



Ministry of
JUSTICE

**LEGAL AID, SENTENCING AND
PUNISHMENT OF OFFENDERS BILL**

**Delegated Powers Memorandum prepared by
the Ministry of Justice**

for the

**House of Lords Delegated Powers
and Regulatory Reform Committee**

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Introduction

This Memorandum describes the purpose and content of the Legal Aid, Sentencing and Punishment of Offenders Bill. It identifies the provisions of the Bill which confer powers to make delegated legislation, and it explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

The Bill is in 4 Parts:

Part 1 makes provision for the reform of both civil and criminal legal aid, which is currently provided for under Part 1 of the Access to Justice Act 1999. The Legal Services Commission (which was created by the Access to Justice Act 1999) is to be abolished and its functions will be transferred to the Lord Chancellor and the Director of Legal Aid Casework.

Part 2 makes changes to the ways in which payments for services in certain types of civil case are provided for, and requires a losing defendant in civil proceedings to make additional payments to a successful claimant, in prescribed circumstances. It also deals with reforms to the system of refunding acquitted privately-paying criminal defendants out of public funds.

Part 3 deals with provisions relating to out of court disposals, including reform of the Penalty Notice for Disorder regime, and Cautions and Conditional Cautions, both for adult offenders and for young people. It amends the Bail Act by implementing a "reasonable prospect of custody" test for courts to consider, and for higher threshold criteria to be considered when deciding on secure remands for children and young people. It deals with sentencing provisions for adult offenders, and with provisions relating to end of custody arrangements, release and recall. It creates a power to establish a scheme for deducting a proportion of earnings from serving prisoners, to be paid into victims' funds and other reparative schemes.

Part 4 deals with final provisions about financial provisions, commencement, repeal, extent and so forth.

PART 1

LEGAL AID

Provision of legal aid

Clause 2(3): Regulations concerning remuneration

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

Clause 1 of the Bill places a duty on the Lord Chancellor to secure that legal aid is made available in accordance with Part 1 of the Bill. The remainder of Part 1 of the Bill confers other functions on the Lord Chancellor in relation to the provision of civil and criminal legal aid.

1. Clause 2 provides that the Lord Chancellor can make such arrangements as the Lord Chancellor considers appropriate to perform the Lord Chancellor's functions under Part 1 of the Bill. Clause 2(3) confers power on the Lord Chancellor to make regulations about payment of remuneration including setting the rates of remuneration that will be paid to persons who provide services that are funded by legal aid under arrangements made by the Lord Chancellor. Remuneration is defined in clause 41 as including disbursements. Clause 2(4) provides that if it falls to a court or other person to assess the remuneration that is payable the court or other person must make that assessment in accordance with the arrangements made by the Lord Chancellor or, if regulations have been made under clause 2(3) and are relevant, in accordance with those regulations.
2. The power in clause 2(3) sits alongside the general power to make arrangements. It is open to the Lord Chancellor to make provision concerning the payment of remuneration including setting the rates of remuneration without using regulations, for example, provision concerning remuneration could be made using a contract. There is a similar power to set remuneration rates in secondary legislation in section 6(4) of the Access to Justice Act 1999¹ ("the 1999 Act") for civil cases and sections 13(3) and 14(3) of that Act for criminal cases. The power in clause 2(3) covers both civil and criminal legal aid.
3. The Lord Chancellor is given the power to make provision about payment of remuneration including setting remuneration rates in secondary legislation rather than just relying on non-legislative arrangements for a number of reasons. First, at present in many cases, particularly when legal advice is being provided by counsel, there will be no contract to set rates of remuneration and these ad hoc arrangements rely on the current secondary legislation made under the 1999 Act to set the amounts that will be paid. Second, the Lord Chancellor's policy to set remuneration rates primarily in contracts or other non-legislative arrangements may change over time. Third, the power to set remuneration rates may be used in combination with a non-legislative mechanism, for example, the regulations could

¹ 1999 c.22

prescribe a maximum payment with the contract containing more detailed provision about determining remuneration below that ceiling.

4. Section 25(2) of the 1999 Act makes provision about consultation in relation to the powers to set remuneration rates in that Act. The Lord Chancellor is obliged to consult the General Council of the Bar and the Law Society when proposing to make a remuneration order about the fees to be paid to barristers and solicitors. The Bill does not contain a corresponding obligation to consult. In some circumstances, changes to rates of remuneration will be of a routine nature, in others more complex. We will continue to engage the Bar Council and the Law Society wherever it is appropriate and constructive to do so. It is considered that it is unnecessary to impose a statutory requirement in this respect.
5. Section 25(3) of the 1999 Act outlines some factors that the Lord Chancellor must have regard to when making a remuneration order. Again, the Bill does not impose a corresponding statutory requirement on the Lord Chancellor. The Lord Chancellor will take into account those and other, relevant, factors when making regulations.
6. The power in clause 2(3) will be subject to the negative resolution procedure. This procedure has been selected because it is the same as the procedure for the corresponding powers in the 1999 Act (see section 25(10) of that Act). This is considered to be the appropriate level of scrutiny for detailed provision on the amounts to be paid.

Clause 4(3): Directions and guidance to the Director of Legal Aid Casework

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Directions or Guidance*

Parliamentary procedure: *None*

7. Clause 4 provides for a Director of Legal Aid Casework (“the Director”). Although the Lord Chancellor has overall responsibility for the provision of legal aid in the Bill, decisions in individual cases will be taken by the Director.
8. Clause 4(3) provides that the Lord Chancellor can issue directions or guidance to the Director about the carrying out of the Director’s functions under Part 1 of the Bill. The Director is obliged to comply with directions. The Director must have regard to any guidance. Directions and guidance will provide the Director with a policy framework for making decisions. The Lord Chancellor will choose to issue directions or guidance depending on the extent to which the Lord Chancellor wishes to bind the Director.
9. The Lord Chancellor will not be able to give directions or guidance about individual cases and this is provided for expressly in clause 4(4). This is an important safeguard in the decision making process. The Director will have independence in relation to individual cases even though the Lord Chancellor retains overall accountability for the provision of legal aid. Clause 4(6) provides a power for directions and guidance to be revised or withdrawn.
10. Clause 5 provides for delegation of the functions of the Lord Chancellor and the Director. Under clause 5(5) the Lord Chancellor’s power to issue directions

11. Directions and guidance must be published by the Lord Chancellor as provided for in clause 4(5), but they are not subject to any parliamentary procedure. It is considered that this is appropriate because the directions and guidance will provide the Director with a decision making framework and include discussion of the Lord Chancellor's policy on legal aid and the interpretation of the Bill. It is considered that provision such as this does not necessitate parliamentary scrutiny.

Clause 5: Delegation and Clause 6: Authorisations

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

12. Clause 5 provides for the delegation of the Lord Chancellor's functions in Part 1 of the Bill and the Director's functions in Part 1 of the Bill. Clauses 5(2) and (4) provide for certain functions to be delegated by regulations. Regulations means regulations made by the Lord Chancellor (see clause 41).
13. Clause 5(2) enables regulations to be made delegating the functions of the Lord Chancellor under regulations made under Part 1 of the Bill. The regulations can delegate those functions to any person, or employee of that person, authorised by the Lord Chancellor for the purpose of delegation. Clause 5(4) provides that regulations may be made that allow any function of the Director under regulations under Part 1 of the Bill to be delegated to any person, or employee of that person, authorised by the Director for the purpose of delegation.
14. Clause 5(6) provides that delegation can be limited (such as to particular cases or areas) or unlimited. Clauses 5(7) and (8) and clauses 6(1) and (5) make provision about authorisations of delegation by either the Lord Chancellor or the Director. Clause 5(7) provides that authorisations can be limited or unlimited but this is subject to clause 5(8), which makes it clear that the extent of any authorisation is subject to any provision in regulations under clause 5. Clause 6(1) of the Bill makes provision about the content of an authorisation for the purposes of clause 5 and regulations under clause 5. Clause 6(5) makes provision about what happens to a contract between the Lord Chancellor and an authorised person if an authorisation under clause 5 or regulations under clause 5 is revoked.
15. It is appropriate for functions conferred on the Lord Chancellor or the Director by regulations to be capable of being delegated by secondary legislation because it permits an appropriate level of flexibility. The alternative would be to allow all such functions to be delegated on the face of the Bill, even though it may not be appropriate for each such function to be delegated, or to allow no delegation of such functions, even though delegation may be both appropriate and practical.
16. The powers in clause 5(2) and (4) are subject to the negative resolution procedure. This is the most appropriate procedure because the regulations will

Civil legal aid

Clause 8(2): General cases: Amendment of Schedule 1

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Affirmative Resolution*

17. Clause 8(2) confers power on the Lord Chancellor to amend Schedule 1 to the Bill. The services that can be provided as part of civil legal aid are defined in clause 7. Under the provisions of clause 8, those services can be provided to a person if they are described in Part 1 of Schedule 1 to the Bill and the Director has determined that the person qualifies for civil legal aid in accordance with Part 1. Schedule 1, therefore provides the list of matters and proceedings that will be within the scope of civil legal aid and will be considered for funding.
18. Clause 8(2) provides that the Lord Chancellor may, by order, omit services from the list of civil legal services which may be made available under Part 1 of Schedule 1. The power extends to modifying any Part of Schedule 1. The power will allow for services to be omitted from Schedule 1 if they are no longer needed, or it is no longer appropriate for them to be listed. For example, if particular court proceedings are moved to a tribunal, it may cease to be appropriate to provide funding for advocacy for those proceedings and so an amendment to Part 3 of Schedule 1 would be needed. The power can also be used to add new exceptions to the matters listed in Part 1. It is appropriate for there to be a limited power to amend Schedule 1 to allow it to be kept up to date. As this is a power to amend primary legislation, it is drawn as narrowly as possible.
19. The power does not allow new areas of law to be added to Schedule 1. Any additions to scope will require primary legislation. In contrast, under section 6(8) of the 1999 Act the Lord Chancellor may by direction require the Legal Services Commission to fund the provision of any of the services set out in Schedule 2 i.e. areas otherwise excluded to be brought back into scope of legal aid funding. Such a direction must be published (see section 25 of the 1999 Act) but is not subject to any parliamentary procedure.
20. The power in clause 8(2) is subject to the affirmative resolution procedure as it is a power to amend primary legislation with secondary legislation.

Schedule 1: Powers under Schedule 1

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

21. Schedule 1 sets out the civil legal services for which legal aid may be made available for the purposes of general cases under clause 8 of the Bill. There are a number of powers for the Lord Chancellor to make regulations under the Schedule. References in Schedule 1 to “prescribed” mean prescribed by regulations made by the Lord Chancellor (see clause 41). References to “regulations” in Schedule 1 mean regulations made by the Lord Chancellor (see clause 41).
22. Under paragraph 1 of Part 1 of Schedule 1, civil legal services provided in relation to the care, supervision and protection of children are in scope as defined in paragraph 1(1). Paragraph 1(1)(k) enables other orders or procedures under an enactment for the care, supervision or protection of children to be prescribed for the purposes of paragraph 1 of the Schedule. Paragraph 23 of Part 3 of Schedule 1 enables regulations to be made for an exception to the exclusion of advocacy from scope in relation to legal proceedings relating to orders and procedures prescribed under paragraph 1(1)(k) of Part 1.
23. Under paragraph 6 of Part 1 civil legal services provided in relation to community care services are in scope. Paragraph 6(3) defines community care services as services which a relevant person may provide under a number of listed enactments. Paragraph (m) of that definition enables other enactments to be prescribed for the purposes of that definition. The definition of “relevant person” includes a power for other relevant persons to be prescribed. Paragraph 23 of Part 3 enables regulations to be made for an exception to the exclusion of advocacy from scope in relation to legal proceedings relating to orders and procedures relating to community care services (as defined in paragraph 6 of Part 1 of Schedule 1).
24. Paragraphs 9, 10, 12 and 13 of Part 1 of Schedule 1 make provision about a number of family proceedings that are in scope. The paragraphs refer to a family relationship. Paragraphs 9(5), 10(8), 12(8) and 13(4) allow the Lord Chancellor to make regulations about when circumstances or, as the case may be, matters arise out of a family relationship.
25. Paragraph 11(1)(g) of Part 1 of Schedule 1 enables other orders or procedures under an enactment relating to children to be prescribed for the purposes of paragraph 11 of the Schedule. Paragraph 23 of Part 3 enables regulations to be made for an exception to the exclusion of advocacy from scope in relation to legal proceedings relating to orders and procedures prescribed under paragraph 11(1)(g) of Part 1.
26. Paragraph 26 of Part 1 of Schedule 1 provides that claims in relation to rights to enter, and to remain in, the United Kingdom arising from the Refugee Convention (as defined in paragraph 26), Article 3 of the European Convention on Human Rights or the Temporary Protection Directive (as defined in paragraph 26) are in scope. Paragraph 26(3) provides that attendance at an interview concerning these matters will be out of scope but subject to exceptions that may be prescribed in regulations by the Lord Chancellor.
27. Paragraph 37 of Part 1 of Schedule 1 is concerned with the circumstances in which civil legal services in relation to injunctions for nuisance arising from environmental pollution will be in scope. The Lord Chancellor is able to prescribe the type of environmental pollution.

