# Health and Social Care Bill 2011

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

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

## Purpose

2. The Bill contains provisions on a range of policies. It contains 281 clauses over twelve Parts, and has twenty-two Schedules. The Bill is intended to give effect to the policies requiring primary legislation that were set out in the White Paper *Equity and Excellence: Liberating the NHS*[1], which was published in July 2010.

## Provisions for delegated legislation

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

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

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

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

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

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

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

**The structure of this memorandum**

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

**PART 1: THE HEALTH SERVICE IN ENGLAND**

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

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

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

**The Secretary of State's powers**

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

10. The Bill maintains the overarching duty of the Secretary of State, which dates from the original NHS Act of 1946, to promote "a comprehensive health service designed to secure improvement in the physical and mental health of the people of England, and in the prevention, diagnosis and treatment of illness." It distinguishes for the first time between healthcare and public health, laying the way for the new Public Health England. It also sets clear constraints on the Secretary of State's ability to intervene in the NHS.

11. The Bill places the Secretary of State under an overall duty to act with a view to promoting the autonomy of arm's length bodies, commissioners and providers to exercise their functions as they see fit, so far as is consistent with the interests of the health service. This duty would require the Secretary of State, when considering whether to place requirements on the NHS, to make a judgement as to whether these were in the interests of the health service. If challenged, the Secretary of State would have to be able to justify why these requirements were necessary.

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

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

14. The Secretary of State's mandate to the Board would include the totality of the Government's requirements and expectations for the NHS over what is likely to be a three-year period, updated annually. For the first time the Secretary of State would be under specific duties in relation to the promotion of improvement in quality and outcomes, and the reduction of inequality in healthcare provision, and would set out objectives for the Board in these areas, including specific levels of improvement. The mandate would also include financial allocations to the Board. The Board would be under a duty to seek to achieve the objectives set for it in the mandate, and would have a duty to comply with any requirements imposed on it for that purpose.

15. Alongside the mandate, the Bill proposes a power for the Secretary of State to make "standing rules" through regulations, setting legal requirements for commissioners. These would, for example, provide the basis for the legal rights in the NHS Constitution that currently depend on directions to Primary Care Trusts and would also give power for Ministers to ensure compliance with European Union (EU) obligations. The Bill proposes a limited list of areas where standing rules can be made. Balancing the need for future flexibility with proper Parliamentary scrutiny, the Secretary of State would be able to make new standing rules in additional areas only through regulations made by the affirmative resolution procedure. Furthermore, the expectation is that the Secretary of State would make changes to the standing rules only at the same time as the mandate is set; where that is not the case, the Secretary of State would be obliged to lay a report in Parliament explaining why.

16. The overall framework proposed in the Bill is designed to give the NHS greater freedoms, improve transparency and help prevent political micro-management. The powers of the Secretary of State would be constrained and made more transparent. At the same time, political accountability to Parliament would be strengthened. This is illustrated by the use of the affirmative resolution procedure to scrutinise the Secretary of State's powers in a number of areas, including the power to confer additional functions on the Board and to extend the existence of new Special Health Authorities beyond three years.

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

a) setting out the standing rules which govern the exercise of functions by the Board and commissioning consortia;

b) setting the Board's annual mandate;

c) conferring additional functions on the Board;

d) conferring additional functions on Special Health Authorities;

e) directing Special Health Authorities;

f) limitations around establishing new Special Health Authorities;

g) EU obligations.

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

19. In addition to the standing rules, the Secretary of State would be required to publish and lay before Parliament before the start of each financial year a document to be known as "the mandate". The intention is that this document will set out what is expected from the NHS during that year and that once the mandate is published, the Board will be under an obligation to seek to achieve the objectives and comply with the requirements specified.

20. There would be a further regulation-making power to confer additional functions in relation to the health service on to the Board if these are connected to another function of the Board, subject to the affirmative resolution procedure.

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

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

23. The Secretary of State would have powers by regulations to require the Board and consortia to exercise functions connected to the health service for the purpose of implementing EU obligations, and to give them directions about this.

**The NHS Commissioning Board**

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

25. The Board would take on a number of functions in relation to the NHS which would include some currently carried out by the Secretary of State (such as issuing commissioning guidance and allocating NHS resources), some currently carried out by Strategic Health Authorities (such as commissioning national specialised services), some functions currently carried out by Primary Care Trusts (such as commissioning primary care services), as well as

some functions currently carried out by various arm's length bodies. The Board would also have some new functions including powers in relation to commissioning consortia.

26. The Board would have broad overarching duties to promote a comprehensive health service (held concurrently with the Secretary of State but not extending to public health) and to exercise its functions with a view to securing the provision of services for the purposes of the health service.

