure*: None*

1008. Subsections (2) and (3) enable provision to be made for functions conferred by regulations made under this clause to be exercisable only on direction of the Board or the Secretary of State and in accordance with such directions as to their exercise. Directions

made pursuant to regulations under this clause could, for example, require NICE to provide training to support the implementation of a particular piece of guidance or to work in partnership with another organisation to provide training to healthcare professionals.

Reason for delegating the power

1009. NICE would perform its functions in relation to NHS services to support the Board and it is therefore appropriate for the Board, as well as the Secretary of State, to have powers, that can be provided for in regulations, to direct NICE in the exercise of these functions. Secretary of State or the Commissioning Board may want to commission specific training programmes or support packages from NICE, within the parameters of the functions conferred upon NICE in regulations, and the direction-giving power enables this flexibility.

Reason for the selected procedure

1010. A Parliamentary procedure is considered unnecessary as the content of directions would be constrained by the regulations under which they would be made.

Clause 237: Advisory services

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

1011. This clause gives the Secretary of State a regulation-making power to confer functions on NICE in relation to the provision of advisory services in connection with the provision of health care or social care services or the protection or improvement of public health. Subsections (2) and (3) allow the regulations to provide for the imposition of charges in connection with such advice. The power may be used to enable NICE to carry out activities similar to the services the Special Health Authority currently provides to foreign Governments or the pharmaceutical industry.

Reason for delegating the power

1012. The functions of the predecessor body, the Special Health Authority, are mostly conferred on it by directions. This flexibility has enabled its role to adapt and evolve over time. The regulation-making power preserves this flexibility for the new body.

Reason for the selected procedure

1013. The negative resolution procedure is appropriate as the broad scope within which advisory services could be conferred on NICE under this clause is described in the Bill. The current mechanism through which such functions would be conferred on the predecessor body is through directions; a regulation-making power provides for greater transparency.

Clause 238: Commissioning guidance

Power conferred on: *NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure*: None*

1014. This clause allows the Board to direct NICE to exercise the Board's functions in relation to the preparation of commissioning guidance and as to the manner in and period within which NICE must exercise the functions. Subsection (3) enables the Board to require NICE to provide advice and information about commissioning guidance and disseminate commissioning guidance in the manner requested.

Reason for delegating the power

1015. Under the proposals in the Bill, the Board will be responsible for the preparation and publishing of commissioning guidance to which clinical commissioning groups must have regard. The direction-giving power enables the Board to delegate its power to develop commissioning guidance to NICE if it wishes to draw on NICE's expertise in this area.

Reason for the selected procedure

1016. Directions are appropriate to give the Board a degree of flexibility and control over NICE's supporting role in the development of commissioning guidance. The Board would be

delegating functions that have been approved by Parliament, and would be delegating them to a body that will work consultatively and transparently in pursuit of its legislative functions. This is a continuation of the current approach to the commissioning from the National Institute for Health and Clinical Excellence of expert advice. Regulations are therefore not considered necessary for what is essentially a matter of day to day management of an established public body.

Functions: other

Clause 239: NICE's charter

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure*: Negative*

1017. This clause allows the Secretary of State to make regulations requiring NICE to produce a charter explaining its functions. The regulations may include provision about the information to be provided in the charter, the timing of its preparation, review and revision of the charter and the manner in which it must or may be published.

Reason for delegating the power

1018. The Secretary of State may in future want NICE to produce a charter that explains to a wider audience what functions it carries out and how it does so. The requirements of a charter may evolve over time in line with NICE's functions and the delegated power ensures that it is possible for appropriate provision for a NICE charter to continue to be made without amending primary legislation.

Reason for the selected procedure

1019. A NICE charter would reflect the functions conferred on NICE by the Bill and in any subsequent regulations. The negative resolution procedure is therefore appropriate for regulations requiring publication of a NICE charter.

Clause 242: Failure by NICE to discharge any of its functions

***Power conferred on**: Secretary of State*
***Power exercised by**: Directions*
***Parliamentary procedure**: None (unless given by regulations – see clause 298(13) – in which case negative)*

1020. This clause confers power on the Secretary of State to direct NICE in cases of serious failure by NICE as to how to carry out any of its functions The power enables the Secretary of State to give NICE a direction if the Secretary of State considers that NICE is failing or has failed to discharge any of its functions, or is failing or has failed to discharge any of its functions properly. The direction can direct NICE to discharge those functions in a manner and within a period specified in the direction. If NICE fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State. The failure must be significant and the Secretary of State must publish his reasons for the intervention. (See the discussion of failure powers in relation to new section 13Z1, inserted by clause 20).

Reason for delegating the power

1021. The power would concern how an existing function should be exercised, rather than a matter of principle (such as what functions there should be). The directions concerned could be given either in writing (subject to no Parliamentary procedure) or through regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided based on the type of intervention that is necessary.

Reason for the selected procedure

1022. The power would concern an operational matter (how an existing function should be exercised in particular circumstances) rather than a matter of principle (such as what functions there should be). A direction-giving power is therefore considered to be appropriate. The directions can be given either in writing or through regulations, which allows the most appropriate format for the directions to be decided based on the type of intervention that is necessary.

PART 9: HEALTH AND ADULT SOCIAL CARE SERVICES: INFORMATION

1023. The White Paper *Equity and Excellence: Liberating the NHS* explained that the Government intended to centralise data collection through the Health and Social Care Information Centre. The Information Centre would therefore become the main organisation centrally collecting information from health and social care bodies on the provision of health or adult social care services. This Part of the Bill would establish the Information Centre, which is currently a Special Health Authority, on a firmer statutory footing (in primary legislation). The proposals in the Bill would also empower the Secretary of State and the NHS Commissioning Board to direct the Information Centre to establish systems for the collection and analysis of information in connection with health or adult social care. It would also enable the Care Quality Commission, Monitor and NICE, as well as any body prescribed in regulations, to make mandatory requests for information. Any other person would also be able to make a request for information to be collected. The Information Centre would have a duty to publish the information it collects subject to certain exceptions. In certain circumstances the Centre may or must disseminate the information. It would also would have a duty to seek to minimise the burdens it imposes on others, for example, through the requirements and requests it makes on health and social care bodies for information.

1024. *"Liberating the NHS"* set out the commitment to a more widespread publication of information to provide greater transparency and promote choice. The Department consulted on its proposals in relation to information policy in the document *Liberating the NHS: An Information Revolution*. The report from the NHS Future Forum and the Government's response to that report both recognised the importance of high quality information and of putting in place systems that can join up information while also treating information confidentially where appropriate. Many of the delegated powers in Part 9 of the Bill would support this.