28. Paragraph 40 of Part 1 of Schedule 1 enables the Lord Chancellor to make regulations about the provision of legal aid in cases where a case raises a number of different matters, not all of which will be in scope. Sub-paragraph (2)(a) enables regulations under paragraph 40 to make exceptions to the exclusions in Part 2 of Schedule 1. Sub-paragraph (2)(b) makes provision for additional exceptions to be added in relation to the exclusion advocacy in Part 3 of Schedule 1.
29. Paragraph 5(1) of Part 4 of Schedule 1 provides further definition of what is included within a reference to proceedings in Part 1 of the Schedule. It includes preliminary or incidental proceedings. Paragraph 5(2) enables regulations to prescribe whether proceedings are or are not preliminary or incidental proceedings.
30. Paragraph 6 of Part 4 of Schedule 1 allows regulations to be made clarifying and further defining certain terms that are used at a number of points in Schedule 1.
31. The powers described above have been included in Schedule 1 to allow for clarification of the particular paragraphs. They also allow for flexibility to take account of unforeseen changes in legislation. Specific powers have been taken in relation to specific paragraphs in preference over a general power to amend and add to the Schedule, to ensure that the delegated powers are kept to a minimum.
32. The powers serve different purposes in different paragraphs. Some powers will be used to clarify a particular paragraph; for example, clarifying when circumstances arise out of a family relationship (see for example paragraph 9(5)). Some powers are to provide exceptions to matters otherwise out of scope; for example, the power to make exceptions to the exclusion of interviews under paragraph 26(3). Some powers allow detail to be provided in regulations; for example, in relation to environmental pollution, the detail of the types of pollution will be in regulations.
33. All the powers under the Schedule are subject to the negative resolution procedure. It is considered that this is the appropriate procedure because they are detailed powers concerned with, among other things, ensuring clarity in the Schedule. Under the 1999 Act the Lord Chancellor can make a direction under section 6(8) bringing matters excluded in Schedule 2 back into scope. A direction only needs to be published; it is not subject to any parliamentary procedure.

Clause 10: Qualifying for civil legal aid

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

34. Clause 10 confers power on the Lord Chancellor to make regulations concerning the merits test for civil legal aid. Under clause 8 (general cases) and clause 9 (exceptional cases) a person will only receive civil legal aid if the person qualifies for it. Under clause 10 a person will qualify for legal aid if the person meets the provisions on financial eligibility in clause 20 (financial resources) of the Bill, and the merits criteria laid down in regulations under clause 10. At present the merits

35. Clause 10(2) provides that when making the regulations the Lord Chancellor must consider the circumstances in which it is appropriate to make civil legal services available and the extent to which the regulations ought to reflect the list of factors in clause 10(3). These include the costs and benefits of providing particular services, the prospects of success and the availability of other services – besides legal aid services - to an individual. Under clause 10(4) the Lord Chancellor must seek to ensure that, where more than one type of service could be provided, a person is provided with the most appropriate one. Clause 10(5) provides that the regulations must reflect the principle that mediation or other alternative forms of dispute resolution may be more appropriate than legal proceedings. Clause 10(6) provides that regulations may provide that no criteria apply in relation to a prescribed description of an individual or services.
36. It is appropriate for the detail of the merits test to appear in secondary legislation because the provision will be detailed. It also reflects the current practice under the 1999 Act.
37. The regulations will be subject to the negative resolution procedure. This is appropriate for detailed provisions which will not make amendments to primary legislation. It does not reflect the procedure under the 1999 Act but it is considered that this approach is appropriate, given that it is to be expected that the regulations will contain less of substance than the current Funding Code, because the scope of legal aid is being drawn tightly on the face of the Bill in Part 1 of Schedule 1.
38. Furthermore, the current Funding Code is made by the Legal Services Commission, which is an arms length non-departmental public body. In contrast, the rules under clause 10 will be made by the Lord Chancellor, who is directly accountable to Parliament for the overall delivery of legal aid services.

Clause 11: Determinations

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

39. Clause 11 confers power on the Lord Chancellor to make regulations concerning the procedure for applying for civil legal aid. Under clause 11 if a person qualifies for civil legal aid the Director will make a determination to that effect. Clause 11(2) provides for regulations to be made by the Lord Chancellor (see clause 41) to provide the procedure for making and withdrawing a determination. Clause 11(3) provides a non-exhaustive list of the things that can be included in the regulations, such as the detail of the form and content of applications, and provision about the supply of information and documents by an applicant for legal aid.
40. Clause 11(3) includes the power at sub-paragraph (b) for the Lord Chancellor to specify circumstances where applications and determinations must be made by telephone or by other prescribed means. Similar provision exists in Clauses

41. Clause 11(5) provides that the regulations must make provision for the review of civil legal aid determinations and the withdrawal of determinations. Clause 11(6) provides that the rules may make provision about appeals against a determination or the withdrawal of a determination.
42. The rules will be subject to the negative resolution procedure. This is the appropriate procedure given the nature of the provisions. It is in line with the procedure for the Legal Services Commission's Funding Code under the 1999 Act (see section 9(5) of that Act).

Criminal legal aid

Clause 12: Advice and assistance for individuals in custody

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

43. Clause 12 confers power on the Lord Chancellor to make regulations about criminal legal aid for advice and assistance for individuals in custody. Clause 12 is concerned with the provision of criminal legal aid for initial advice and assistance for individuals in custody at a police station or other premises. The Director will determine whether a person qualifies for legal aid under this clause. Clause 12(3) enables the Lord Chancellor to make regulations to specify that the Director must make a determination under this clause in accordance with the means test under clause 20 (and regulations made under that clause) and other criteria, besides having regard to the interests of justice (clause 12(2)).
44. Clause 12(5) provides that regulations may set the procedure for the making and withdrawal of a determination by the Director. Clause 12(6) provides a non-exhaustive list of the provisions that may be made under the regulations such as the form and content of determinations and the giving of reasons for a determination to the applicant for legal aid. Clause 12(6)(b) includes the power to require applications to be made by telephone as discussed at paragraph 41 above.
45. It is appropriate for these provisions to be in secondary legislation as they are detailed and technical matters.
46. Clause 12(9) enables the Lord Chancellor to provide that particular advice and assistance is not initial advice and assistance for the purposes of clause 12. This power enables the Lord Chancellor to control the circumstances in which criminal legal aid is provided for those in custody. It also enables the Lord Chancellor to respond to the Director's practice on when funding should be given and changes and developments in the circumstances in which a person can be arrested and held in custody.

47. Regulations under clause 12 are subject to the negative resolution procedure, which is appropriate as they will be detailed and technical. In particular, regulations under clause 12(9) will not be altering the principle that advice and assistance should be provided, where necessary, to those in custody, but will be focused on the particular meaning of initial advice and assistance.

Clause 13: Criminal proceedings

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

48. Clause 13 defines the criminal proceedings for which criminal legal aid may be provided. Clause 13(h) confers power on the Lord Chancellor to add to the list of criminal proceedings by regulations (see clause 41 for the meaning of prescribed). This power will allow the Lord Chancellor to respond to the creation of new types of proceedings that should be funded as criminal proceedings. Allowing this to be done by secondary legislation will mean that the Lord Chancellor can respond quickly to such changes, thus ensuring that legal aid is available where it is needed. A similar power exists under section 12(2)(g) of the 1999 Act. That power has been exercised in regulation 3 of the Criminal Defence Service (General) (No. 2) Regulations 2001² (as amended).

49. The power is subject to the negative resolution procedure. This is the appropriate procedure as the Bill provides for the principle of when criminal legal aid should be available and this is adding to an existing list. It is also consistent with the procedure for the power in section 12(2)(g) of the 1999 Act.

Clause 14: Advice and assistance for criminal proceedings

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

50. Clause 14 confers power on the Lord Chancellor to make regulations about the availability of criminal legal aid for advice and assistance in the circumstances described in clause 14(2). Those circumstances are where a person is involved in an investigation that may lead to criminal proceedings (although this does not cover initial advice and assistance at a police station, which is covered by clause 12), individuals before a court, tribunal or other person in criminal proceedings and individuals who have been the subject of criminal proceedings.

51. The Lord Chancellor must have regard to the interests of justice when making the regulations (clause 14(3)). Regulations must ensure that when making determinations the Director has regard to the interests of justice (clause 14(4)). As well as being subject to the interests of justice, regulations may make a

² S.I. 2001/1437

determination of the Director subject to the rules on financial eligibility under clause 20 and other criteria (clause 14(5)). Clauses 14(6) to 14(9) enable regulations to provide the procedure for making and withdrawing determinations, including power in relation to review and appeals. There is provision in the 1999 Act for regulations concerning advice and assistance for criminal proceedings in section 13(1)(b). Clause 14(7)(b) includes the power to require applications to be made by telephone as discussed at paragraph 41 above.

52. The regulations under clause 14 will be subject to the negative resolution procedure. This is consistent with the current procedure for regulations under the powers in section 13(1)(b) the 1999 Act. It is the appropriate procedure as the Bill sets out the principle of when advice and assistance will be available, and the regulations only make detailed provision.

Clause 15: Representation for criminal proceedings

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

53. Clause 15 is concerned with the availability of representation for criminal proceedings. Clause 15(3) provides that representation extends to bail proceedings and preliminary and incidental proceedings. Clause 15(4) enables regulations to be made, to provide for particular proceedings to be regarded as preliminary or incidental for the purposes of clause 15(3). It also makes provision for regulations to make exceptions from clause 15(3). There is a similar power in paragraph 2(2) of Schedule 3 to the 1999 Act. An example of proceedings that are prescribed under that power is confiscation proceedings following conviction for an offence.

54. The power in clause 15 enables the Lord Chancellor to control the circumstance in which criminal legal aid is provided for representation, including ensuring that proceedings are not too far removed from the principal proceedings. It also enables the Lord Chancellor to respond to changes and developments in the proceedings that surround the principal criminal proceedings.

55. Clause 15(5) enables the Lord Chancellor to make exceptions for legal aid representation in criminal proceedings taking place more than a prescribed period of time before or after the principal proceedings.

56. Regulations under clause 15 are subject to the negative resolution procedure, which is appropriate because the regulations will be dealing with minor and technical matters. It is also the same as the corresponding power in the 1999 Act.

Clause 16(3): Qualifying for representation: power to amend interests of justice test

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Affirmative resolution*

57. Clause 16 defines the interests of justice for the purpose of representation in criminal proceedings under clause 15. Clause 16(2) contains a number of factors which must be taken into account when deciding what the interests of justice consists of in relation to a particular individual.

58. Clause 16(3) provides for the Lord Chancellor, by order, to be able to add to or vary the factors set out in clause 16(2). There is a similar test of the interests of justice in paragraph 5(2) of Schedule 3 to the 1999 Act and corresponding power to amend the list of factors in paragraph 5(3). A power to amend or vary the factors is appropriate to allow for legal developments on the requirements of the interests of justice.

59. As this is a power to amend primary legislation with secondary legislation it is subject to the affirmative resolution procedure. This is consistent with the power in the 1999 Act.

Clause 16(4): Qualifying for representation: circumstances in which the interests of justice requires legal aid

Power conferred on: The Lord Chancellor

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

60. Clause 16(4) confers power on the Lord Chancellor to make regulations to prescribe circumstances in which it is to be taken that the interests of justice require representation to be provided to an individual. There is a corresponding power in paragraph 5(4) of Schedule 3 to the 1999 Act.

61. The power is subject to the negative resolution procedure, which is consistent with the procedure under the 1999 Act. This remains the appropriate procedure as the regulations will be concerned with ensuring that funding is available as of right in certain cases, which does not affect the fundamental principle that legal aid should be available where required by the interests of justice.

Clause 17: Determinations by Director

Power conferred on: The Lord Chancellor

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative Resolution, save for clause 17(7) which is subject to the Affirmative Resolution procedure

62. Clause 17 is concerned with the power of the Director to make determinations on whether a person qualifies for representation for the purposes of criminal proceedings under clause 15. Clause 17(3) and (4) enable regulations to be made about the procedure for making and withdrawing a determination by the Director. Clause 17(4)(b) includes the power to require applications to be made by telephone as discussed at paragraph 41 above.

63. Under Clause 17(6) an appeal will lie to a prescribed court, tribunal or other person against a determination by the Director that the interests of justice do not require representation to be made available. The court, tribunal or other person who will hear the appeal is to be prescribed in regulations made by the Lord Chancellor (see clause 41 for the meaning of prescribed). Clause 17(7) provides for exceptions to be made to the right of appeal in clause 17(6). There is a similar power in paragraph 4 of Schedule 3 to the 1999 Act. The principal regulations under this power are the Criminal Defence Service (General) (No. 2) Regulations 2001 (as amended).
64. The matters in clause 17(3) to (6) are points of technical detail, which is why it is considered that they should be dealt with in secondary legislation. The power in clause 17(7) enables the Lord Chancellor to respond to changing circumstances.
65. The powers in clause 17(3) to (6) are subject to the negative resolution procedure. This is appropriate for powers making detailed, technical provisions. The power in clause 17(7) is subject to the affirmative resolution procedure as this is consistent with the power under Schedule 3 to the 1999 Act.