27. The intention is to establish an interim Board in 2011 as a Special Health Authority under existing legislation. The interim Board would carry out preparatory work during 2011/12, relying on the Secretary of State's general powers in section 2 of the NHS Act 2006.

**Commissioning consortia**

28. The intention is that commissioning consortia will be corporate statutory bodies, which must be constituted in accordance with the provisions of the Bill and established by the Board. Each provider of primary medical services (that is, each GP practice) will have to be a member of a commissioning consortium. Under the proposals in the Bill, each commissioning consortium will commission healthcare for patients registered with the GP practices in the consortium and for some other specified people (for example, patients living in a defined geographic area who are not registered with any GP practice). The intention is that the healthcare services that consortia will commission will include elective hospital care and rehabilitative care, urgent and emergency care, most community health services, and mental health and learning disability services. The default position would be that, if the Board does not have specific responsibility to commission a healthcare service, it will be for commissioning consortia to commission.

29. The Board would be responsible for holding consortia to account for stewardship of NHS resources, for the outcomes they achieve, and for discharging their other statutory functions. In turn, each consortium would have internal arrangements to ensure the accountability to the consortium of its members. These internal arrangements would be for consortia to determine, within a framework set out in this legislation. They would, for example, have to have an accountable officer, responsible for ensuring that the consortium complies with its financial duties and its duties in relation to quality improvement.

30. The intention is that consortia will generally have flexibility within the legislative framework to determine how they carry out their functions. There will, however, be a need to make further more detailed provision in secondary legislation regarding certain matters. These would include the circumstances where consortia have responsibility for commissioning services for persons other than those registered with the GP practices in the consortium, the constitution of consortia, and the process for establishment of consortia. Regulations would also set out matters such as the procedure that the Board must follow before it can exercise its power to intervene in the event of failure or the risk of failure. It is intended that the interactions between the Board and consortia would be conducted in a transparent "rules-based" manner, where consortia are aware of the expectations upon them and the Board has appropriately circumscribed powers: the prescription of further detail is considered necessary to achieve that. Some of the matters that would be provided for in delegated legislation are purely administrative in nature (for example, the date by which consortia must supply their commissioning plans to the Board, which is proposed to be the subject of a direction).

31. Other proposed delegated powers include powers for the Board to issue various forms of statutory guidance to consortia. These powers would be given to the Board primarily to ensure that it can fulfil its function of supporting consortia in the discharge of their various responsibilities. The guidance format would also mean that the information in question can be given to consortia in an accessible fashion. This statutory guidance would also form part of the clear, rules-based framework within which we envisage that consortia would act.

**Public Health**

32. The White Paper *Equity and excellence: Liberating the NHS* said that the Government would use the Bill to support the creation of a new public health service that could combine the work done now by a number of agencies to protect and improve the health of the people of England. Further detail on the new approach to public health and the creation of Public Health England is included within the public health White Paper *Healthy Lives, Healthy People: Our strategy for public health in England* (HM Government, November 2010[2]).

[2] http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353

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

34. The Bill would change the law so that, broadly speaking, the Secretary of State for Health would take responsibility for health protection and local authorities would take responsibility for health improvement (although local authorities also have responsibilities for health protection under existing legislation). Local authorities would be required to appoint a director of public health, acting jointly with the Secretary of State. The Secretary of State would have powers to make regulations to require local authorities to exercise his health protection functions, or to take prescribed steps in the exercise of their health improvement functions, subject to the affirmative procedure. The Secretary of State would also have powers to specify additional functions to be performed by directors of public health and to give directions to a local authority to investigate or take other action when the director may be failing in respect of certain functions. In addition, the Secretary of State would have powers specify in regulations when a local authority may make a charge for public health services (subject to the affirmative procedure), and to issue guidance and other documents to local authorities.

**Functions relating to mental health matters**

35. Two clauses in this Part deal with delegated powers:

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

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

*The health service: overview*

**Clause 5 and Schedule 1: The NHS Commissioning Board**

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

**Paragraph 11: Trust funds and trustees**

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

38. Paragraph 11 of the Schedule confers an order-making power on the Secretary of State similar to that in paragraph 13 of Schedule 2 to the NHS Act 2006, which currently enables the Secretary of State to provide for the appointment of trustees for Strategic Health Authorities. The power enables the Secretary of State to appoint trustees for the Board to hold property on trust. An order may make provision as to appointment and number of trustees and specify conditions of the appointments. It is necessary to take this power for the Secretary of State in relation to the Board, since it is possible that property might be given to the Board to be held on trust.