CHAPTER 2: THE HEALTH AND SOCIAL CARE INFORMATION CENTRE

Establishment and general duties

Clause 249 and Schedule 19: The Health and Social Care Information Centre

1025. This clause introduces Schedule 19, which includes the following delegated powers.

Paragraph 12: Reports

***Power conferred on**: Secretary of State*
***Power exercised by**: Requirement*
***Parliamentary procedure**: None*

1026. Sub-paragraph (3) requires the Information Centre to provide the Secretary of State with such reports (in addition to its annual report, which is dealt with in sub-paragraph (2)) and information relating to the exercise of its functions as the Secretary of State may require.

Reason for delegating the power

1027. The information required may need to be specified in some detail and is likely to change from time to time. For both reasons, it is desirable to seek a delegated power.

Reason for the selected procedure

1028. The Department does not consider a Parliamentary procedure necessary for the use of this power to require information.

Paragraphs 13, 14 and 15: Accounts

***Power conferred on:** Secretary of State, in some cases with the approval of the Treasury*
***Power exercised by:** Directions*
***Parliamentary procedure:** None*

1029. Paragraph 13(2) would enable the Secretary of State, with the approval of the Treasury, to give directions to the Information Centre on the content and form of its accounts, and on the methods and principles to be applied in their preparation.

1030. Paragraph 14 would require the Information Centre to prepare accounts for each financial year, and send copies to the Secretary of State and to the Comptroller and Auditor General within such period after the end of the financial year as the Secretary of State may specify in directions under paragraph 14(2). The Comptroller and Auditor General would be required to examine, certify and report on the accounts and lay copies of the accounts and the report in Parliament.

1031. It is possible that Parliament may also request in-year financial statements from the Department. It is therefore necessary to have a power to require in-year accounts from the Board and to direct that these are audited if required. Paragraph 15 therefore enables the Secretary of State, with the approval of the Treasury, to direct the Information Centre to prepare accounts for other periods (interim accounts) and send copies to the Secretary of State and the Comptroller and Auditor General within a specified period. Paragraph 15(3) would require the Comptroller and Auditor General to examine, certify and report on any interim accounts, and, if directed by the Secretary of State, the Comptroller and Auditor General would be required to send a copy of the report to the Secretary of State, and lay copies of the accounts and the report in Parliament.

Reason for delegating the power

1032. Accounting requirements need to be specified in detail and are likely to change over time (for example as the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual are revised and updated), so it is not desirable to set them in primary legislation.

Reason for the selected procedure

1033. The Department considers a Parliamentary procedure unnecessary for these directions. Accounting requirements for public bodies deal with technical matters and it is standard

practice to use directions for this purpose (as with other bodies established under the NHS Act 2006). There is a power for the Secretary of State to direct that copies are laid before Parliament, so Parliament can scrutinise the actual accounts rather than the process for preparing them. The Information Centre's annual accounts and the Comptroller and Auditor General's report would be laid in Parliament.

Functions: information systems

Clause 251: Powers to direct Information Centre to establish information systems

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case, negative)*

1034. Subsection (1) of this clause provides the Secretary of State or the NHS Commissioning Board with a power to direct the Information Centre to put in place a system for the collection and analysis of health or adult social care information. In the case of the Board, the direction must be made in respect of information that the Board considers is necessary or expedient for the Board to have in relation to its exercise of functions in connection with the provision of NHS services. In the case of the Secretary of State, the information must be information which the Secretary of State considers is necessary or expedient for the Secretary of State to have in relation to his exercise of functions in connection with the provision of health services or of adult social care in England. The Secretary of State otherwise may give a direction if he considers it to be in the interests of the health service in England or of the recipients or providers of adult social care in England for the direction to be given. An example of the latter might be in relation to the collection of anonymised information on the incidence of violence-related attendances in A&E departments of trusts for police purposes, as well as for health care purposes**.**

1035. An information collection function conferred on the Information Centre by a direction under subsection (1) would be subject to any directions given by the Secretary of State or the Board about the Information Centre's exercise of the function.

1036. The Secretary of State or the NHS Commissioning Board would need to consult the Information Centre before giving a direction, so that they could be advised on methodologies, options and potential duplications, enabling the Centre to discharge its duty to seek to minimise the burden of information collection on bodies required to provide information.

Reason for delegating the power

1037. The information requirements of the Secretary of State or the NHS Commissioning Board will be technical and require more detail to describe than is usually included in primary legislation. The Secretary of State and the Board need to be delegated this power as they would have overall responsibility for health and social care and for the information flowing across the system. Therefore they would be best placed to determine what information the Information Centre should collect in relation to health or social care.

Reason for the selected procedure

1038. The directions are likely to set out detailed and technical matters that do not merit a Parliamentary procedure. The Secretary of State is, however, able to give his directions by regulations subject to the negative resolution procedure if appropriate.

Clause 252: Powers to request Information Centre to establish information systems

Subsection (3)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1039. Subsection (3) of this clause provides for regulations to set out descriptions of information in relation to which the Information Centre would not be obliged to establish a system for the collection and analysis of information following a request to do so from Monitor, the Care Quality Commission, the National Institute for Health and Care Excellence, or any other body prescribed in regulations under clause 252(9)(d). Whilst the intention is that the Information Centre becomes the main body responsible for the central collection of health and

adult social care information, there might be situations where it would not be appropriate for the information to be collected by the Information Centre. Such a situation could be where the information that is required is highly technical or highly sensitive and it would be more appropriate for another body to collect the information. The regulations could set out the types of information that the Information Centre should not collect where the duty of another body is that the information must be collected.

Reason for delegating the power

1040. The prescribed information that the Information Centre would not be under an obligation to collect would be technical and more detailed than would be appropriate for primary legislation. The prescribed categories may also be subject to change in the future. It would therefore not be appropriate to describe them on the face of the Bill.

Reason for the selected procedure

1041. Regulations under this power would be detailed and technical, and the negative resolution procedure would make for appropriate transparency.

Subsection (6)

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case, negative)*

1042. Subsection (6) of this clause would enable the Secretary of State or the NHS Commissioning Board to direct the Information Centre not to establish a system for the collection of information in response to a request for an information collection that is not a mandatory request. This course of action would be exceptional and the intention is that the Secretary of State or the Board would not interfere in the day-to-day operational activities of the Information Centre unless they consider it necessary.

1043. Subsection (1) allows any person to make a request to the Information Centre. In the case of a request that is not a mandatory request, the Information Centre would determine whether a system should be established, taking into consideration (amongst other things) its duty to seek to minimise the burden that would be imposed on those bodies that would be required to provide the information. Whilst the Information Centre may determine that a system should be established, the Secretary of State or the NHS Commissioning Board may, exceptionally, consider that the system should not be established, for example, if it would interfere with or pre-empt planned Government policy relating to information processing or future changes in the collection of information.

Reason for delegating the power

1044. It would not be possible to cover in primary legislation the precise circumstances in which the Secretary of State or the NHS Commissioning Board would not want an information system to be established by the Information Centre following a non-mandatory request. The NHS Commissioning Board needs to be delegated this power in order to assist it to carry out its functions in connection with the provision of NHS services.