Clause 18: Determinations by court

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Affirmative Resolution*

66. Clause 18(1) confers power on the Lord Chancellor to allow a court (rather than the Director) to determine whether an individual qualifies for representation in criminal proceedings under clause 15. The regulations can make provision about the procedure for the making or withdrawing of a determination by the court. This power is the equivalent of paragraph 2 of Schedule 3 to the 1999 Act. The principal regulations under this power are the Criminal Defence Service (General) (No. 2) Regulations 2001 (as amended).
67. Clause 18(2) makes particular provision about the content of the regulations. The regulations may include provision on the form of the application, how the court shall determine the application, and for one court to decide that representation should be granted for proceedings in another court. Clause 18(2)(b) includes the power to require applications to be made by telephone as discussed at paragraph 41 above.
68. Under clause 18(4) the regulations must provide that an appeal will lie to a court, tribunal or other person against a determination that the interests of justice do not require representation in a particular case. The court, tribunal or other person who will hear the appeal must be prescribed by regulations. The right of appeal is subject to any prescribed exceptions under clause 18(5). This is similar to the provisions in paragraph 4 of Schedule 3 to the 1999 Act. Clause 18(5) includes a power to make consequential provision, including modifying an Act.
69. Regulations under clause 18 are subject to the affirmative resolution procedure. This is appropriate because not only the detail but also some of the principles of when the court will make a determination is to be provided in secondary legislation. The powers also include a power to amend primary legislation using

Clause 19: Provisional determinations

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Affirmative Resolution*

70. Clause 19 confers power on the Lord Chancellor to make regulations which allow, in prescribed circumstances, the Director or a court to make a provisional determination in the circumstances listed in clause 19(1) about whether an individual qualifies for representation for the purposes of criminal proceedings. Clause 19(2) provides for specific procedural provision to be made.

71. The Clause is the equivalent of paragraph 1A of Schedule 3 to the 1999 Act. The regulations made under that power are the Criminal Defence Service (Provisional Representation Orders) Regulations 2009³. The powers in the Bill and in the 1999 Act are subject to the affirmative resolution procedure. This is appropriate as the principle of when provisional determinations can be made as well as the detail will be provided in secondary legislation.

Financial resources, contributions and costs

Clause 20: Financial resources

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

72. Clause 20 confers powers on the Lord Chancellor to make regulations relating to the financial eligibility of an individual to receive legal aid.

73. Clause 20(2) enables regulations to provide for when the financial resources of a person are such that they are financially eligible for legal aid services that are subject to means testing. Regulations may also make exceptions, so that legal aid otherwise subject to means testing is available in certain circumstances regardless of a person's financial means.

74. Clauses 20(3) and (4) enable regulations to provide that a person is to be treated as having or not having prescribed financial resources. This may include providing that an individual is to be treated as having the financial resources of a person of a description set out in the regulations

75. Clauses 20(5) and (6) provide powers in respect of making or withdrawing financial eligibility determinations. Subsection (6) is a non-exhaustive list of

³ S.I. 2009/1995

matters that such regulations may contain, including provision requiring information and documents and provision establishing procedures for the review of financial eligibility determinations.

76. These powers provide a flexible framework for the Lord Chancellor to prescribe financial eligibility criteria for civil and criminal legal aid services where means testing applies, including providing that certain services are available regardless of an individual's means. Clause 20 provides a single suite of powers applicable to both civil and criminal legal aid, albeit the Lord Chancellor will continue to be able to make separate provision for civil and criminal legal aid and for different legal aid services.
77. Powers to make provision in respect of financial eligibility currently exist in the 1999 Act; section 7 (financial eligibility for civil legal aid) and paragraph 3B of Schedule 3 (financial eligibility for representation in criminal proceedings). The detailed financial eligibility rules for civil legal aid are currently contained in the Community Legal Service (Financial) Regulations 2000⁴. In respect of criminal legal aid, financial eligibility rules for magistrates' court representation are contained in the Criminal Defence Service (Financial Eligibility) Regulations 2006⁵ and rules also exist for criminal advice and assistance in the Criminal Defence Service (General) (No. 2 Regulations) 2001. Representation in the Crown Court is available regardless of financial means, albeit financial contributions may be required. It is envisaged that the powers in Clause 20 will be used to re-enact the substance of the current rules, subject to the changes in respect of civil financial eligibility proposed in the Government's response to the consultation paper *"Proposals for Reform of Legal Aid in England and Wales"*.
78. It is envisaged that the specific power in clauses 20(3) and (4) will be used to mirror provisions in existing regulations made under the 1999 Act in both the civil and criminal context, including the Community Legal Service (Financial) Regulations 2000 and the Criminal Defence Service (Financial Eligibility) Regulations 2006. Such provisions, for example, ensure that the resources of the spouse or partner of a person seeking legal aid can be treated as their resources, and that the resources of a person substantially maintaining a legally aided person or making their resources available to them can be treated as their resources.
79. As with the existing statutory framework, these powers have been left to delegated legislation as provisions on financial eligibility are a matter of considerable detail and will need to be varied from time to time.
80. These powers will be subject to the negative resolution procedure, which we consider will provide the appropriate level of scrutiny for detailed and technical provisions regarding financial eligibility. Under the 1999 Act regulations made under section 7 (financial eligibility for civil legal aid) are subject to the negative procedure. The first set of regulations made under paragraph 3B of Schedule 3 (financial eligibility for representation in criminal proceedings) was subject to the affirmative resolution procedure, but regulations made under that power thereafter have been subject to the negative procedure.

⁴ SI 2000/516

⁵ SI 2006/2492

Clause 21: Information about financial resources

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Affirmative resolution*

81. Clause 21 allows the Lord Chancellor to request information from the Secretary of State for Work and Pensions, the Commissioners for Her Majesty's Revenue and Customs, the Department for Social Development in Northern Ireland and the Department of Finance and Personnel in Northern Ireland, for the purpose of facilitating an assessment of whether a person is financially eligible for legal aid. Clauses 21(3)(f) and (4)(h) enable the Lord Chancellor to prescribe information that can be requested in addition to the information already listed in sub-sections (3) and (4).
82. Clause 21(5) gives particular examples of the information that may be prescribed under those regulations – the prescribed income of an individual for a prescribed period and the prescribed capital of an individual.
83. Clause 21(6) provides that the consent of the Commissioners is required before the power in clause 21(4)(h) can be exercised.
84. The information that will be requested includes information about a person's benefits status. Clause 21(8) defines benefits status. Under the definition, regulations will prescribe:
 - a. the benefits covered;
 - b. the circumstances in which the amount of a prescribed benefit can be requested;
 - c. the circumstances in which the elements that comprise the prescribed benefit and the amount of each element can be requested.
85. Information requests under clause 21 can be made by a relevant authority. Under clause 21(8), relevant authority means a prescribed person or, if no person is prescribed, the Director.
86. It is appropriate for the matters in clause 21 to be left to secondary legislation as they are concerned with matters that are likely to be subject to regular change and need regular updating. They mirror current provisions in relation to criminal legal aid in the Criminal Defence Service (Information Requests) Regulations 2009⁶ and the Criminal Defence Service (Information Requests) (Prescribed Benefits) Regulations 2009⁷ (made under paragraphs 6 and 8 of Schedule 3 to the 1999 Act).

⁶ SI 2009/391

⁷ SI 2009/212

87. However, as the powers include powers to amend primary legislation it is appropriate that they should be subject to the affirmative resolution procedure. It is also consistent with the powers in the 1999 Act.

Contributions and costs

Clause 22: Payment for services

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative Resolution</i>

88. Clause 22 enables the Lord Chancellor to make Regulations relating to payment for services by persons who are legally aided. The clause largely reflects existing powers in sections 10, 17 and 17A of the 1999 Act.
89. The starting point, in clause 22(1), is that a legally-aided individual may not be required to make a payment in connection with the provision of the services they receive unless regulations provide otherwise. The powers in clause 22 provide the framework for the Lord Chancellor, by regulations, to provide for payments by legally aided persons in prescribed circumstances. The clause provides a single suite of powers applicable (for the most part) to both civil and criminal legal aid, albeit the Lord Chancellor will continue to be able to make separate provision for civil and criminal legal aid and for different legal aid services. Regulations must provide for repayment to a legally aided person of any amount paid by them that exceeds their liability under the regulations (clause 22(11)).
90. Clause 22(2) makes clear that such regulations may include provision requiring an individual, in prescribed circumstances, to pay the cost of the services, a contribution in respect of the cost or administration costs. These provisions, as they relate to costs of services and contributions, substantially reproduce existing provisions in section 10(2) of the 1999 Act for civil legal aid and sections 17 and 17A of the 1999 Act in respect of criminal legal aid. The power in section 22(2) differs from existing powers to the extent that it explicitly includes the possibility of regulations requiring payment of administration costs associated with the provision of legal aid. This ensures that regulations can require payments in respect of the overall costs associated with the provision of legal aid in the case (including associated administrative costs) as opposed to just the direct cost paid to the client's legal representatives.
91. The current detailed rules on payment of contributions and case costs for civil legal aid are contained in the Community Legal Service (Financial) Regulations 2000. In respect of criminal legal aid, the regulations exercising the powers in sections 17 and 17A of the 1999 Act are contained in the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001⁸ and the Criminal Defence Service (Contribution Orders) Regulations 2009⁹. It is envisaged that the powers in Clause 22 will be used to re-enact the substance of the current rules,

⁸ SI 2001/856

⁹ SI 2009/3328

subject to the changes in respect of civil contributions proposed in the Government's response to the consultation paper "*Proposals for Reform of Legal Aid in England and Wales*".

92. Clause 22(3) enables regulations to provide that, in civil disputes only, legally aided individuals must, where prescribed conditions are met, pay a sum that may exceed the cost of the services. This allows for a so-called 'Supplementary Legal Aid Scheme', whereby a percentage of certain damages obtained by a successful legally aided person is recouped to the legal aid fund. Section 10(2)(c) of the 1999 Act contains equivalent provision.
93. Clause 22(4) enables the Lord Chancellor to make provision by regulations about determining the costs of services provided to a legally-aided person for the purposes of regulations under clause 22(1). Clause 22(4) reproduces existing provisions at sections 10(6)(b), 17(3)(c) and 17A(2)(b) of the 1999 Act.
94. Clauses 22(5), (8) and (9) contain supplementary provisions regarding regulations under clause 22, including allowing regulations to provide for liability to make a payment to arise on determination by a prescribed person (as is currently the case for criminal contributions and orders to pay costs) and variation or withdrawal of a liability to make a payment. Regulations may also make provision for payment by periodical payments or lumps sums out of income or capital, and procedural matters, such as when payment shall be made and to whom.
95. Clauses 22(6) and (7) make provision in identical to terms to clauses 20(5) and (6), referred to at paragraph 76 above.
96. Clause 22(10) ensures that regulations can provide for payment of interest by an individual in particular circumstances. This reproduces existing provisions in section 10(4) and section 17(2)(d) of the 1999 Act.
97. As under existing legislation, these powers have been left to delegated legislation given the level of detail required in respect of these matters, the need to make different provision for different circumstances and the need for variation from time to time.
98. These powers will be subject to the negative resolution procedure, which we consider provides the appropriate level of scrutiny for detailed and technical provisions regarding payments by legally aided persons. Under the 1999 Act, regulations made under section 10 and section 17 are subject to the negative procedure. The first set of regulations made under section 17A was subject to the affirmative resolution procedure, but regulations made under that power thereafter have been subject to the negative procedure.

Clause 23: Enforcement

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

99. Clause 23 enables the Lord Chancellor to make regulations about the enforcement of an obligation to make a payment imposed under clause 22. The regulations can include provision for recovery of enforcement costs from the individual and to require documents and information to be provided.
100. Under clause 23(3), the regulations may in particular provide that overdue amounts are recoverable summarily as a civil debt or are recoverable as if payable under an order of the High Court or county court, if the court in question so orders. This reproduces existing regulation-making powers relating to criminal legal aid in sections 17(4) and 17A(2A) of the 1999 Act as inserted by the Coroners and Justice Act 2009¹⁰.
101. Clause 23(5) introduces Schedule 2 to the Bill. This enables the Lord Chancellor to make regulations in respect of criminal legal aid to authorise a court to make a motor vehicle order to clamp and sell an individual's motor vehicle as a form of enforcement action. This substantially reproduces existing powers applicable to criminal contribution orders in section 17A and Schedule 3A of the 1999 Act as inserted by the Coroners and Justice Act 2009. Those powers have not, to date, been exercised but are still required as they may be exercised in the future. The provisions were added to the 1999 Act as part of a suite of powers following the implementation of the Crown Court Means Testing scheme, to ensure that speedy and effective enforcement action is available against those defendants who wilfully refuse to engage in making their required contributions.
102. As under existing legislation, these powers have been left to delegated legislation given the level of detail required in respect of these matters and the need for variation from time to time.
103. The negative resolution procedure is considered appropriate for detailed provisions regarding enforcement, as with the equivalent powers in existing legislation. For example, the exercise of the power equivalent to that in clause 23(3) (regulation 6 of the Criminal Defence Service (Contribution Orders) (Amendment) Regulations 2001¹¹, pursuant to section 17A(2A)(c) of the 1999 Act) was subject to the negative resolution procedure. Any exercise of the motor vehicle orders power in section 17A and Schedule 3 of the 1999 Act would also have been subject to the negative resolution procedure.

Clause 24: Charges on property in connection with civil legal services

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative Resolution</i>

104. Clause 24 enables the Lord Chancellor to make regulations regarding the 'statutory charge'. The 'statutory charge' is the charge created by clause 24(1) on any property recovered or preserved or costs payable in proceedings or a settlement by a person in receipt of civil legal aid. Regulations regarding the charge may include exceptions to the charge, provide for whether the charge is in

¹⁰ 2009 c.25

¹¹ SI 2010/142

favour of the Lord Chancellor or the service provider and provide for enforcement of the charge.