Reason for delegating the power

39. Delegating the power provides flexibility to appoint trustees if the need arises.

Reason for the selected procedure

40. The nature of the power (which is to make appointments of trustees, if necessary) does not seem to warrant use of a procedure that involves Parliamentary scrutiny.

**Paragraph 14: Provision of information to Secretary of State**

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

41. Paragraph 14 of the Schedule requires disclosure by the Board of such information, in such form, and at such time or within such period, as the Secretary of State may require, if the Secretary of State consider that information necessary for the purposes of the Secretary of State's functions in relation to health services.

Reason for delegating the power

42. The Secretary of State and the Department require information to enable the effective and efficient management of the Department's financial position against Departmental Expenditure Limits, Parliamentary Estimates and other controls, and also for the effective and efficient management of other Departmental business. In addition, the Department has a responsibility to provide information on bodies for which it is accountable to meet requirements that may be set by the Treasury and others on both financial and non-financial matters. The information required by the Department to fulfil these functions would change regularly over time.

Reason for the selected procedure

43. The power relates to the collection of routine information required by the Secretary of State to discharge the Secretary of State's functions effectively and efficiently. Such information would vary regularly over time in line with wider Government policy. This administrative function is not expected to be controversial, and so the Department suggests that Parliamentary scrutiny is not necessary.

**Paragraphs 15, 16 and 17: Accounts, Annual Accounts and Interim Accounts**

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

44. Paragraph 15 of the Schedule requires the Board to keep proper accounts and records in relation to the accounts. Paragraph 15(2) enables the Secretary of State, with the approval of the Treasury, to give directions to the Board as to

(a) the content and form of its accounts, and

(b) the methods and principles to be applied in the preparation of its accounts.

45. Paragraph 16 of the Schedule requires the Board to prepare consolidated annual accounts in respect of each financial year. This consolidated account will separately present the accounts of the Board itself (that is, as an arm's length body) and a consolidation of the individual consortia accounts and the Board's accounts. Paragraph 16(3) enables the Secretary of State to direct the Board regarding the period within which the Board must send copies of the consolidated annual accounts to the Secretary of State and the Comptroller and Auditor General.

46. Paragraph 17 of the Schedule enables the Secretary of State, with the approval of the Treasury, to direct the Board to prepare consolidated interim accounts in respect of a period specified in the direction. Paragraph 17(3) enables the Secretary of State to direct the Board regarding the period within which the Board must send copies of the interim accounts to the Secretary of State and, if the Secretary of State directs, the Comptroller and Auditor General.

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

48. It is possible that Parliament may also request in-year financial statements from the Department. Additional provision is therefore required so that the Secretary of State can require the Board to prepare in-year accounts and the interim accounts to be are audited if required.

Reason for delegating the power

49. Accounting requirements are likely to change over time, so it is not desirable to set them in primary legislation.

Reason for the selected procedure

50. Accounting requirements for individual public bodies deal with technical matters and are unlikely to be controversial, as reflected by the fact that it is standard practice to use directions for this purpose (as with other bodies established under the NHS Act 2006).

*Arrangements for provision of health services*

**Clause 9: Duties of consortia as to commissioning certain health services**
**Clause 10: Powers of consortia as to commissioning certain health services**

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

51. Clause 9 amends section 3 of the NHS Act 2006 and makes provision for the duties of consortia as to commissioning certain health services. Clause 10 inserts a new section 3A into the NHS Act 2006 and makes provision for discretionary powers of consortia to commission health services. Clause 9 inserts a regulation-making power at subsections (1B) and (1C) of section 3 of the NHS Act 2006. The powers in these new subsections of section 3 apply also to the discretionary power conferred by new section 3A, inserted by clause 10.

52. A commissioning consortium has responsibility for commissioning services for persons who are provided with primary medical services by a member of the consortium, in other words for people registered with the GP practices in the consortium. Regulations may provide that a consortium also has responsibility for persons who have a specified connection with the area of the consortium. It is envisaged that this will include people who live within this area and are not registered with any GP practice as well as people who are present within the area and need emergency care. Regulations may provide that consortia do not have responsibility for certain people or cases that would otherwise meet the criteria. This could include people who are resident in Scotland but registered with a practice that is a member of a consortium and people who are receiving primary medical services as 'temporary residents'.

Reason for delegating the power

53. The detail of the services to be provided and the groups to whom they must be provided (for example, those resident within the area of a consortium but not registered with a member of any consortium, and those present in the area of the consortium who need emergency care) would be set out in regulations. These powers fulfil a similar function to the current NHS Functions Regulations[3] (which specify the responsibilities of Primary Care Trusts and Strategic Health Authorities) and allow the detail specifying which consortium is responsible for providing services for which groups of patients to be set out clearly in a format that can be amended if necessary.