Reason for the selected procedure

1045. Under clause 298(13), the directions can be given either in writing (subject to no Parliamentary procedure) or in regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided in the light of the nature of the individual request.

Subsection (6)

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case, negative)*

1046. Subsection (1) of this clause would enable any person or body other than the Secretary of State or the NHS Commissioning Board to request the Information Centre to put in place a

system for the collection and analysis of health or adult social care information that they require.

1047. Subsection (6) would enable the Secretary of State or the NHS Commissioning Board to direct that the Information Centre must comply with such a request from a person outside England. The power would enable the Secretary of State or the NHS Commissioning Board to ensure that England as part of the United Kingdom complies with its international obligations, for example its international agreements such as with the World Health Organization in the compilation of health statistics for comparison. It would also allow for bilateral agreements on information sharing of anonymised health data between England and other countries. It also provides a mechanism to ensure that information that the Secretary of State or the Board considers it in the public interest for a devolved authority to have, following a request by the authority, can be collected or analysed by the Information Centre.

Reason for delegating the power

1048. It would not be possible to specify in primary legislation what the precise requirements for an information collection might be for bodies from outside England. A direction-giving power would provide the necessary scope to direct the Information Centre to comply with new information requests as they are needed, as the requirements from bodies outside England for information are likely to be infrequent and subject to change. The Secretary of State and the NHS Commissioning Board would, in some cases, be best placed to assess whether the Information Centre should collect information in relation to health or social care in response to a request from outside England.

Reason for the selected procedure

1049. Under clause 298(13), the directions can be given either in writing (subject to no Parliamentary procedure) or, if by the Secretary of State, in regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided in the light of the nature of the individual request.

Subsection (9)(d)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1050. Subsection (9)(d) of this clause provides the Secretary of State with flexibility through regulations to specify bodies in addition to those already listed in subsection (9) that would be able to make mandatory requests of the Information Centre to collect information.

Reason for delegating the power

1051. It is necessary to delegate the power so that new bodies that may need to be able to make mandatory requests can be enabled to do so without the need to change primary legislation.

Reason for the selected procedure

1052. The negative resolution procedure would ensure transparency if a new body is specified as a "relevant body" in respect of mandatory information collections.

Clause 256: Publication of information

Subsection (2)(d)

Power conferred on*: Secretary of State or NHS Commissioning Board*
Power exercised by*: Directions*
Parliamentary procedure*: None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case, negative)*

1053. Subsection (1) of this clause would require the Information Centre to publish all information which it collects pursuant to a direction under clause 251 or a request under clause 252. However, if the information is of a type set out in subsection (2), the Information Centre must not publish it.

1054. Subsection (2)(d) provides a direction-giving power that would enable the Secretary of State or NHS Commissioning Board to direct the Information Centre not to publish information of a description that is not otherwise covered in subsection (2).

Reason for delegating the power

1055. As the information collection functions of the Information Centre mature, it may become apparent that there are classes of information, other than those specified in subsection (2)(a) to (c), that it would not be appropriate to publish. Delegating the power makes it possible to protect any such additional classes of information from publication in a timely fashion, without the delays likely to be involved if they could be protected only by changing primary legislation. The Secretary of State and the NHS Commissioning Board need to be delegated this power as they would have overall responsibility for health and social care and for the information flowing across the system. Therefore, in some cases, they would be best placed to determine whether the information that the Information Centre has collected in relation to health and social care should not be published.

Reason for the selected procedure

1056. Under clause 298(13), the directions can be given either in writing (subject to no Parliamentary procedure) or, in the case of directions given by the Secretary of State, in regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided in the light of the nature of the individual request.

Subsection (3)

Power conferred on*: Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions under clause 251*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case, negative)*

1057. Subsection (3) provides that a direction requiring the Information Centre to collect information (under clause 251) could specify that information of a description that falls under subsection (2)(a) must be published. Subsection (2)(a) exempts information collected as a

result of a direction under clause 251 from being published if the information is in a form which enables identification of any “relevant person” to be ascertained and publication is not in the public interest.

1058. This is to say, pursuant to clause 251, a direction under subsection (3) could specify that information about a relevant person is to be published. A relevant person would be any person who provides health or adult social care or a body corporate. The term does not include those receiving care or using services.

1059. The NHS Commissioning Board and the Secretary of State have the power to direct the Information Centre to collect information. As they are specifying the information collections, in some circumstances they may be better placed than the Information Centre to know whether publication of certain information that identifies a relevant person is appropriate. For example, the Board could direct that information that identifies providers should be published when information about patient experience is collected so that the information may be used by other patients in exercising choice about where to be treated.

Reason for delegating the power

1060. As highlighted in the discussion of the power in clause 251(1), the information requirements of the Secretary of State and the NHS Commissioning Board would require more detail to describe than is usually included in primary legislation. Specification about the publication of an information collection is a technical detail about that collection and would not be appropriate for primary legislation. The Secretary of State and the NHS Commissioning Board need to be delegated this power as they would have overall responsibility for health and social care and for the information flowing across the system. Therefore, in some cases, they would be best placed to determine whether the information that the Information Centre has collected in relation to health and social care which identifies a relevant person should be published.

Reason for the selected procedure

1061. The directions made under clause 251 would generally set out detailed and technical matters, including specifications about publication, which would not merit a Parliamentary

procedure. The Secretary of State would, however, be able to give directions by regulations subject to the negative resolution procedure if the content warranted this.

Clause 257: Other dissemination of information

Subsection (2)(d)

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions under clause 256(2)(d)*
Parliamentary procedure*: None (unless directions by the Secretary of State are given in regulations – see clause 293(13) – in which case negative)*

1062. Subsection (2) of this clause sets out categories of information that the Information Centre may disseminate which has been collected pursuant to a direction under clause 251 or a request under clause 252.

1063. A direction under subsection (2)(d) would give the Information Centre discretion to disseminate information whch has not been published. This would be used in cases where the Secretary of State or the NHS Commissioning Board has determined that it is not appropriate for information collected by the Centre to be made publicly available, but where it is appropriate for the Information Centre to determine that information is passed to specific persons. For example, the Information Centre is likely to collect information about hospital treatments and outcomes. The information might indicate that there is a possible irregularity in the performance of a particular hospital compared with that of other hospitals. This could be due to a problem with information that has been captured rather than evidence of poor performance. It may be appropriate not to publish this information but to bring it to the attention of the Care Quality Commission for them to consider if further investigation is required

Reason for delegating the power

1064. The direction-giving power in clause 256(2)(d) amplified by this provision future-proofs the legislation so that types of information not appropriate for publication may be disseminated where the Information Centre has discretion to determine dissemination. The Secretary of State and the NHS Commissioning Board would have overall responsibility for health and

social care and for the information flowing across the system. Therefore, in some cases, they would be best placed to determine what information the Information Centre should disseminate in relation to health or social care.