105. This reflects existing provisions at section 10 (7) and (8) of the 1999 Act. Current provisions in exercise of these powers are found in the Community Legal Service (Financial) Regulations 2000 and the Community Legal Service (Costs) Regulations 2000. It is envisaged that the powers in Clause 24 will be used to re-enact the substance of the current rules.
106. Clause 24(5) permits regulations to require any amount awarded to a legally aided person in proceedings or payable to them from a settlement to be paid to the Lord Chancellor or to the service provider (section 11(4)(f) of the 1999 Act currently explicitly includes a provision to this effect in respect of costs awards). Such regulations may include provision about the timing and manner of such payments, how the money is to be dealt with and enforcement of such a requirement. Regulations making such provision, made under powers in section 10 and 11 of the 1999 Act, form part of the Community Legal Service (Costs) Regulations 2000. It is envisaged that the powers in Clause 24 will be used to re-enact the substance of the current provisions.
107. As under existing legislation, these powers are suitable for delegated legislation given the detailed and technical nature of the necessary provisions and the need for variation on occasion.
108. These powers are subject to the negative resolution procedure, which is considered to provide an appropriate level of Parliamentary scrutiny for matters of this nature and reflects the level of scrutiny applicable to the relevant existing provisions of the 1999 Act.

Clause 25: Costs in civil proceedings

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative Resolution, save for regulations made under clause 25(3), 25(6)(b) or 25(6)(b) which are subject to the Affirmative Resolution procedure</i>

109. Clause 25 contains regulation-making powers relating to costs in civil proceedings in which a party has legal aid funding. The provisions in clause 25 substantially reproduce existing provisions in section 11 of the 1999 Act. These powers have been exercised in the Community Legal Service (Cost Protection) Regulations 2000¹² and the Community Legal Service (Costs) Regulations 2000. It is envisaged that the powers in Clause 25 will be used to re-enact the substance of the current rules.
110. The general rule set out in clause 25(1) (known as 'cost protection') is that costs ordered against a legally aided individual must not exceed the amount (if any) that it is reasonable for them to pay having regard to all the circumstances,

¹² SI 2000/824

including the financial resources of the parties and their conduct in relation to the dispute. Regulations may provide for exceptions to this rule. When assessing the financial resources of a legally aided person for these purposes, the specific items listed at clause 25(4)(a) and (b) must be disregarded unless otherwise prescribed.

111. Subject to the restriction in subsection (1), the clause confers on the Lord Chancellor a power to make provision by regulations as to costs in proceedings where a party is legally aided. Such regulations may include provision for: setting out principles to be applied when determining the amount of any costs awarded against a legally aided party; limiting the circumstances in which an order for costs may be enforced against such a party; security for costs; requiring the Lord Chancellor to pay all or part of the costs of a non-legally aided party; specifying principles to be applied in determining the amount of any costs award in favour of a legally aided party; the forum for determining any amount of costs; and as to the extent to which any costs determination is final.
112. Consistent with the existing provisions, these powers have been left to delegated legislation given the level of detail involved and the need for alteration from time to time.
113. Regulations making exceptions to the general 'cost protection' rule under clause 25(3), regulations limiting the circumstances in which, or the extent to which, an order for costs may be enforced against a legally aided party and regulations requiring payment by the Lord Chancellor of the whole or part of any costs incurred by a legally aided party will be subject to the affirmative resolution procedure. This accords with the level of scrutiny applicable to the mirror provisions in existing legislation and is still considered to remain appropriate given the content of such regulations. Otherwise, the negative resolution procedure is considered appropriate as it mirrors the current arrangements.

Providers of services etc

Clause 26: Choice of provider of services etc

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative Resolution, save for regulations made under clause 26(6)(a) and (8) which are subject to the Affirmative Resolution procedure</i>

114. Clause 26(4) provides that a person who qualifies for representation for the purposes of criminal proceedings may choose their representative, but that is subject to regulations under clause 26(6). Similar provision is made in section 15 of the 1999 Act.
115. Clause 26(7) further elaborates clause 26(6)(b) as including power to provide under regulations that a person is to be taken as having chosen a particular representative. Clause 26(8) enables regulations to provide that the Lord Chancellor is not required to make representation available for an individual by a prescribed representative. This power does not prejudice the right of an individual to select another representative (clause 26(9)). Clause 26(10) provides that the

116. This level of detail is currently prescribed in regulations under the 1999 Act and it is considered that it is appropriate to do the same under the Bill. The main regulations under the 1999 Act are the Criminal Defence Service (General) (No. 2) Regulations 2001. The powers in clauses 26(6)(a) and (8) are subject to the affirmative resolution procedure as they allow the Lord Chancellor to place limits on the choice of representative. The remaining powers in clause 26 are subject to the negative resolution procedure as they are of a minor and technical nature.

Clause 27: Position of providers of services

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

117. Clause 27 confers power on the Lord Chancellor to make exceptions to the general rule in clause 27 that the fact that services are funded by legal aid under Part 1 of the Bill does not affect the relationship between the provider of those services and the individual to whom services are provided. This is similar to provision in section 22(1) of the 1999 Act.

118. The power in clause 27 is subject to the negative resolution procedure as it will deal with minor and technical matters and this is the same as the procedure for section 22 of the 1999 Act.

119. Clause 27(3) enables regulations to provide that the withdrawal of a determination that a person qualifies for legal aid does not affect any payment to the provider of the services. This power is subject to the negative resolution procedure as it is a minor and technical matter.

Clause 28: Code of Conduct

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Code of Conduct*

Parliamentary procedure: *Laid before Parliament*

120. Clause 28 requires the Lord Chancellor to publish a code of conduct to be observed by civil servants and employees of a body established and maintained by the Lord Chancellor when those persons are providing services to an individual under arrangements made for the purposes of Part 1 of the Bill. A body established by the Lord Chancellor would include a body like the Public Defender Service that has been established by the Legal Services Commission.

121. There is a duty to make a code of conduct in section 16 of the 1999 Act, which is conferred on the Legal Services Commission. The code under section 16 is concerned with services provided under the Criminal Defence Service whereas the provisions in clause 28 are concerned with both criminal and civil legal aid.

Clause 29: Position of other parties, courts and tribunals

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative Resolution</i>

122. Clause 29 makes provision about the position of parties, courts and tribunals in relation to proceedings where legal services are funded by legal aid. Clause 29(1) provides that the fact that services are funded by legal aid does not affect the rights and liabilities of other parties to proceedings nor the principles on which a court or tribunal normally exercises its discretion, but this is subject to provisions in regulations. The clause reproduces, in part, section 22 of the 1999 Act.

123. Clause 29(2) enables regulations to make provision about the procedure of a court or tribunal in relation to services funded by legal aid. Clause 29(3) enables regulations under clause 29(2) to authorise the exercise of the functions of a court or tribunal by a court or tribunal officer or another court or tribunal.

124. The powers under this clause are concerned with minor and technical matters which are appropriate for secondary legislation. The powers are subject to the negative resolution procedure, which is consistent with the powers under the 1999 Act.

Supplementary

Clause 30 and Schedule 3: Legal aid for legal persons

<i>Power conferred on:</i>	<i>The Lord Chancellor</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative Resolution, save for paragraph 5(8) which is subject to the Affirmative Resolution procedure</i>

125. Clause 30 and Schedule 3 are concerned with the circumstances in which both civil and criminal legal aid will be made available to legal persons.

126. Paragraph 3 of Schedule 3 makes provision in relation to civil legal aid and applies the regulations on procedures under clause 11.

127. Paragraph 4(1) of Schedule 3 provides that regulations made by the Lord Chancellor may provide that prescribed advice and assistance for criminal proceedings is to be made available to a legal person if:

- prescribed conditions are met;
- the Director has made an exceptional case determination; and
- the Director has determined (provisionally or otherwise) that the individual qualifies for advice and assistance in accordance with the regulations.

128. Paragraph 4(3) then applies the provisions on regulations under clause 14 to regulations under paragraph 4, except with references to individuals as references to a legal person (paragraph 4(4)).

129. Paragraph 5 of the Schedule is concerned with representation for criminal proceedings for legal persons. Paragraph 5(4) provides that regulations under clause 15(4) and (5) apply for the purposes of paragraph 5(3), as they apply for the purposes of clause 15(3) except to the extent that the regulations provide otherwise. Clause 15(3) is concerned with proceedings that will be funded in addition to the primary criminal proceedings

130. Paragraph 5(8) provides that the Director may not make a provisional determination under paragraph 5(2)(b) that the legal person qualifies for representation in accordance with Part 1 of the Bill unless regulations made under paragraph 5(9) provide for this. Paragraph 5(12) makes provision for regulations to prescribe circumstances in which making representation available is to be taken to be in the interests of justice.

131. Paragraphs 6 to 9 of the Schedule apply a number of provisions to the provisions on legal aid for legal persons, including those made in regulations under the Schedule.

132. All of the powers in this Schedule are subject to the negative resolution procedure, except the power in paragraph 5(8), which is subject to the affirmative resolution procedure. These procedures have been chosen because they correspond with the procedures for the powers in relation to individuals in Part 1 of the Bill.

Clause 31: Foreign Law

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Negative Resolution*

133. Clause 31 provides that legal aid cannot be provided for services in relation to the law other than the law of England and Wales. This is subject to a small number of exceptions in clause 31 and any exceptions made in an order made by the Lord Chancellor. Clause 31(2) provides the circumstances in which such an order may be made. There is a similar power in section 19 of the 1999 Act.

134. This power is subject to the negative resolution procedure as this is consistent with the power under the 1999 Act.

Clause 32: Restriction on disclosure of information about financial resources

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

135. Clause 32 is concerned with the restrictions on the disclosure of information provided under clause 21. Clause 32(3)(b) permits a disclosure for the purposes of the investigation or prosecution of an offence under the law of England and Wales or Northern Ireland, or any other jurisdiction except where regulations otherwise provide. It is appropriate for this to be provided for in secondary legislation and subject to the negative resolution procedure as it is a minor and technical matter.

Clause 33: Restriction on disclosure of other information and Clause 34: exceptions from restriction under section 33

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

136. Clause 33 is concerned with the restrictions on disclosure of information concerned with applications for legal aid other than as provided for by clause 32. Such information must not be disclosed subject to the exceptions in clause 34.

137. Clause 34(2)(d) provides that information may be disclosed for the purpose of the investigation or prosecution of an offence under the law of England and Wales or any other jurisdiction, except where regulations otherwise provide. It is appropriate for this to be provided for in secondary legislation subject to the negative resolution procedure as it is a minor and technical matter.

Clause 37: Abolition of Legal Services Commission and Schedule 4: Transfer of employees and property etc of Legal Services Commission

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument.
Transfer Scheme*

Parliamentary procedure: *Affirmative Resolution if amending or repealing primary legislation, Negative Resolution otherwise
Transfer scheme – none.*

138. Clause 37 abolishes the Legal Services Commission (“the LSC”). Clause 37(2) introduces Schedule 4.

139. Schedule 4 provides for employees of the LSC to become civil servants on their existing terms and conditions (save as to pensions and severance) with their continuity of employment preserved. Schedule 4 also provides for the transfer of property, assets and liabilities held in the name of the LSC to the Lord Chancellor or to the Secretary of State.
140. Paragraph 4(3) of Schedule 4 enables the Lord Chancellor to make one or more transfer schemes providing for the transfer to the Lord Chancellor or the Secretary of State of the LSC's rights, powers, duties and liabilities in connection with occupational pension schemes or compensation schemes.
141. There is provision at paragraph 4(7) of Schedule 4 to allow the Lord Chancellor to provide that a transfer scheme may apply legislation (relating to compensation schemes and occupational pension schemes) with modifications, so far as is necessary to give effect to the transfer scheme. For example, this will allow the Lord Chancellor to provide that an aspect of pensions legislation applies in a particular way to that particular scheme (such as ensuring that the Lord Chancellor falls within the definition of Employer (under pensions legislation) for the purposes of acting as Employer of the LSC Schemes that continue after abolition of the LSC). This will assist, as appropriate, in enabling the continuation of the LSC pension scheme or schemes (post LSC abolition) so that they can continue for the benefit of their pensioner and preserved members.
142. There is also provision (at paragraph 4(8)) of Schedule 4 to allow for a transfer scheme to amend or otherwise modify the existing LSC compensation scheme. This will allow compensation arrangements for LSC employees transferring to the civil service to be brought in to line with those of other civil servants, over a transitional period.
143. Paragraph 5 of Schedule 4 provides the Lord Chancellor may make a scheme providing for the merger of LSC occupational pension schemes. There are currently two LSC occupational pension schemes that the LSC run for the benefit of its current and former employees. This provision is explicit that a scheme exercising this power must not result in members of the pension schemes or other beneficiaries under the schemes being deprived of any rights accrued prior to the merger.
144. As the powers referred to in the above four paragraphs are essentially detailed administrative matters relating to transferring LSC employees to the civil service, and LSC pension schemes, it is considered appropriate that the making of any such transfer schemes should not be subject to any parliamentary procedure.
145. Paragraph 11(1) of Schedule 4 provides that the Lord Chancellor may by regulations make consequential, supplementary, incidental, transitional, transitory or saving provision in connection with transfers effected by Schedule 4 or schemes made under Schedule 4. Clause 40(7)(j) provides for the affirmative procedure only where the regulations amend or repeal a provision of an Act.
146. Any such regulations could relate to: transfer schemes in connection with an occupational pension scheme or a compensation scheme (paragraph 4(3) of Schedule 4); transfers in relation to employees (paragraph 1 of Schedule 4) or property etc (paragraphs 6 and 7 of Schedule 4). The negative resolution procedure will provide the appropriate level of parliamentary scrutiny as these are technical matters.

147. Sub-paragraph 11(2) of Schedule 4 provides that regulations under paragraph 11(1) may include provision modifying an enactment, including Schedule 4. Clause 40(7)(j) provides for the affirmative procedure only where the regulations amend or repeal a provision of an Act.

Clause 39 and Paragraph 1 of Schedule 6: Northern Ireland: Information about Financial Resources

Power conferred on: *The Department of Justice in Northern Ireland*

Power exercisable by: *Regulations made by Statutory Rule*

Parliamentary procedure: *Negative resolution, save for the first set of regulations made under paragraph 1 of the Schedule, which are subject to Northern Ireland's Affirmative Resolution procedure*

148. Paragraph 1 of Schedule 6 allows a relevant authority to request information from the Secretary of State, the Commissioners for Her Majesty's Revenue and Customs, the Department for Social Development in Northern Ireland and the Department of Finance and Personnel in Northern Ireland, for the purpose of facilitating an assessment of whether a person is financially eligible for legal aid in Northern Ireland. Paragraph 1(3)(f) and (4)(h) enable the Department of Justice in Northern Ireland to prescribe information that can be requested in addition to the information already listed in sub-paragraphs (3) and (4).

149. Paragraph 1(5) gives particular examples of the information that may be prescribed under those regulations – the prescribed income of a relevant individual for a prescribed period and the prescribed capital of a relevant individual. A "relevant individual", in relation to an information request under this paragraph for the purposes of a determination about an individual's financial resources, is defined in paragraph 1(8), as that individual, and any other individual whose financial resources are or may be relevant for the purposes of the determination;

150. Paragraph 1(6) provides that the consent of the Commissioners for Her Majesty's Revenue and Customs is required before the power in paragraph 1(4)(h) can be exercised.

151. The information that will be requested includes information about a person's benefits status. Paragraph 1(8) defines benefits status. Under the definition, regulations will prescribe:

- a. the benefits covered;
- b. the circumstances in which the amount of a prescribed benefit can be requested;
- c. the circumstances in which the elements that comprise the prescribed benefit and the amount of each element can be requested.

152. Information requests under Schedule 6 can be made by a relevant authority. Under paragraph 1(8), relevant authority means a prescribed person or, if no

153. It is appropriate for the matters in paragraph 1 of Schedule 6 to be left to secondary legislation as they are concerned with matters that are likely to be subject to regular change and need regular updating. This is the approach taken in the current provisions that relate to criminal legal aid in England and Wales in Schedule 3 to the 1999 Act. As noted at paragraph 87 above, this is also the approach that is proposed to be taken in the similar provisions in clause 21.

154. As the powers in paragraph 1 include powers to amend primary legislation, it is appropriate that the first regulations made under this paragraph should be subject to Northern Ireland's affirmative resolution procedure in accordance with paragraph 4(4)(a) of the Schedule. As such regulations concern matters that are likely to be subject to regular change and need regular updating however, it is thought that subsequent regulations should be subject to Northern Ireland's negative resolution procedure in accordance with paragraph 4(3) of the Schedule. This follows the approach adopted in the Justice Act (Northern Ireland) 2011.

Clause 39 and Paragraph 2 of Schedule 6: Northern Ireland: Information about Financial Resources

Power conferred on: *The Department of Justice in Northern Ireland*

Power exercisable by: *Regulations made by Statutory Rule*

Parliamentary procedure: *Negative resolution*

155. Paragraph 2 of Schedule 6 is concerned with the restrictions on the disclosure of information provided under paragraph 1 of the Schedule. Paragraph 2(3)(b) permits a disclosure for the purposes of the investigation or prosecution of an offence under the law of England and Wales or Northern Ireland, or any other jurisdiction except where regulations otherwise provide. It is appropriate for this to be provided for in secondary legislation and subject to the negative resolution procedure as it is a minor and technical matter. As noted at paragraph 136 above, this is also the approach that is proposed to be taken in the similar provisions in clause 32.

Clause 39 and Paragraph 3 of Schedule 6: Northern Ireland: Information about Financial Resources

Power conferred on: *The Department of Justice in Northern Ireland*

Power exercisable by: *Regulations made by Statutory Rule*

Parliamentary procedure: *Negative resolution, save for regulations that amend or repeal Northern Ireland legislation, which are subject to Northern Ireland's Affirmative Resolution procedure*

156. Paragraph 3 of Schedule 6 confers on the Department of Justice in Northern Ireland, the power to make by regulations consequential, supplementary, incidental or transitional provision in relation to this Schedule extending to

157. The power in this paragraph is needed in order to make consequential and other provision after the Bill has been passed. Without this power further primary legislation may be needed to give effect to the Schedule in Northern Ireland.

158. In accordance with paragraph 4(3) and (4) of the Schedule any regulations under this paragraph will be subject to Northern Ireland's negative resolution procedure unless they amend or repeal Northern Ireland legislation, in which case they will be subject to Northern Ireland's affirmative resolution procedure. Where the regulations are amending primary legislation, it is appropriate for the affirmative resolution procedure to be used. Where the regulations make other provision it is appropriate for the negative resolution procedure to apply.

Clause 40: Orders, regulations and directions and Clause 41: Interpretation

159. Clause 40 makes general provision about the powers to make delegated legislation in Part 1 of the Bill. Clause 40(1) provides that orders, regulations and directions made under Part 1 of the Bill may include different provisions for different cases, circumstances or areas; make general provision or provision for specific cases; and that provision may only have effect for a specified period. Clause 40(2) is concerned with the matters with reference to which orders, regulations or directions may be made. Clause 40(3) includes provision that orders and regulations may allow for the exercise of a discretion, make provision by reference to a document made by any person and make consequential, incidental, supplementary, transitional or saving provision.

160. Clause 41 provides that "prescribed" means prescribed by regulations and "regulations" means regulations made by the Lord Chancellor.

Part 2

LITIGATION FUNDING AND COSTS

Payments for legal services in civil cases

Clauses 41 – 43: Conditional Fee Agreements, Damages Based Agreements and After The Event Insurance Premiums

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary procedure: *Affirmative and Negative Resolution*

161. Clauses 41 – 43 allow the Lord Chancellor to make regulations concerning Conditional Fee Agreements (CFAs), Damages Based Agreements (DBAs) and After the Event (ATE) Insurance Premiums.

162. The provisions reform the existing legal framework by providing that success fees and After the Event insurance premiums are no longer recoverable from losing parties in civil proceedings. This is subject to one exception which will allow for the recovery of After the Event Insurance Premiums for expert reports in clinical negligence cases. Success fees will continue to be recoverable by lawyers from successful clients, but this will be subject to a power to limit the amount that is recoverable from any damages awarded in particular proceedings.
163. The provisions also extend the use of DBAs in civil litigation, and provide for their regulation within a framework aligned closely to that for Conditional Fee Agreements. Damages Based Agreements are currently only permitted in “non-contentious” business, such as the Employment Tribunal, where their use is subject to the Damages Based Agreement Regulations 2010¹³.
164. Clause 41 inserts new subsections (4A) and (4B) into section 58 of the Courts and Legal Services Act 1990¹⁴. These clauses add to the current conditions that a CFA must comply with in order to be enforceable. New subsection (4A) provides that CFAs which provide for a success fee and relate to proceedings prescribed by the Lord Chancellor must comply with certain conditions in order to be enforceable. New subsection (4B) sets out those conditions. This is a new power. Before making an order under new subsections (4A) and (4B), section 58A(5) of the 1990 Act, as amended by clause 41, requires that the Lord Chancellor shall consult with designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate, before making an order.
165. Clause 42 amends section 58AA of the 1990 Act, which currently only applies to the use of DBAs in employment matters, to enable the use of DBAs in civil litigation. Clause 42 also amends subsection (4) of section 58AA, which prescribes the conditions that a DBA must comply with in order to be enforceable, by inserting new paragraph (aa). New paragraph (aa) provides that a DBA may not relate to proceedings which may not be the subject of an enforceable CFA under section 58A of the 1990 Act (essentially criminal and family proceedings) or to proceedings of a description prescribed by the Lord Chancellor. This is a new power.
166. Clause 42 further amends subsection (4) of section 58AA, by providing that the Lord Chancellor may prescribe the information which a legal representative must provide to a claimant prior to entering a DBA and the maximum amount which may be paid under the DBA from the claimant’s damages. Subsection (6) of section 58AA of the 1990 Act already requires that the Lord Chancellor must consult with designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate before making regulations under section (4).
167. Primary legislation will set out some basic requirements which both Conditional Fee Agreements and Damages Based Agreements must meet. There are, however, specific requirements which might apply in different categories of case, and which are more properly left to a delegated power, to allow for flexibility.
168. In relation to After the Event insurance premiums, clause 43 repeals section 29 of the 1999 Act, which currently provides for recovery of premiums, and inserts

¹³ SI 2010/1206

¹⁴ 1990 c.41

new section 58C in to the 1990 Act. The effect of new section 58C is to limit, by regulation, the recoverability of insurance premiums to certain clinical negligence proceedings and only allow recovery of the premium to the extent that it relates to the costs of an expert report. The clause enables the Lord Chancellor to make regulations to prescribe the circumstances in which the premium would be recoverable (new section 58C(2)) and the maximum amount of the premium that may be recovered (new section 58C(3)). The maximum amount may, in particular, be prescribed by specifying a percentage of the relevant part of the premium or an amount calculated in a prescribed manner (section 58C(4)). This is a new power.

169. The affirmative resolution procedure is appropriate in respect of the above clauses, as it will enable more detailed Parliamentary scrutiny of its use.

Clause 46: Divorce etc proceedings: matters to be considered by court making legal services order

Clause 49: Dissolution etc proceedings: matters to be considered by court making legal services order

Power conferred on: The Lord Chancellor

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution

170. Clauses 46 and 49 enable the Lord Chancellor, by order, to amend the factors to be taken into account by the court when making orders in respect of the costs of proceedings. This is a new power.

171. These clauses list certain factors that the court should take into account when considering whether to order one party to make a payment or payments to allow the other party to secure legal services for the purposes of the current divorce or dissolution proceedings.

172. While the courts have used the power to order maintenance pending suit to order payments to cover legal expenses, extending the power to provide for lump sum payments, and codifying the principles for its exercise, is new. Unforeseen issues may arise in practical application by the courts. Therefore, it is considered appropriate that the Lord Chancellor is able to amend the matters to which the courts should have regard when considering whether to exercise the power.

173. The affirmative resolution procedure is appropriate, to ensure sufficient Parliamentary scrutiny.

Clause 51: Payment of additional amount to successful claimant

Power conferred on: The Lord Chancellor

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative Resolution

174. Clause 51 enables rules of court to be made, in monetary claims, to permit an additional amount to be paid by defendants to claimants, where a defendant has not accepted a claimant's offer to settle, and where the court gives judgement for the claimant that is at least as advantageous as the claimant's offer. It also confers a power on the Lord Chancellor to enable rules of court to provide that, in non-monetary claims, a defendant may be required to pay an amount to a claimant where the court gives a judgment in favour of a claimant which is at least as advantageous as an offer the claimant made to settle the claim. The additional amount which the court may order is not fixed by the clause either for monetary or non-monetary claims, but is to be set in accordance with provision made by order. This is a new power.

175. In respect of monetary claims, subsection (3) of clause 51 enables the Lord Chancellor to prescribe, as a percentage of the value of the benefit awarded to the claimant, the maximum additional sum that the court may order. The Lord Chancellor may prescribe different percentage values for different values of claim (by virtue of subsection (9)).

176. In non-monetary claims (or mixed non-monetary and monetary claims), subsection (4) of clause 51 enables the Lord Chancellor to provide, by order, that rules of court may be made to enable a court to make an order requiring a defendant to pay an amount to a claimant where the court gives a judgment in favour of a claimant which is at least as advantageous as an offer the claimant made to settle the claim. Subsection (5) provides that in claims to which subsection (4) applies, an order made by the Lord Chancellor must provide for the amount payable to be calculated by one or more of three specified ways, namely by reference to the claimant's costs, or any amount of money that is awarded to the claimant in the proceedings, or the value of any non-monetary benefit awarded to the claimant.

177. Subsection (6) additionally requires that any order under made subsection (4) must provide that rules of court made under the order may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle, and may provide that such rules may make provision as to the calculation of the value of any non-monetary benefit awarded to a claimant.

178. In addition, in relation to both monetary and non-monetary claims, the Lord Chancellor may prescribe additional conditions which must be satisfied before the court may award an additional amount. Subsection (7) provides that these conditions may, amongst others, relate to the nature of the claim, the amount of money awarded to the claimant and the value of the non-monetary benefit awarded to the claimant.

179. Subsections (8) and (9) respectively provide that any order must be made by statutory instrument and will be subject to the negative resolution procedure.

Referral Fees

Clauses 54 to 58 provide for the prohibition of the payment and receipt of referral fees in personal injury cases. Referral fees are paid by solicitors and others to third parties, such as Claims Management Companies, who 'refer' business to them. In addition, the

Lord Chancellor may, by regulation, extend the prohibition to other types of claim and legal services as well as other providers of legal services. Those who are subject to the prohibition are referred to as “regulated persons”. It will be for the appropriate regulators, such as the Law Society and the Claims management regulator to enforce any prohibition.

Clause 54 – Rules against referral fees

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Affirmative*

Clause 54 prohibits the payment and receipt of referral fees by regulated persons in personal injury cases. Subsection 4(b) enables the Lord Chancellor to make regulations to extend the prohibition to other types of claim and legal services.