Reason for the selected procedure

1065. Directions by the Secretary of State or the NHS Commissioning Board setting out descriptions of information that should not be published but may be disseminated could be made in writing, without a Parliamentary procedure. Where warranted, directions given by the Secretary of State could be given in regulations subject to the negative resolution procedure.

Subsection (3)

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case negative)*

1066. This enhancement of the power in clause 257(2)(d) enables the Secretary of State or the Board to specify that information in a direction under clause 257(2)(d) which is prohibited from being published must be disseminated. The difference between this power and that given in clause 257(2)(d) is that the Secretary of State or the NHS Commissioning Board rather than the Information Centre determines whether this information should be disseminated by virtue of it being of a description specified under 256(2)(d).

Reason for delegating the power

1067. This enhancement of the direction-giving power in clause 257(2)(d) future-proofs the legislation so that types of information that are not appropriate for publication can be disseminated if the Secretary of State or Board so determines. The Secretary of State and the Board need to be delegated this power as they would have overall responsibility for health and social care and for the information flowing across the system. Therefore, in some cases, they would be best placed to determine what information the Information Centre should disseminate in relation to health or social care.

Reason for the selected procedure

1068. A procedure by way of directions would enable the Secretary of State or the NHS Commissioning Board to require that the Information Centre disseminate information which the Centre is prohibited from publishing only by virtue of the direction without unnecessary use of Parliamentary time. However, directions by the Secretary of State could be given in regulations subject to the negative resolution procedure.

Subsection (4)

Power conferred on: *Secretary of State or NHS Commissioning Board or bodies able to make a mandatory request*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case negative)*

1069. This subsection provides that a direction given by the Secretary of State or the NHS Commissioning Board under clause 251 or a mandatory request under clause 252 can require the Information Centre to disseminate the information it has been directed to collect or requested to collect from a mandatory request. This power can only be exercised where the Information Centre has power to disseminate under clause 257(1) or another provision of this or any other Act.

Reason for delegating the power

1070. As highlighted in the discussion of the power in clause 251(1), the information collection requirements of the Secretary of State and the NHS Commissioning Board will be technical and require more detail to describe than is usually included in primary legislation. Dissemination of a specific information collection is a detail about that collection and would not be appropriate for primary legislation. The Secretary of State and the Board, as well as those bodies that are able to make a mandatory request, need to be delegated this power as they will be best placed, as the individual requestors for particular information collections, to determine whether the Information Centre can disseminate the information.

Reason for the selected procedure

1071. The directions would set out detailed and technical matters that generally would not merit a Parliamentary procedure. However, the Secretary of State would be able to give directions by regulations subject to the negative resolution procedure if appropriate.

Subsection (5)

Power conferred on: *Secretary of State or NHS Commissioning Board or bodies able to make a mandatory request*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless directions by the Secretary of State are given in regulations – see clause 298(13) – in which case negative)*

1072. This subsection provides that a direction under clause 251 from the Secretary of State or NHS Commissioning Board or a mandatory request under clause 252 from those bodies that can make a mandatory request, can require that the Information Centre does not exercise the power conferred by subsection (1). In other words, that the Centre does not disseminate the information to be collected.

1073. For example, if in a public health emergency the Secretary of State wanted to ensure that information was disseminated in a controlled manner, he could use this power to ensure that information was disseminated himself via channels other than the Information Centre.

Reason for delegating the power

1074. The information collection requirements of the Secretary of State, the NHS Commissioning Board and mandatory requestors will be technical and require more detail to describe than is usually included in primary legislation. Publication of a specific information collection is a detail about that collection and would not be appropriate for primary legislation. The Secretary of State and the NHS Commissioning Board, as well as those bodies that are able to make a mandatory request, need to be delegated this power as they will be best

placed, as the individual requestors for particular information collections, to determine whether the Information Centre can disseminate the information.

Reason for the selected procedure

1075. The directions made under clause 251 and requests from mandatory requestors would set out detailed and technical matters, including specifications about dissemination which would generally not merit a Parliamentary procedure. The Secretary of State would, however, be able to give his directions by regulations subject to the negative resolution procedure if appropriate.

Functions: quality of health and social care information

Clause 261: Power to establish accreditation scheme

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1076. Subsection (1) of this clause would enable the Secretary of State in regulations to establish an accreditation scheme that might be run by the Information Centre or by another specified body. The scheme would relate to information intermediaries ("information service providers") who take available information about NHS, public health and/or adult social care services and process that information to add value. Information intermediaries will enable NHS-derived data to be made available much more freely and in innovative ways that make sense to and can be easily used by people with an interest.

1077. Subsections (3) and (4) set out the expected scope of the regulations in connection with an accreditation scheme, in particular that they may require the operator to publish details of the scheme including the accreditation criteria and an appeals procedure for reconsideration of decisions. The operator may also be required in regulations to provide advice to applicants on how to meet the criteria. An accreditation scheme would be intended essentially to kite-mark information service providers that meet certain criteria as specified in regulations in order to enable those seeking the services of such a provider to select one that has demonstrated that

it meets the necessary quality standards. The operator of a scheme could have power under regulations to determine the accreditation criteria or be permitted to charge a reasonable fee in respect of an application.

Reason for delegating the power

1078. The procedures for the operation of an accreditation scheme would be technical and require more detail to describe than would usually be included in primary legislation.

Reason for the selected procedure

1079. To ensure transparency, the negative resolution procedure would be appropriate for any regulations making provision for an accreditation scheme for information intermediaries who would analyse and present aggregated health and adult social care information.

Functions: other

Clause 262: Database of quality indicators

Subsections (1) and (2)

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1080. This clause could enable the Information Centre, through regulations, to establish, maintain and publish a database of quality indicators relating to health and adult social care services. Quality indicators support health and social care service providers as a way to measure and demonstrate their performance. Subsection (2) sets out the expected scope of regulations including the assessment and approval processes for indicators proposed for inclusion in the database and provision for a direction-giving power to enable the Secretary of State or the Board to identify a person to carry out assessment and approval.

Reason for delegating the power

1081. Provisions setting out the technical requirements for the establishment, maintenance and publication of a database of quality indicators would require more detail than would usually be included in primary legislation.

Reason for the selected procedure

1082. The Information Centre Special Health Authority currently maintains a database of indicators and this function will remain largely the same. Nevertheless, the negative resolution procedure seems appropriate to ensure transparency about any provisions for a database to be established under this provision.

Subsection (2)(c)

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions under regulations*
Parliamentary procedure: *None*

1083. Regulations made under subsection (2) may by virtue of paragraph (c) make provision to enable the Secretary of State or the Board to direct a person to assess and approve proposed quality indicators for inclusion in the database.

Reason for delegating the power

1084. A direction-giving power in regulations would provide flexibility as to who could carry out the assessment and approval of quality indicators proposed for inclusion in the database. The Secretary of State and the NHS Commissioning Board have overall responsibility for health and social care and the information that flows across the system. As a result, it is right that this power is delegated as they will be best placed to determine the appropriate person to assess and approve quality indicators.

Reason for the selected procedure

1085. Directions dealing with the assessment and approval process for quality indicators would be technical process and the Department considers a Parliamentary procedure unnecessary.

Clause 263: Power to confer functions in relation to identification of GPs

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1086. This clause would enable regulations to be made conferring functions on the Information Centre so that it can exercise functions currently carried out by the Special Health Authority of the same name in relating to issuing Doctor Index Numbers to GPs. The process involves the Special Health Authority confirming the identity of a GP so that a unique number can be issued to individual GPs to enable them to prescribe. The system would help to ensure that only authorised GPs are able to issue prescriptions.

Reason for delegating the power

1087. The process would be technical and require more detail to describe than would usually be included in primary legislation.

Reason for the selected procedure

1088. The negative resolution procedure would be appropriate to ensure transparency.

Clause 266: Failure by Information Centre to discharge any of its functions

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless given by regulations – see clause 298(13) – in which case negative)*

1089. Subsection (1) of this clause confers power on the Secretary of State to direct the Information Centre in cases of serious failure by the Centre as to how to carry out any of its functions.

1090. The power enables the Secretary of State to give the Centre a direction if the Secretary of State considers the Centre is failing or has failed to discharge any of its functions, or is failing or has failed to discharge any of its functions properly. The direction can direct the Centre to discharge those functions in a manner and within a period specified in the direction. If the Centre fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State. The failure must be significant and the Secretary of State must publish his reasons for the intervention. (See the discussion of failure powers in relation to new section 13Z1, inserted by clause 20).

Reason for delegating the power

1091. It would not be possible to set out in primary legislation exactly what intervention would be necessary in what circumstances, so this power provides the Secretary of State with flexibility to respond accordingly to failures by the Centre and at speed. These powers might be needed, not necessarily because of any fault on the part of the Centre, but because of circumstances outside its control, for example, a serious infection affecting many of its staff and therefore its ability to perform its duties.

Reason for the selected procedure

1092. The power would concern how an existing function should be exercised, rather than a matter of principle (such as what functions there should be). The directions concerned could be given either in writing (subject to no Parliamentary procedure) or through regulations (subject to negative resolution procedure). This allows the most appropriate format for the directions to be decided based on the type of intervention that is necessary.

General and supplementary

Clause 268: Powers of Secretary of State or Board to give directions

Regulations

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1093. Subsection (1) of this clause enables directions to be provided for in regulations to enable the Secretary of State or the NHS Commissioning Board to transfer information functions specified in the regulations from one health or social care body to another, as set out in subsections (1)(a), (b) and (c). This regulation-making power is needed to future-proof the legislation, for example if it becomes apparent that the Secretary of State or the Board should be able to determine whether the Information Centre should be directed to take on some information collection functions previously conferred on another health or social care body.

Reason for delegating the power

1094. Although it is envisaged that the Information Centre will carry out the majority of central information collections, to attempt to set out in primary legislation precisely what information should, or should not, be collected by the Information Centre or an alternative body and to specify which body should exercise which function at any particular point would invite obsolescence.

Reason for the selected procedure

1095. The negative resolution procedure seems appropriate for regulations re-allocating existing information functions to different bodies.

Directions

Power conferred on: *Secretary of State or NHS Commissioning Board*
Power exercised by: *Directions /Regulations*

Parliamentary procedure: *Negative*

1096. Directions given under regulations could vary which health or social care bodies should exercise existing specified information functions. This is intended to help ensure that the functions are exercised efficiently, effectively and economically.

1097. In some circumstances, the Secretary of State or the NHS Commissioning Board, having consulted the Information Centre in accordance with clause 251(5), may determine that it would not be appropriate for the Information Centre to collect certain information, for example, if the information is for a specific purpose and there is no wider interest in its publication or dissemination. In these cases, regulations made under clause 268(1)(a) may permit the Secretary of State or the NHS Commissioning Board, through directions, to direct an alternative health or social care body to collect the information. The power in subsection (1)(a) complements that in clause 253(4), pursuant to which the Information Centre may have discretion not to comply with a mandatory request for certain types of information as described in regulations. In light of these circumstances, if the Information Centre is not best placed to carry out a specific information collection, the collection may nevertheless be important, and another better-placed organisation could be delegated the function through a direction under this clause.

1098. Regulations made under subsection (1)(b) could enable the Secretary of State or the NHS Commissioning Board, by direction, to specify that their own information functions, for example in relation to consultation or preparation of an information standard, must be exercised by the Information Centre or another health or social care body, for example, where this would be more efficient, effective or economic. Subsection (1)(c) similarly could enable regulations to provide for the Secretary of State or the NHS Commissioning Board to direct the Information Centre to carry out information functions of another health or social care body where centralising the functions would again result in efficiency, effectiveness or economic benefits.

1099. Subsections (2) and (3) constrain the scope of the directions for which provision could be made under the regulations in line with the limits set out for directions pursuant to clause 251 or mandatory requests pursuant to clause 252.

Reason for delegating the power

1100. Direction-giving powers in regulations enables the necessary scope in the future as to the exact arrangements for information collection across the health and social care system. Provision to enable such powers to be conferred future-proofs the primary the legislation to ensure it is resilient to organisational changes and will ensure that effective and timely transfers of functions can be made. The Secretary of State and the Board need to be delegated this power as they would have overall responsibility for health and social care and for the information flowing across the system. They would also be the bodies that would publish information standards in relation to health and social care. Therefore, in some cases, they would be best placed to determine which health body should carry out an information function in relation to health and social care.

Reason for the selected procedure

1101. Directions are likely to contain a level of detail inappropriate for primary legislation about the function being transferred. For example, direction-giving powers in regulations under clause 268(1) could provide the necessary flexibility to complement the direction-giving powers in clause 251, exceptionally, in respect of which body should collect or analyse what information.

1102. Parliament would already have had the opportunity to scrutinise the regulations specifying details about the directions that could be made.

1103. The procedure would enable the efficient administration of central information collections to be determined by the Secretary of State and the Board without unnecessary use of Parliamentary time on matters of a level of detail not appropriate for Parliamentary debate.

PART 11: MISCELLANEOUS

1104. This Part of the Bill creates or amends the following delegated powers:

- powers for the Secretary of State relating to the sharing of births and deaths data;

- two powers for the Secretary of State to make orders (subject to affirmative resolution procedure) in relation to duties of co-operation binding on various bodies.

  One order-making power would allow the Secretary of State to add to the bodies identified in primary legislation as covered by a duty of co-operation in relation to Monitor and the Care Quality Commission.

  The other order-making power would be a contingency power under which the Secretary of State would be able, for a limited period and in certain circumstances, to prohibit bodies that were failing to co-operate from exercising certain functions, or from doing so in a specified way.

- a power for the Secretary of State and Welsh Ministers to make regulations in relation to supervised community treatment under the Mental Health Act 1983.