Clause 55 – Effects of the rules against referral fees

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Affirmative*

Clause 55 requires regulators to ensure that appropriate arrangements are in place for the monitoring and enforcement of the prohibition on referral fees and permits regulators to make rules and to use existing powers to enable them to do so. Any payment by or to a regulated person may be treated as a referral fee, unless the regulated person can show that the payment was for the provision of a particular service, unconnected to the referral. Subsection (9) allows the Lord Chancellor to specify in regulations the maximum amount that can be paid for certain services, such as the provision of a medical report, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

Clause 56 – Regulation by the FSA

Power conferred on: *Treasury*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Affirmative*

The power in clause 55 referred to above does not apply where the Financial Services Authority (FSA), which is responsible for the regulation of insurers, is the relevant regulator.

Clause 56 enables the Treasury to make regulations which will enable the FSA to monitor and enforce the prohibition on the payment and receipt of referral fees in respect of those it regulates. As clause 55 allows regulators to use existing powers to

enforce the prohibition, so clause 56 allows the Treasury to make regulations enabling the FSA to use existing provisions in the Financial Services and Markets Act 2000¹⁵ for the same purpose. In addition, the regulations may make provisions similar to those under clause 55 which require regulated persons to show that a particular payment is not a referral fee and to specify maximum amounts that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

Clause 57 – Regulators and regulated persons

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Affirmative*

Clause 57 lists both the regulators who are required to monitor and enforce the prohibition of the payment and receipt of referral fees in respect of personal injury claims and the regulated persons to whom the prohibition applies. Subsection (1) enables the Lord Chancellor to specify further regulators and regulated persons.

In addition, in respect of any other type of claim or provision of legal services to which the prohibition might in the future extend, subsection (2) lists those regulators who would be required to monitor and enforce the prohibition. Subsection (2) also enables the Lord Chancellor to specify further regulators and regulated persons as and when it may become necessary to do so. Further, subsection (2) ensures that Alternative Business Structures can also be specified by the Lord Chancellor as regulated persons and be made subject to the prohibition.

The affirmative resolution procedure is appropriate in all these instances, to ensure sufficient Parliamentary scrutiny.

Clause 58 – Referral fees: regulations

Clause 58 provides that any regulations must be made by statutory instrument and will be subject to the affirmative resolution procedure.

Costs in criminal cases

Clause 59 and Schedules 7 and 8: Costs in criminal cases

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Affirmative and Negative Resolution*

¹⁵ 2000 c.8

180. Clause 59 gives effect to Schedules 7 and 8 of the Bill. Schedule 6 amends the Prosecution of Offences Act 1985¹⁶ by making changes to the amounts payable pursuant to Defendants' Costs Orders (DCOs) as well as other amounts payable from central funds. Currently, a court may award a sum that is "reasonably sufficient to compensate" an acquitted defendant or successful appellant in respect of costs they have incurred in their criminal proceedings. These costs include "legal costs", i.e. fees, charges, disbursements and other amounts payable in respect of advocacy services or litigation services, including expert witness costs.
181. Schedule 7 provides that a DCO cannot include legal costs in respect of non-natural persons in any court, except the Supreme Court. A DCO cannot include legal costs in respect of individuals in the Crown Court (except successful appellants appealing from the magistrates' court), or in the High Court or the Court of Appeal. Legal costs are still available for individuals in the magistrates' court, and in respect of a limited number of cases in the Court of Appeal relating to defendants who have been found not guilty by reason of insanity or have been found unfit to stand trial. Schedule 7 also provides that where a DCO does include legal costs, such costs, except costs incurred in respect of proceedings in the Supreme Court, may be limited to rates set by the Lord Chancellor.
182. Paragraph 3 of Schedule 7 to the Bill inserts Section 16A into the Prosecution of Offences Act 1985. There is a new power in Section 16A(6) which allows the Lord Chancellor to add, modify or remove an exception from the prohibition on the payment of legal costs. This would enable the Lord Chancellor to alter the availability of legal costs. It also allows the Lord Chancellor to make an exception where a determination has been made by a specified person. This power would, for example, enable the Lord Chancellor to specify that legal costs are not to be available in respect of proceedings which do not pass the interests of justice test (i.e. where legal representation is not required) – not all proceedings in the magistrates' court would pass the interests of justice test.
183. Paragraph 5 of Schedule 7 to the Bill inserts new section 19(3ZA) into the Prosecution of Offences Act 1985. This section amends the regulation making power in Section 19(3). Regulations made under section 19(3) provide for the Lord Chancellor to make provision for payments from central funds to (i) compensate any witness; (ii) to cover the proper expenses of an interpreter; (iii) to compensate a duly qualified medical practitioner for expenses properly incurred; (iv) to cover the proper fee or costs of a person appointed under section 4A of the Criminal Procedure (Insanity) Act 1964¹⁷; (v) to cover the proper fee or costs of a legal representative appointed under Section 38(4) of the Youth Justice and Criminal Evidence Act 1999¹⁸.
184. New section 19(3ZA) provides that regulations made under subsection (3) are subject to regulations made under new Section 20(1A)(d) and do not have to provide for an amount that the court considers is "reasonably necessary to compensate". New section 19(3D) provides that regulations made under subsection (3) may make provision generally or only in relation to particular descriptions of persons, expenses, fees, costs, trouble or losses.

¹⁶ 1985 c.23

¹⁷ 1964 c.84

¹⁸ 1999 c.23

185. Paragraph 5(4) of Schedule 7 to the Bill inserts new subsections (4A) to (4C) into the Prosecution of Offences Act 1985. Section 19(4) provides that the Court of Appeal may order the payment from central funds of sums that appear to it to be reasonably sufficient to compensate an appellant who is not in custody and who appears before it on, or in connection with, his appeal under Part I of the Criminal Appeal Act 1968. New subsection (4B) removes the Court of Appeal's power to award legal costs under subsection (4) unless the Lord Chancellor's regulations made under subsection (4B) provide otherwise.
186. The Lord Chancellor's regulations, made under new subsection (4B) of section 19 of the Prosecution of Offences Act 1985, also provide for an exception where a determination has been made by a person specified in the regulations. This would, for example, allow the Lord Chancellor to prescribe that legal costs are not to be available in respect of cases that do not pass the interests of justice test. Regulations made under subsection (4B) would also allow the Lord Chancellor to provide that where the amount awarded by the Court of Appeal includes an amount in respect of legal costs it must include a statement to that effect and allow the Lord Chancellor to limit the amount that the court may award to an amount not exceeding that specified in the Lord Chancellor's regulations.
187. Paragraph 6 of Schedule 7 to the Bill inserts subsection (1A) into Section 20 of the Prosecution of Offences Act 1985. New subsection (1A) contains a number of provisions, some of which are new, and some of which are effectively the same as the existing provisions in Section 20(1), with minor amendments and clarification. The existing Section 20(1)(a) is effectively the same as 20(1A)(a) and (b). The existing Section 20(1)(b) is effectively the same as Section 20(1A)(e).
188. Sections 20(1A)(c) and (d) contain new provisions beyond those found in Section 20(1). New section 20(1A)(c) provides that the Lord Chancellor may make regulations requiring amounts to be calculated "having regard to regulations", which would, for example, enable a court to fix an amount that was not exactly in accordance with rates and scales, but was in line with them (for example by way of a summary assessment). Section 20(1A)(d) explicitly provides that the regulations do not need to provide for an amount that the court considers "reasonably sufficient or necessary" to compensate the recipient of a costs order.
189. Sections 20(1B) and 20(1C) are new provisions that help to explain the scope of regulations under section 20(1A) of the Prosecution of Offences Act 1985.
190. Two of the new regulation-making powers in the Bill are subject to the affirmative resolution procedure; those to be made under new Sections 16A(6) (paragraph 3 of Schedule 7 to the Bill) and 19(4B) (paragraph 5 of Schedule 7 to the Bill). The affirmative resolution procedure is considered appropriate because any amendments the Lord Chancellor might make under these Sections would have an effect that is similar to an amendment of the Prosecution of Offences Act 1985, by altering the availability of legal costs in certain types of case or in respect of certain types of person.
191. It is considered that the negative resolution procedure is appropriate for all of the other regulation making powers because these powers largely reflect existing negative resolution powers which allow the Lord Chancellor to make procedural provisions in respect of the award of costs. Whilst new Section 20(1A)(d) allows the Lord Chancellor to, by regulations, limit the award of costs to an amount that

192. Part 2 (Attorney General's references) of Schedule 7 to the Bill amends Section 36 of the Criminal Justice Act 1972¹⁹ (reference to the Court of Appeal of point of law following acquittal on indictment) and Schedule 3 (Reviews of sentencing-supplementary) to the Criminal Justice Act 1988²⁰. The effect of these amendments is that references to regulations made under Section 20(1) of the Prosecution of Offences Act 1985 are replaced with references to regulations made under new Section 20(1A) of that Act, including subsection (d). New Section 20(1A)(d) allows the Lord Chancellor, by regulations, to limit the award of costs to an amount that is less than an amount that the court considers "reasonably sufficient or necessary" to compensate the recipient of a costs order. In respect of Attorney General's references, this would allow the Lord Chancellor's regulations to limit the amount of costs awarded in respect of references to the Court of Appeal ("legal costs" are not available in this court but travel and other costs would be).
193. Part 3 (Extradition Act 2003) of Schedule 7 to the Bill amends the Extradition Act 2003²¹. Section 61(5) of the Extradition Act 2003 provides that the court may make an order for such amount as it considers is reasonably sufficient to compensate the person for expenses incurred in the extradition proceedings. In England and Wales such orders would be subject to regulations made under section 20(1A)(d) of the Prosecution of Offences Act 1985. Section 20(1A)(d) of the Prosecution of Offences Act 1985 allows the Lord Chancellor to, by regulations, limit the award of costs to an amount that is less than an amount that the court considers "reasonably sufficient or necessary" to compensate the recipient of a costs order.
194. There is a power in new Section 62A(3)(b) of the Extradition Act 2003 which mirrors the power in section 16(6D)(b) of the Prosecution of Offences Act 1985 allowing the Lord Chancellor to specify the procedure for determining the cost awarded by regulations.
195. New section 62B of the Extradition Act 2003 provides that, in England and Wales, an order under section 61(5) of that Act may not include an amount in respect of "legal costs" unless those legal costs were incurred in the magistrates' court or the Supreme Court. Section 62B(3) provides that the Lord Chancellor may, by regulations, make provision about exceptions from the prohibition against the award of legal costs, but such regulations cannot affect the Supreme Court's power to award an amount in respect of legal costs incurred in proceedings before it.
196. Section 62B(6) of the Extradition Act 2003 provides that the Lord Chancellor may, by regulations, limit the amount of "legal costs" awarded by the court under Section 61(5) except "legal costs" awarded in respect of proceedings in the Supreme Court.

¹⁹ 1972 c.71

²⁰ 1988 c.33

²¹ 2003 c.41

197. Section 134 of the Extradition Act 2003 (costs where discharge ordered) reflects section 61 of that Act. Part 3 of Schedule 7 to the Bill also amends section 134 and inserts new sections 135A and 135B into the Extradition Act 2003. The new powers in sections 135A and 135B reflect those in new sections 62A and 62B discussed above.
198. Section 223(6)(a) of the Extradition Act 2003 provides that regulations made under sections 62B(3) and 135B(3) are to be made following the affirmative resolution procedure. It is considered that the affirmative resolution procedure is appropriate because regulations under these sections have the effect of altering the availability of legal costs in proceeding in certain courts, other than the Supreme Court, or in respect of certain types of person.
199. Schedule 8 of the Bill (Costs in criminal cases: service courts) amends Part 2 (appeals from Court Martial) and Part 3 of the Court Martial Appeals Act 1968 and Part 3 (Appeals from the Court Martial Appeal Court) of the Court Martial Appeals Act 1968²².
200. New Section 31(5)(b) provides a power for the Lord Chancellor to specify, by regulations, the procedure by which the Appeal Court may fix the sum that it considers reasonably sufficient to compensate successful appellants for their expenses incurred in the proceedings. As these regulations set the procedure and do not control the amount that is awarded to the successful appellant it is considered that the negative resolution procedure is appropriate.
201. New Section 31A (Legal costs) of the Court Martial Appeals Act 1968 provides the Lord Chancellor with the power to include “legal costs” in the costs that the Appeal Court may order be awarded to compensate successful appellants (the default position being that “legal costs” are not awarded). There is also a power to limit the amount of legal costs that the Court may award. The Lord Chancellor’s power is to be exercised by regulations that are subject to the affirmative resolution procedure. It is considered that the affirmative resolution procedure is appropriate for the exercise of this power because the effect of the regulations would be to amend primary legislation by altering the availability of “legal costs”.
202. Schedule 8 of the Bill amends Section 33 (Witnesses’ expenses) of the Court Martial Appeals Act 1968 and provides that the amount that the Appeal Court may order be paid to compensate a witness who appears to give evidence may not include sums in respect of expert witness costs (these would fall within “legal costs”) unless regulations made by the Lord Chancellor provide otherwise. It is considered that these regulations ought to be subject to the affirmative resolution procedure because the effect of the regulations would be to amend primary legislation (by allowing costs that are not otherwise allowed by Section 33).
203. Section 33A (Appellant’s expenses) is amended by Schedule 8 of the Bill and provides that the where an appellant who is not in custody appears before the Appeal Court on the hearing of his appeal or in preliminary or incidental proceedings the Appeal Court may direct that the expenses of his appearance be paid. The appellant’s expenses may not include an amount in respect of “legal costs” unless regulations made by the Lord Chancellor provide otherwise. There

²² 1968 c.20

is also a power for the Lord Chancellor's regulations to limit the amount of legal costs that the Appeal Court may award. It is considered that the affirmative resolution procedure is appropriate for the exercise of this power because the effect of the regulations is to allow "legal costs" which the section would otherwise not allow.