  The regulations would prescribe the form of a new certificate which could be used, in certain cases, in place of the certificates currently issued by second opinion appointed doctors when approving the treatment of patients on supervised community treatment.

- powers in relation to schemes transferring rights and liabilities relating to staff and property from one body to another as a result of bodies being abolished or created by this Bill.

  The Secretary of State would be able to make schemes transferring staff and property to various bodies.

  The Secretary of State would also be able to direct the National Health Service Commissioning Board or a qualifying company (formed under existing powers for the purpose of holding property transferred to it by a transfer scheme, and wholly owned by the Secretary of State, to make transfer schemes.

Information relating to births and deaths etc.

Clause 278: Special notices of births and deaths

Power conferred on: *Secretary of State*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1105. This clause amends section 269 of the NHS Act 2006 to ensure that local health organisations and, where appropriate, the NHS Commissioning Board receive notices and information in relation to births and deaths. Section 269 of the NHS Act 2006 currently provides that local registrars of births and deaths must provide particulars of registered births and deaths to Primary Care Trusts. In relation to births, the section also requires a child's father (for a home birth) or person attending the mother (in other cases) to notify the Primary Care Trust in whose area the birth takes place. The section also provides for the local registrar to have access to the notification of births provided to the local Primary Care Trust.

Reason for delegating the power

1106. The powers within section 269 are important because the information relating to births is used to activate the health-visiting programme and is also a trigger for safeguarding and child protection services. The information relating to deaths is used to update lists – for example by ensuring that patients who have died are not sent screening or other appointment letters. In broad terms, the intention is to amend the references to Primary Care Trusts and insert references to the NHS Commissioning Board, clinical commissioning groups and local authorities. In the new system, these bodies may require the information for different purposes. The clause therefore provides for notification of "a relevant body" and for the Secretary of State to make regulations to specify the relevant body in particular cases. The relevant body can only be a clinical commissioning group, a local authority or the NHS Commissioning Board.

1107. The regulation-making power is necessary to ensure that the move from one body (that is, the Primary Care Trust) to three potential bodies works smoothly. In addition, the final decision on where health visiting sits within the system will have an impact on the most sensible approach to assigning the responsibilities under section 269. The Department has proposed that the NHS Commissioning Board will commission health-visiting services in the short term and that once numbers of health visitors increase, the responsibility could transfer to

local authorities. Given the importance of safeguarding children, the regulations offer crucial flexibility to deal with system change.

Reason for the selected procedure

1108. The regulations would be subject to the negative procedure. This is considered appropriate for the regulation-making power in light of the need for flexibility and the technical nature of the regulations in question.

Clause 279: Provision of Information by Registrar General

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None*

1109. This clause amends section 270 of the NHS Act 2006 which provides for the Registrar General of Births and Deaths to disclose information about births and deaths to the Secretary of State. The clause would allow the Registrar General of Births and Deaths to disclose information on births and deaths to a number of other bodies such as local authorities for the purposes of their health service functions. This amendment ensures that both new and existing bodies within the system continue to be able to receive vital events data from the General Register Office.

Reason for delegating the power

1110. Subsection (2) extends the list of persons who may receive birth and death data from the Registrar General of Births and Deaths to include (in addition to Secretary of State) local authorities, the NHS Commissioning Board and the Care Quality Commission. There is also the flexibility to include such other persons as the Secretary of State may specify in a direction. This direction-giving power is necessary to ensure sufficient flexibility to specify other organisations where necessary without needing to make amendments to primary legislation every time a new body is created.

Reason for the selected procedure

1111. The proposed power is a power of direction which is not subject to Parliamentary procedure. We consider that this is appropriate, given the administrative nature of the content of directions likely to be made under this power.

Clause 280: Provision of information by Registrar General: Wales

Power conferred on: *Welsh Ministers*
Power exercised by: *Directions*
Parliamentary procedure: *None*

1112. This clause amends section 201 of the NHS (Wales) Act 2006, to make equivalent provision in Wales allowing the Registrar General to disclose vital events data to Welsh Ministers and to relevant bodies exercising functions in Wales such as Local Health Boards.

Reason for delegating the power

1113. Subsection (2) substitutes the 'Welsh Ministers' for a range of bodies including: Welsh Ministers, a Special Health Authority with functions that are exercisable in relation to Wales, a Local Health Board and an NHS trust established under section 18 of the National Health Services (Wales Act). There is also the flexibility to include other such persons that Welsh Ministers specify in a direction. This direction-giving power is necessary to ensure sufficient flexibility to specify other organisations where necessary without needing to make amendments to primary legislation every time a new body is created.

Reason for the selected procedure

1114. The proposed power is a power of direction which is not subject to Parliamentary procedure. We consider this appropriate given the administrative nature of directions likely to be made under this power.

Clause 281: Provision of statistical information by Statistics Board

Power conferred on: *Welsh Ministers and the Secretary of State*

Power exercised by: *Directions*
Parliamentary procedure: *None*

1115. This clause amends section 42 of the Statistics and Registration Service Act 2007, which contains provision to specify that the Statistics Board (ONS) may disclose information on births and deaths to a number of bodies.

Reason for delegating the power

1116. In a similar way to the amendment to section 269 of the NHS Act 2006 and the amendment to section 201 of the NHS (Wales) Act 2006, this clause would replace the reference to the Secretary of State with a range of persons and bodies connected to the health service. The clause also gives the Secretary of State and Welsh Ministers a new direction-giving power to specify additional organisations that can receive information from the Statistics Board. This power is necessary to ensure sufficient flexibility to specify other organisations where necessary without needing to make amendments to the face of the Bill.

Reason for the selected procedure

1117. The proposed power is a power of direction which is not subject to Parliamentary procedure. We consider that this is appropriate given the administrative nature of directions likely to be made under this power.

Duties to co-operate

1118. Clause 284 places a number of bodies under a duty to co-operate with one another in the exercise of their respective functions. Clauses 282 and 283 also place duties on Monitor and the Care Quality Commission to co-operate with one another. Clause 285 then provides a mechanism for enforcing those duties and other statutory duties to co-operate imposed on the bodies listed in clause 284. Where the Secretary of State has issued a notice to two or more of those bodies that in his opinion they have breached or are in breach of a duty to co-operate, or are at risk of doing so, and is satisfied that –

a. the duty has been breached, or there is a continuing breach; and

b. that there is a detrimental effect on the performance of the health service,

the Secretary of State would, under clause 288, be able to make an order prohibiting each body from exercising specified functions in a specified manner without the agreement of the other body.

Clause 284: Other duties to co-operate

***Power conferred on**: Secretary of State*
***Power exercised by**: Order*
***Parliamentary procedure**: Affirmative*

1119. This clause sets out duties on certain bodies listed in the clause to co-operate with one another in the exercise of their respective functions. The bodies in question are Monitor, the Care Quality Commission and those bodies listed in subsection (3). It includes a power conferred on the Secretary of State to make an order by statutory instrument to add to the list of bodies in subsection (3) to which the duty applies. This will be subject to the affirmative procedure. The power would provide the ability to add relevant bodies to the list should new bodies be created in the future. Those additional bodies could be removed by subsequent revocation or amendment of the order. There is however no power to remove the bodies referred to in subsection (3) (that is, the NHS Commissioning Board, the National Institute for Health and Care Excellence and the Health and Social Care Information Centre, which are all established by the Bill, or Special Health Authorities established under the NHS Act 2006).

Reason for delegating the power

1120. The power seeks to ensure sufficient flexibility to add to the list of bodies covered by the duty to co-operate to reflect the transfer of functions or the establishment of new bodies as a result of any future changes to the arm's length bodies with a responsibility for health service matters. Delegating the power is, in our view, an appropriate and proportionate way of providing the requisite flexibility while also ensuring appropriate Parliamentary accountability.

Reason for the selected procedure

1121. The order would amend primary legislation, so the Department considers the affirmative resolution procedure appropriate.

Clause 285: Breach of duties to co-operate

***Power conferred on**: Secretary of State*
***Power exercised by**: Order*
***Parliamentary procedure**: Affirmative*

1122. This clause sets out the powers conferred on the Secretary of State to take action in response to a breach of certain duties to co-operate. (These duties are identified in subsection (2)). Where the Secretary of State believed there was an actual breach of the duty or a significant risk of a breach, he would be able to give a written notice of his opinion to each body concerned. Following that notice, the Secretary of State would also be able to make an order to prohibit each body from exercising specified functions in a specified manner without the agreement of the other body, if the following conditions were met. First, the Secretary of State would have to be satisfied that there had been a breach or that a breach was continuing. Secondly, the Secretary of State would have to be satisfied that the (overall) effect of the breach is detrimental to the performance of the health service. The purpose of this power is to enable the Secretary of State to press the specified bodies to resolve significant differences or issues between them which are causing a breach of a statutory duty to co-operate, or a risk of such a breach, without the Secretary of State becoming responsible directly for determining or resolving the dispute. The effect of the order could not last more than a year, unless extended by a further order.

Reason for delegating the power

1123. The power would be used, only if necessary, to respond to specific situations and changes in relationships between arm's length bodies. It needs to be delegated because it is not feasible to specify in the Bill itself those situations and the action that would then need to be taken. Nor would it be sensible to delay action until there was an opportunity to set these matters out in other primary legislation.

1124. It is appropriate for the power to be delegated to the Secretary of State. His role in the new system will not involve directing or micromanaging the NHS, but he will retain a responsibility for the overall 'stewardship' of the system. Pressing the relevant arm's length bodies to come to agreement in a situation where they are unable to resolve differences between themselves is linked to the Secretary of State's role as sponsor of key arm's length bodies.

Reason for the selected procedure

1125. Because the order would represent an intervention by the Secretary of State in the way independent arm's length bodies work together, we consider use of the affirmative resolution procedure appropriate.

The Care Quality Commission

Clause 288: Failure to discharge functions

***Power conferred on**: Secretary of State*
***Power exercised by**: Directions*
***Parliamentary procedure**: None (unless given by regulations – see section 165(3) of the 2008 Act as amended by clause 293(6) of the Bill – in which case negative)*

1126. This clause amends section 82 of the Health and Social Act 2008, which enables the Secretary of State to give a direction to the Care Quality Commission if the Secretary of State considers that it is failing or has failed to discharge any of its functions properly. The direction could require the Commission to discharge those functions in any manner and within any period specified in the directions. If the Commission fails to comply with the direction, the Secretary of State would be able to carry out functions of the Commission or arrange for a third party discharge them on behalf of the Secretary of State.

1127. The clause places certain limitations on the Secretary of State's use of this power to intervene. In future, the power could be used only in the event of a significant failure of the Commission to perform its functions and could not be used to intervene in individual cases. This is a safeguard to protect regulatory independence (see the discussion of failure powers in

relation to new section 13Z1, insert by clause 20). In addition, the Secretary of State would have to publish his reasons for every exercise of the power.

Reason for delegating the power

1128. It would not be possible to set out in primary legislation exactly what intervention would be necessary in which circumstances, so this power provides the Secretary of State with flexibility to respond accordingly to failures by the Commission and at speed. These powers might be needed, not necessarily because of fault on the part of the Commission, but also because of circumstances outside its control (for example, a serious infection affecting many of its staff and therefore its ability to perform its duties).

Reason for the selected procedure

1129. This power would concern how an existing function should be exercised, rather than a matter of principle (such as what functions there should be). In the event that such an intervention by the Secretary of State is required, it is important that he can act quickly to provide for a rapid resolution, and a direction-giving power is therefore considered appropriate. Consequently, the option of issuing the directions in writing remains.

1130. In order to allow Parliamentary oversight of the proposed intervention, and bring parity across the ALB sector (including Monitor, NICE, the Information Centre and the NHS Commissioning Board), the amendments under subsections (5) and (6) of the new clause introduce an additional power to give the directions by way of regulations.

Supervised community treatment

Clause 293: Certificate of consent of community patients to treatment

Power conferred on: *Secretary of State (in relation to England), the Welsh Ministers (in relation to Wales)*
Power exercised by: *Regulations*
Parliamentary procedure: *Negative*

1131. This clause amends the Mental Health Act 1983 (the 1983 Act) to provide a new way in which the certificate requirement in Part 4A of that Act may be met.

1132. As it stands, the certificate requirement provides (in brief) that certain forms of treatment for mental disorder may not be given to patients on supervised community treatment (SCT) under that Act unless they have been approved on a "Part 4A certificate" given by an independent second opinion appointed doctor (SOAD), appointed (in England) by the Care Quality Commission or (in Wales) by the Welsh Ministers.

1133. The main effect of this clause is to provide an alternative way by which the certificate requirement can be met, where the SCT patient consents to the treatment in question. In most such cases, the certificate requirement would in future also be met if the approved clinician in charge of the treatment in question issued a certificate stating that the patient consents to the treatment and has the capacity (or, in the case of a child under 16, the competence) to do so.

1134. Section 64H(2) of the 1983 Act already requires that a Part 4A certificate be given in such form as may be prescribed by regulations by the appropriate national authority. The appropriate national authority is defined later in that section as the Secretary of State in respect of SCT patients whose responsible hospital is in England, or the Welsh Ministers in respect of SCT patients whose responsible hospital is in Wales. (The responsible hospital is the hospital whose managers have certain powers and duties in respect of the patient under the 1983 Act as a result of the patient being on SCT.)

1135. As a result of the changes made by the clause, the appropriate national authorities would also be empowered (and in practice required) to prescribe the form of the new Part 4A certificate to be completed by approved clinicians. To that end, subsection (5) of the clause amends section 64H(2) to make clear that regulations may prescribe different forms for different types of Part 4A certificate.