204. Section 33B (Further provision about costs) is inserted into the Court Martial Appeals Act 1968 by Schedule 8 to the Bill. Section 33B provides the Lord Chancellor with the power to make procedural regulations governing how sums directed or ordered to be paid under Sections 31, 33 or 33A of the Court Martial Appeals Act 1968's may be calculated, including provision in respect of reviews of determinations of sums directed to be paid under Section 31. It is considered that regulations made under Section 33B are suitable for the negative resolution procedure because they are procedural in nature. Whilst Section 33B(1)(d) provides that the Lord Chancellor's regulations may provide that the sums awarded may be less than "an amount that the court considers reasonably sufficient to compensate the person concerned", this principle is clear on the face of the Bill. It is considered that the negative resolution procedure would provide the appropriate level of Parliamentary scrutiny when this power is exercised.

205. New section 33C (Regulations) of the Court Martial Appeals Act 1968 provides that regulations made under Sections 31A, 33 or 33A of the Act are subject to the affirmative resolution procedure.

206. New Section 46A (Costs: application to Appeal Court by Director of Service Prosecutions) is inserted into the Court Martial Appeals Act 1968 by Part 2 of Schedule 8 to the Bill. Section 46A provides that where the Appeal Court dismisses an application for leave to appeal to the Supreme Court made by the Director of Service Prosecutions, the Appeal Court may direct that the Secretary of State compensate the accused for any reasonable expenses he has incurred in resisting the application. Such sums, directed to be paid, may not include an amount in respect of "legal costs" except where regulations made by the Lord Chancellor provide otherwise. The Lord Chancellor's regulations may limit the amount that the Appeal Court may direct be paid. It is considered that regulations made under Section 46A are subject to the affirmative resolution procedure because they allow "legal costs" which the section would otherwise not allow.

207. Section 47 (Costs: application to Supreme Court) of the Court Martial Appeals Act 1968, as amended by Part 2 of Schedule 8 to the Bill, provides that (i) where the Appeal Court or the Supreme Court dismiss an application for leave to appeal to the Supreme Court and the application was made by the Director of Service Prosecutions; (ii) where the Supreme Court determines an appeal from the Appeal Court; the Supreme Court may direct the payment by the Secretary of State of such sums as appear to the Supreme Court to be reasonably sufficient to compensate the accused for any expenses properly incurred by him. The costs which the Supreme Court may direct be paid by the Secretary of State do not include "legal costs" incurred in proceedings in a court below unless regulations made by the Lord Chancellor provide otherwise. Regulations made by the Lord Chancellor may limit the amount of "legal costs" that the Supreme Court may direct be paid (in respect of proceedings below it). It is considered that the affirmative resolution procedure is appropriate for the exercise of this power because the effect of the regulations is to allow "legal costs" which the section would otherwise not allow.

208. New Section 47A (Further provision about costs) of the Court Martial Appeals Act 1968, inserted by Part 2 of Schedule 8 to the Bill, provides that the Lord Chancellor may, by regulations, make provision in respect of sums directed or ordered to be paid under Section 46A or 47(3). Such provision would be procedural in nature and it is considered that the negative resolution procedure is appropriate for these regulations for that reason. While subsection (1)(d) provides that the Lord Chancellor's regulations may provide that the sums awarded may be less than "an amount that the court considers reasonably sufficient to compensate the person concerned", this principle is clear on the face of the Bill and does not require additional Parliamentary scrutiny when this power is exercised.

209. New Section 47B (Regulations) provides that regulations made under Sections 46A and 47 are to be made using the affirmative resolution procedure.

PART 3

SENTENCING AND PUNISHMENT OF OFFENDERS

CHAPTER 1

SENTENCING

General

Clause 61: Duty to give reasons for and to explain effect of sentence

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary Procedure:</i>	<i>Affirmative Resolution</i>

214. Clause 61 gives the Secretary of State a power, by order, to exempt certain cases from the duty to explain a sentence. This is a restatement of an existing power in section 174 of the Criminal Justice Act 2003²³.

215. Changes are being made to simplify the provision to explain a sentence. Where such sentences are obvious this may not be necessary. The Secretary of State can therefore make the condition less onerous to the courts by removing this obligation for certain types of offences (for example where there is a fixed penalty). The duty can also be removed for convictions dealt with on paper (for example driving offences). Such detail is suitable for delegated powers as it will alter over time depending on new offences and new procedures.

²³ 2003 c.44

216. The use of such a power and the exemptions will not be controversial and therefore the negative resolution procedure is suitable.

Community orders

Clause 63: Breach of community order

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary Procedure:</i>	<i>Negative Resolution</i>

217. Clause 63 inserts new paragraph 11A of Schedule 8 to the Criminal Justice Act 2003²⁴. It gives the Secretary of State a power, by order, to amend any sum for the time being specified as the maximum amount which magistrates' courts or the Crown Court may impose as a fine following a finding that an offender has breached a requirement in a community order.

218. This power is to allow the maximum amount to be altered to follow inflation. By virtue of new paragraph 11A(2) the power may be exercised only if it appears to the Secretary of State that there has been a change in the value of money since the relevant date. 'Relevant date' is defined in new paragraph 11A(3).

219 This power replicates for community order the existing power in respect of youth rehabilitation orders in paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008.

220 It is also consistent with a new power introduced by Clause 58 for increasing the level of a fine for Breach of a suspended sentence order

221. The power is intended to enable the Secretary of State to respond to price changes which occur from time to time. It is therefore appropriate and necessary to make this provision by way of a power. The use of the power will not be controversial and therefore the negative resolution procedure is suitable.

Suspended sentence orders

Clause 65: Fine for breach of suspended sentence order

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary Procedure:</i>	<i>Negative Resolution</i>

222. Clause 65 inserts new paragraph 12A into Schedule 12 to the Criminal Justice Act 2003. It gives the Secretary of State a power, by order, to amend any sum for the

²⁴ 2003 c.44

time being specified as the maximum amount which magistrates' courts or the Crown Court may impose as a fine following a finding that an offender has breached a requirement in a community order.

223 This power is to allow the maximum amount to be altered to follow inflation. By virtue of new paragraph 12A(2) the power may be exercised only if it appears to the Secretary of State that there has been a change in the value of money since the relevant date. 'Relevant date' is defined in new paragraph 12A(3).

224. This power replicates for community order the existing power in respect of youth rehabilitation orders in paragraph 10 of Schedule 2 to the Criminal Justice and Immigration Act 2008.

225. It is also consistent with a new power introduced by Clause 56 for increasing the level of a fine for breach of a community order.

226. The power is intended to enable the Secretary of State to respond to price changes which occur from time to time. It is therefore appropriate and necessary to make this provision by way of a power. The use of the power will not be controversial and therefore the negative resolution procedure is suitable.

Youth sentences

Clause 74: Breach of Detention and Training Order

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

227. Clause 74 enables the Secretary of State to make provision, by regulations, for the interaction between a period of detention, imposed for a breach of a Detention and Training Order during the supervision period of the Order, and a custodial sentence. This power is inserted into the Powers of Criminal Courts (Sentencing) Act 2000²⁵ by new section 104B of that Act.

228. A Detention and Training Order can only be given to an offender under the age of 18. The breach process for young offenders who fail to comply with the supervision part of the Detention and Training Order is being amended. A period of detention imposed for the breach of a Detention and Training Order will be able to be imposed at any time, even after the offender has reached the ages of 18 or 21. This will close the loophole which currently enables a young offender to avoid being penalised for a breach if they succeed in postponing breach proceedings until after the Order has come to an end. Courts will be able to punish an offender for a breach in an appropriate and proportionate way, either during or following the term of the original Order.

²⁵ 2000 c.6

229. The broad framework for this offence and the associated breach powers are set out in the Powers of Criminal Courts (Sentencing) Act 2000. It is necessary however to provide for the interaction between the period of breach and other custodial terms, both where the offender is subject to a period for breach when they receive a further sentence and where the reverse is true: the offender is subject to a different sentence and receives a period for breach. These interactions provide for the management and operation of the detention in association with other sentences. The detail will be intricate and must allow for the possible commencement of the prospective repeal of the sentence of detention in a young offenders institution. For these reasons it is our view that these matters are suitable for delegation.

230. The details setting out the operation of the sentence with other sentences supplement the primary legislation. They are uncontroversial and therefore the negative resolution procedure is appropriate.

Fines

Clause 79: Removal of limit of certain fines on conviction by magistrates' court

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

231. Clause 79 provides for offences punishable on summary conviction by maximum fines of £5,000 or more to be punishable with fines of an unlimited amount instead (see cl. 79(1)). This applies where the amount is fixed and where it is expressed by reference e.g. to 'the statutory maximum,' 'the prescribed sum' or 'level 5 on the standard scale.'

232. It also makes provision (see cl. 79(2)) in relation to powers to create offences, where those powers specify that the maximum fine for such an offence is £5,000 or more (again, however expressed). It increases such powers to that the permissible amount of a fine is unlimited.

233. The clause gives the Secretary of State a power by regulation to disapply the provisions mentioned above (see cl. 79(5)(a)) and instead to increase the maximum fine in respect of any relevant offence (or power to create such an offence) to a higher sum (see cl. 79(5)(b) and (c)).

234. Specific provision is also made in respect of maximum fines which are expressed as a proportion of an amount which is £5,000 or more. (Plainly in these cases it would not make sense for an unlimited fine to be applied.) For these cases the Secretary of State has a power to increase the amount to which the proportion relates (see cl. 79(7)).

235. Regulations enacted under this clause may not be retrospective, may not apply to offenders under 18 years old, and may not apply when an offender has been committed from a magistrates' court for sentence by the Crown Court.

236. The main provisions in this clause clearly affect a large number of offences. The powers are needed to enable the Secretary of State to make specific provision for particular cases. Examination of the proposed exceptions through the affirmative resolution procedure will entail a sufficient degree of scrutiny at the appropriate level.

237. The affirmative resolution procedure is suitable because exercise of the power will alter the effect of primary legislation.

Clause 80: Power to increase certain other fines on conviction by magistrates' court

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

238. Clause 80 relates to offences punishable on summary conviction with a maximum fine of a fixed amount of less than £5,000. It gives the Secretary of State a power, by regulations, to increase such maximums.

239. It also makes provision in relation to powers to create offences, where those powers specify that the maximum fine for such an offence is a fixed amount of less than £5,000. The clause gives the Secretary of State a power to increase such maximum fines.

240. Neither power permits such fines to be increased beyond £5,000 or the level 4 maximum on the standard scale of fines, whichever is greater. If the amount specified as level 5 has been increased beyond £5,000 before commencement of this clause, then the new amount specified as level 5 will replace £5,000 for the purposes of this power.

241. Regulations enacted under this power may not be retrospective, may not apply to offenders under 18 years old, and may not apply when an offender was committed from a magistrates' court for sentence by the Crown Court.

242. This power is linked to the power to increase the amounts specified as levels 1-4 on the standard scale (cl. 81). Not all offences with maximum fines of less than £5,000 are drafted by reference to levels 1-4 – some are drafted by reference to fixed amounts set out in the legislation. It is therefore necessary to make specific provision to increase these fixed amounts, so that they do not fall out of step with increases to levels 1-4.

243. The only feasible alternative to taking this power would be to make specific provision in the Bill to increase each fixed amount of less than £5,000. That would only deal with existing offences, of course, and would not deal with powers to create offences where the maximum is a fixed amount of less than £5,000. It is also difficult to make sensible judgments about the level of increase without reference to proposed increases to levels 1-4.

244. The level of scrutiny under the affirmative resolution procedure is in our view sufficient for changes of this type. The affirmative resolution procedure is suitable because exercise of the power will alter the effect of primary legislation.

Clause 81: Power to amend standard scale of fines for summary offences

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

245. Clause 81 gives the Secretary of State a power, by order, to increase the sums specified as levels 1 to 4 on the standard scale of fines for summary offences. The ratios between any new amounts so determined must be the same as between the amounts currently specified.

246. The new order-making power is less restricted than the existing power to increase fine maxima in line with inflation. It is designed to complement the power to replace the highest fines in the magistrates' courts by an unlimited amount, while at the same time keeping fines for less serious offences within specified limits.

247. It is appropriate for new fine levels to be set by secondary legislation, and the affirmative resolution procedure provides sufficient scrutiny. Parliament will have the opportunity to debate and agree any proposed changes. Moreover, the courts are required to set fines in accordance with the seriousness of the offence and the means of the offender, which means that disproportionate fines could not be imposed under the new levels, whatever they were.

248. The affirmative resolution procedure is suitable because the power permits the Secretary of State to amend primary legislation.

CHAPTER 3

REMANDS OF CHILDREN OTHERWISE THAN ON BAIL

Remands to local authority accommodation

Clause 89: Further provisions about electronic monitoring

Power conferred on: Secretary of State

Power exercisable by: Rules and Order made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

249. Clause 89 makes further provision about the imposition of a requirement for electronic monitoring where a child is remanded to local authority accommodation under clause 89 of the Bill. It is a partial restatement of Section 23AA(7) of the Children and Young Persons Act 1969.²⁶

250. Where a child is charged, convicted or subject to extradition proceedings and is not released on bail, the court may remand the child to secure remand or to local authority accommodation. Where the remand is to local authority accommodation the court may impose certain conditions, one of which is electronic monitoring. The requirements to be set for such monitoring are set out in clause 87.