Reason for delegating the power

1136. The Department believes that empowering the Secretary of State and Welsh Ministers to prescribe the form of the new certificate in regulations is the appropriate approach. It would be consistent with the approach already taken in the 1983 Act (not only in respect of Part 4A,

but also certificates given by SOADs and approved clinicians under Part 4 of the Act in relation to patients detained in hospital).

Reason for the selected procedure

1137. The negative resolution procedure is consistent with the approach already taken in the 1983 Act (in respect not only of Part 4A, but also of certificates given by SOADs and approved clinicians under Part 4 of the Act in relation to patients detained in hospital).

Transfer schemes

Clause 294: Transfer schemes
Clause 295: Transfer schemes: supplemental

Power conferred on: *Secretary of State*
Power exercised by: *Scheme*
Parliamentary procedure: *None*

Power conferred on: *Secretary of State*
Power exercised by: *Directions*
Parliamentary procedure: *None (unless given in regulations – see clause 298(13) - in which case negative)*

1138. This clause allows the Secretary of State to make schemes for the transfer of staff or property from one body to another. The transfer schemes may also make supplementary, incidental, transitional and consequential provision; for example, requiring that the property transferred continues to be used for health purposes.

1139. The Secretary of State may direct the NHS Commissioning Board or a qualifying company[13], to exercise this function of making transfer schemes in connection with the

[13] A qualifying company is a company wholly or partly owned by the Secretary of State and formed under section 223 of the NHS Act 2006, for the purpose of providing facilities or services to the NHS. Section 223 is an existing provision and has been used by the Secretary of State in the past to set up a number of companies to offer services to the NHS, such as NHS Professionals Limited, Bio Products Laboratory Limited and Community Health Partnerships Limited (the LIFT delivery company).

abolition of Strategic Health Authorities and Primary Care Trusts. He may also direct them how to exercise the function.

Reason for delegating the power

1140. The details of how transfer schemes will operate is technical, and would require more detailed consideration of the property and staff to be transferred than would usually be included in primary legislation. Moreover, the detail of what property and which staff will transfer to where will need to be determined on a case by case basis

1141. The clause also allows the Secretary of State to delegate the power to prepare property or staff transfer schemes in connection with the abolition of Primary Care Trusts and Strategic Health Authorities either to the NHS Commissioning Board or to a qualifying company. The Secretary of State may consider that these bodies are, in practice, better placed to prepare the transfer schemes and decide where Primary Care Trust and Strategic Health Authority staff and property should be transferred after abolition; the ability for the Secretary of State to delegate this power would allow these bodies to establish schemes to undertake these transfers.

1142. In circumstances where the Secretary of State has delegated this function, the Secretary of State would be able to retain the power to give directions relating to how the function will be undertaken. This power could be used to establish general rules for transfer schemes, for example setting out where certain types of property should be transferred, while allowing the Commissioning Board or qualifying company the flexibility to apply these on a case by case basis to specific properties.

Reason for the selected procedure

1143. The transfer schemes are likely to include more technical detail than is normally included on the face of a Bill. Furthermore, transfer schemes would be made in connection with the abolition or establishment of bodies provided for in primary legislation. We therefore do not believe that it is necessary to subject the resulting transfer schemes to a Parliamentary procedure.

PART 12: FINAL PROVISIONS

Clause 297: Power to make consequential provision

***Power conferred on**: Secretary of State*
***Power exercised by**: Order*
***Parliamentary procedure**: Affirmative where the order changes primary legislation, otherwise negative*

1144. This clause says that the Secretary of State may by order make provision in consequence of the Bill. An order may change primary or secondary legislation and may make transitional and saving provision. The clause includes a power, where relevant, to amend Acts of the Scottish Parliament, Acts or Measures of the National Assembly for Wales, and Northern Ireland legislation.

Reason for delegating the power

1145. This power is necessary to ensure that necessary or expedient transitional arrangements can be made as the Bill is commenced without creating any difficulty or unfairness. It would make it possible to modify the application of the Bill to existing situations and to ensure a smooth transition from the old law and procedures to the new.

1146. The power to make supplemental, incidental or consequential provision would be used to ensure that the changes made to the law by the Bill are reflected in other legislation which refers to or is dependent on provisions repealed or amended by the Bill.

Reason for the selected procedure

1147. The Parliamentary procedure to be followed depends on the content of the order. If the order amends or repeals any provision of an Act of Parliament, it may not be made unless a draft has been laid before and approved by each House of Parliament. In any other case, the negative resolution procedure applies. This combination of procedures seems to the Department to strike an appropriate balance between the need to secure a quick and smooth transition between an old and a new regime and to ensure that changes made by this Bill are

reflected in other legislation, and the need to respect Parliamentary involvement where an Act of Parliament is to be amended.

Clause 298: Regulations, orders and directions

1148. This clause sets out the procedures to be followed for regulations and orders made and directions given under the powers provided by this Bill. Its contents have been taken into account in the discussion earlier in this memorandum of the individual powers concerned.

Clause 300: Commencement

***Power conferred on**: Secretary of State*
***Power exercised by**: Order*
***Parliamentary procedure**: None*

1149. This clause deals with the commencement of the provisions in the Bill. It identifies those provisions for which the Bill itself sets a commencement date. It provides that the other provisions in the Bill come into force on such day as the Secretary of State may by order appoint. Different days may be appointed for different purposes. An order may include transitory provision, and such provision may modify the application of a provision of the Bill pending commencement of another provision of the Bill, or of another Act, or of a provision of an Act or Measure of the National Assembly for Wales, or of subordinate legislation.

Reason for delegating the power

1150. Delegating the power, and enabling transitory provision to be made modifying the application of other provisions, provides flexibility to ensure that provisions in the Bill come into force at suitable dates, for example once steps have been taken to wind up satisfactorily the affairs of bodies that are being abolished.

Reason for the selected procedure

1151. Commencement orders would be made by statutory instrument. However, no Parliamentary procedure is considered necessary, given that the content of the provisions to

be commenced would already have been considered by Parliament during the passage of the Bill and that any modifications made to the application of provisions would be transitory.

Clause 302: Extent

Power conferred on: *Secretary of State*
Power exercised by: *Order*
Parliamentary procedure: *Negative*

1152. Subsection (6) of this clause provides a power for the Secretary of State by order to provide that specified provisions of this Act, in their application to the Isles of Scilly, have effect with such modifications as may be specified.

Reason for delegating the power

1153. Provisions allowing modifications of the application of legislation to the Isles of Scilly are often included in Acts referring to local authorities because the term “local authority” will not necessarily include the Council of the Isles of Scilly. Delegating the power avoids the need to include in the primary legislation detailed provision about the application to one authority.

Reason for the selected procedure

1154. The negative resolution procedure has been chosen so that Parliament has the opportunity, if it wishes, to debate the way in which the provisions of the Bill are modified in their application to the Isles of Scilly.