251. When imposing the condition the court has to make a person responsible for the monitoring. The Secretary of State, by order, must set out the description of those who can be so responsible. The Secretary of State further can make rules for regulating compliance with electronic monitoring and the functions of the person made responsible for the monitoring.

252. The order and rules effectively deal with who would be suitable or qualified to provide such a service and may name a suitable provider and how they are to monitor the requirement. Such detail will change over time and may need to be changed at short notice therefore the power is suitable for delegation.

253. The requirements for electronic monitoring are set out in the primary legislation and any order for a child to be monitored is made by the court. The details in the order and regulations supplementing the function of such a court order are akin to contractual details and will be subject to revision. Therefore, the negative resolution procedure is suitable

Remands to youth detention accommodation

Clause 95: Remands to youth detention accommodation

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

254. Clause 95 gives the Secretary of State the power to make regulations setting out the terms on which he may recover the costs of secure remand from designated local authorities. It also gives the power to recover associated costs, such as those for providing transport for the child from the court to the chosen accommodation.

255. Children who are refused bail during the course of criminal or extradition proceedings will be remanded to local authority accommodation or to secure youth

²⁶ 1969 c.54

detention accommodation (secure children's home, secure training centre or young offender institution).

256. The Bill provides that Secretary of State, or a provider of youth detention accommodation, may recover the costs of accommodating children remanded under these provisions from the local authority; irrespective of where they are placed. At present accommodation for these purposes is procured by the Youth Justice Board (YJB) on behalf of local authorities. The YJB pass on only two thirds of the cost of beds in secure children's homes and secure training centres to the local authorities.

257. Under the new provision the Secretary of State or the YJB will continue to run a centralised procurement system, but over time the Secretary of State will withdraw the financial assistance that is currently given. Financial assistance will be given via other avenues instead.

258. The regulations will need to provide intricate detail as to the funding and procurement structure for three types of accommodation: secure children's homes, secure training centres and young offender institutions. The first and second of these are currently provided under contracts and any changes to the funding structure will need to be phased so as not to interrupt their running. The charging structure that will be applied to local authorities may be subject to alteration over time,

259. The transfer process is expected to take place gradually, and to require considerable transition arrangements. Therefore such detail is suitable for a delegated power.

260. The overall scheme will have been agreed by Parliament and what are essentially contract arrangements will be suitable for negative resolution.

Supplementary

Clause 97: Looked after child status

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

261. Clause 97 enables the Secretary of State to make regulations relating to a child looked after by a local authority, who has become looked after as a result of being subject to a remand under this Bill.

262. The power to make regulations will allow the Secretary of State to apply with modifications or disapply provisions of legislation relating to the looked after status of children in such circumstances.

263. Chapter 3 of the Bill sets out the broad framework for the remand scheme. The arrangements that must be made by local authorities in order to meet the welfare needs of this group are extensive and have a largely statutory basis, set out in the

Children Act 1989²⁷, a number of instruments made under that Act and other associated enactments. Such detail will not always be directly relevant to a child who becomes looked after because they are subject to a remand (as opposed to one who gains this status because they are subject to a care order or being accommodated by a local authority).

264. For example, the placement duties of a local authority as set out in section 22C Children Act 1989 provide for the local authority to make certain arrangements in relation to a child they are looking after; this includes such arrangements as providing accommodation with foster cares or relatives. Such arrangements are clearly not suitable for those children who are subject to remand in secure accommodation and would need to be disapplied.

265. It is therefore vital to the operation of the scheme that the Secretary of State can apply with modifications and disapply both existing provisions and new provisions that make them relevant and appropriate to children who are remanded. Such changes are detailed and are simply applying existing law appropriately. They are therefore suitable for delegation and since they are uncontroversial it is considered that parliamentary scrutiny under the negative resolution procedure is appropriate.

CHAPTER 4

RELEASE ON LICENCE

Other provisions about release

Clause 107: Supervision of young offenders after release

Power conferred on: Secretary of State

Power exercisable by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

266. Clause 107 creates a supervision requirement for youths where the sentence imposed is for less than 12 months' imprisonment and the offender will otherwise be released unconditionally. The period of supervision can be subject to certain requirements including electronic monitoring and drug testing. The clause confers on the Secretary of State the power to make rules for those requirements.

267. Clause 107 is a restatement and amendment of the existing power of supervision for youths under section 65 of the Criminal Justice Act 1991²⁸ and the power for the Secretary of State to make rules is a restatement of subsection (5D) of section 65. Rules will make provision for the operation of the electronic monitoring or drug testing requirement.

²⁷ 1989 c.41

²⁸ 1991 c.53

268. The clause confers the power to impose electronic monitoring and drug testing requirements and it would be suitable for the detail of the process and operation of such requirements to be set out in delegated legislation.

269. The negative resolution procedure is suitable as the rules would set out the details, process and operation of the requirements and would be uncontroversial.

Restatement of earlier enactments and transitional provisions

Clause 112: Power to restate earlier enactments and existing transitional provisions

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution

270. Clause 112 confers on the Secretary of State the power to transpose and restate repealed but saved law and transitional provisions.

271. Specifically, the Criminal Justice Act 1991 still operates in respect of the release and recall of offenders, where the offence was committed before 4th April 2005. While the provisions were repealed by the Criminal Justice Act 2003, they were saved, and because the savings are based on offence date, sentences are still added to the 1991 Act regime.

272. As a result, there are problems in operating the different regimes where there are consecutive sentences which straddle the date line. This power is being taken to be able, when fully commencing the relevant provisions of the Criminal Justice Act 2003 and fully repealing the 1991 provisions under Section 336 of the Criminal Justice Act 2003, to restate in the Criminal Justice Act 2003 the parts of the 1991 Act which need to be saved.

273. This will tidy up and simplify the provisions so they can be operated in one Act without the current difficulties and the impenetrably complex layers of legislation. This is suitable to be done by delegated legislation as it will be restating the current applicable law. It will apply some of the changes to the 2003 Act contained in this Bill to the 1991 Act regime, without further amendment of the 1991 Act and a further layer of transitional provision. The power will not be creating a new regime but effectively putting all the regimes in one place making them easier to operate and understand.

274. The power will be amending primary legislation, so the affirmative resolution procedure is appropriate.

CHAPTER 5

DANGEROUS OFFENDERS

Clause 117: Power to change test for the release on licence of certain prisoners

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary Procedure:</i>	<i>Affirmative Resolution</i>

275. Clause 117 provides a power for the Secretary of State to change the release test applied by the Parole Board for the initial release of a prisoner serving an indeterminate sentence for public protection (IPP) under section 225 of the Criminal Justice Act 2003 ("2003 Act") (release for which is governed by section 28 of the Crime (Sentences) Act 1997²⁹) or the new determinate extended sentence (sections 226A and 226B) inserted into the 2003 Act by the Bill (release for which is under the new section 246A as inserted by the Bill).

276. The power allows the Secretary of State to make an order setting out the conditions under which the Parole Board release of prisoners serving IPP sentences or the new extended sentence. The conditions may be either requirements that must be satisfied for release to be directed or requirements that must be satisfied for release to be refused. The power allows for consequential amendment of the sections which would need to be altered to achieve the change.

277. For the following reasons we believe that this is a suitable delegation.

278. Currently the Parole Board direct the release of life prisoners, certain determinate sentence prisoners whose offences were committed before 4 April 2005 (1991 Act prisoners), some extended sentences under the 2003 Act and all recalled prisoners who are not subject to automatic release. The current test for IPP prisoners is the same as that for lifers and this has been adopted for the new determinate extended sentences. However, there is no release test set out in legislation for release of 1991 Act prisoners. Nor is there any legislative Parole Board release test for recalled offenders serving any type of sentence. Therefore, there it is not deemed necessary to have a release test set out in primary legislation.

279. It is not clear whether a release test set for indeterminate sentences is suitable for determinate sentences where the considerations will be different (if not released early by the Parole Board release will at some point become automatic). It is also not clear that the current test for IPP's is the right test when the release rate of such prisoners is considerably lower than that of life sentence prisoners where the same test is applied. In the sentencing Green Paper we raised the issue of whether the Parole Board's test for release in these cases was the right one, and committed to explore further whether the current release test for IPPs (and consequently now the new extended determinate sentence) ensures effective public protection while allowing offenders to demonstrate that they can be safely managed in the community.

²⁹ 1997 c.43

In the interests of justice we would want to be able to respond swiftly to any conclusion that that the release test should be revised so that different conditions can be satisfied.

280. Changing the release test will not change the parameters of the sentence set by the court. Nor will it change the eligibility points for release which are set out in the primary legislation. Although secondary legislation was deemed suitable to alter the proportion of a determinate sentence which must be served in custody (section 269 of the 2003 Act).

281. The affirmative resolution procedure is suitable because exercise of the power will amend primary legislation.

CHAPTER 6

PRISONERS ETC

Clause 118: Employment in prisons etc

Power conferred on: Secretary of State

Power exercisable by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

282. Clause 118 gives the Secretary of State a rule-making power under the Prison Act 1952, and amends the existing powers in section 47 of that Act. The powers provide for the employment of prisoners and persons in Secure Training Centres and Young Offender Institutions (YOIs).

283. The powers in new section 47A of the Prison Act 1952 allow the Secretary of State to provide for the employment of prisoners and the making of payment to them for such work including making deductions from, reductions in and levies on the earnings of prisoners and persons aged 18 or over in YOIs. The power also provides a non-exclusive list of the purposes to which such deductions etc. may be put. These are new powers to be conferred on the Secretary of State.

284. The Clause confers rule making powers regarding the operation of the scheme, For example, the recipients of the deductions may change over time, given changes in the prison regime and changing political views on prisoner reparation. It will therefore be necessary to have the option to be more flexible about who benefits from this provision, and for the terms on which prisoners are employed and do paid work, and the provisions regarding deductions themselves. Flexibility is therefore desirable.

285. The power in the Prison Act 1952, section 47 has been exercised to make the Prison Rules 1999 and similar rules exist in respect of YOIs. These Rules set out detailed schemes for regulating prisons and YOIs, and it is sensible to use the same legislative framework for this scheme.

286. The current rules are made under the negative resolution procedure and the new power is no more controversial than the matters dealt with under the current rules. Therefore, the new power for the rules would be suitable for scrutiny by the negative resolution procedure by Parliament.

CHAPTER 7

OUT OF COURT DISPOSALS

Penalty notices

Clause 121 and Schedule 14: Penalty notices for disorderly behaviour

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

287. Clause 121 gives effect to Schedule 14 of the Bill. The Schedule amends Chapter 1 of Part 1 of the Criminal Justice and Police Act 2001³⁰, to allow Chief Officers of Police to set up a scheme under which persons given a penalty notice have the option of paying for and attending an education course instead of paying the penalty or asking to be tried.

288. The Schedule confers a number of new powers on the Secretary of State to make regulations in connection with education schemes prescribing matters such as: the information the Police must provide to offenders when offering them the option of an educational course, instead of payment of a penalty; the information about that person the Police may share with the course provider (and vice-versa); when an offender will be treated as having attended or not attended a course; allowing for extensions of time for attendance on a course; the consequences of the offender failing to attend; the minimum and maximum fee for a course that an offender may be required to pay (which will be lower than the penalty amount); directions to be given by a court when it sets aside a fine registered where a person fails to attend or complete a course. There is also a new power which allows the Secretary to State to make provision in regulations about the revocation of a penalty notice (whether or not it is a notice with an education option).

289. The Schedule sets out the broad framework for the scheme. Regulations will supplement the framework with technical details – for example, the level of fees within the parameters of the prescribed power. Future adjustments to such technical detail will be inevitable, and a delegated power is therefore suitable.

290. The regulations will be technical and will fill in the detail as set out by the statutory scheme. They will be relatively uncontroversial and, therefore, it is considered that parliamentary scrutiny under the negative resolution procedure is appropriate.

³⁰ 2001 c.16

PART 4

FINAL PROVISIONS

Clause 132: Power to make consequential and supplementary provision etc

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative and Negative Resolution

291. Clause 132 allows the Lord Chancellor or the Secretary of State, by regulations, to make consequential, supplementary, incidental or transitional provision in relation to any provision of Parts 1 to 3 of the Bill. Such regulations may amend, repeal, revoke or modify legislation and make transitional, transitory or saving provision for that purpose.

292. This power is needed in order make consequential and other provision after the Bill has been passed. The Bill puts in place a new system for legal aid which is quite different from the system under the 1999 Act. The new system is complex and the need for changes may not emerge until the system begins to be operated. Without this power primary legislation may be needed to give effect to those changes. The same is true of the sentencing provisions, which also include changes to areas of law which are complex, such as the provisions on release and recall of prisoners.

293. Under clause 132(5) and (6) any regulations will be subject to the negative resolution procedure unless they amend or repeal an Act, in which case they will be subject to the affirmative resolution procedure. Where the regulations are amending primary legislation, it is appropriate for the affirmative resolution procedure to be used. Where the regulations make other provision it is appropriate for the negative resolution procedure to apply.

Commencement

294. Clause 134 enables the Lord Chancellor, by order, to commence the provisions of the Act on such days as he may appoint.