Reason for the selected procedure

54. The regulations would be subject to the negative resolution procedure. This means they can be amended to take into account emerging operational considerations as to the groups for which consortia should be responsible for commissioning services, whilst providing for a degree of Parliamentary oversight for this. This is consistent with the procedure for the current NHS Functions Regulations.

**Clause 11: Power to require the Board to commission certain health services**

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

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

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

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

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

58. Under subsection (1)(b), regulations under new section 3B may require the Board to arrange services for members of the armed forces and their families. The Ministry of Defence, through the Defence Medical Services, provides primary care services to all members of the armed forces and a small number of their families resident in England.

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

60. Under subsection (1)(c), regulations may require the Board to make arrangements for the provision of healthcare services to people detained in prisons in England or other

accommodation of a prescribed description. The provision of primary care services for prisoners in England is covered separately by the Board's functions in relation to primary care.

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

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

62. This regulation-making power could be used, for example, in relation to services such as those currently listed under Schedule 5 of the NHS Functions Regulations[4] and described as "specialised services" for rare conditions. These are currently commissioned nationally rather than regionally because of their low volume and high cost. The power could also be used to provide for the Board to commission services currently commissioned regionally by groups of Primary Care Trusts for each Strategic Health Authority region.

Reason for delegating the power

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

Reason for the selected procedure

64. The regulations would set out in more detail the descriptions of those services which the Board would be responsible for commissioning. Before making regulations under this power

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

the Secretary of State is required to consult such people as the Secretary of State considers appropriate. The negative resolution procedure is therefore considered appropriate.

**Clause 12: Secure Psychiatric Services**

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

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

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

67. It is intended that the first of these powers would be used in a limited fashion in relation to issues such as safety and security, and children visiting high secure hospitals. The existing directions issued in relation to high secure services by the Secretary of State are the Safety and Security in Ashworth, Broadmoor and Rampton Hospitals Directions 2000 (as amended) and the Visits by Children to Ashworth, Broadmoor and Rampton Directions 1999, which deal with risk assessment and safeguarding.

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

Reason for delegating the power

69. The use of directions provides flexibility in responding to changing circumstances, including within the criminal justice system.

Reason for the selected procedure

70. The use of directions enables the Secretary of State to make changes in a flexible and timely manner, and is consistent with the current approach, under which the Secretary of State may issue directions to Primary Care Trusts about the commissioning of such services and to the NHS trusts which manage the high secure psychiatric hospitals about safety and security at those hospitals. Under section 273 of the NHS Act 2006, such directions must be made in writing – this is the same procedure used for the existing directions.

**Clause 14: Regulations as to the exercise by local authorities of certain public health functions**

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

71. This clause inserts new section 6C into the NHS Act 2006 and confers two regulation-making powers on the Secretary of State. The first, in subsection (1), enables the Secretary of State to require local authorities to exercise any of the Secretary of State's public health functions – that is, the Secretary of State's duty to take steps to protect public health, the Secretary of State's power to take steps to improve public health, and the Secretary of State's powers to provide or arrange for the provision of services under Schedule 1 to the Act (such as contraceptive services). The second, in subsection (2), enables the Secretary of State to prescribe the steps which a local authority must take in the exercise of its public health functions, in particular to prescribe the steps it must take to improve the health of its population. The general effect is that this would enable the Secretary of State to prescribe steps, including services, functions and facilities relating to both health protection and health improvement which must be taken or provided by local authorities. Local authorities would be under a statutory duty to comply with the steps specified in the regulations.

72. The power is sufficiently wide to enable the Secretary of State to prescribe not only what steps may be taken, but the persons in respect of whom such steps must be taken. As an example, this would allow the Secretary of State to prescribe that a particular step (such as vaccination) must be taken but only in relation to vulnerable groups. The power could be exercised generally for all local authorities so as to establish a list of nationally required public health services but could also be exercised in relation to a particular local authority or group of local authorities.

Reason for delegating the power

73. This power provides a mechanism to establish a list of nationally required public health services that would be funded via the ring-fenced grant and to ensure that there is stable national provision of core services. This power would also enable flexibility in the future, for example by allowing the Secretary of State to prescribe specific public health emergency preparedness and response functions which must be exercised by local authorities.

Reason for the selected procedure

74. Regulations made under this power would be subject to the affirmative resolution procedure. The general policy is to allow local authorities flexibility to determine what is necessary to improve public health, and so the specific duties to provide services should be exceptional. Health protection is primarily a Secretary of State role, and the Secretary of State should be able to delegate responsibility to local authorities only after detailed Parliamentary scrutiny.

**Clause 15: Regulations relating to EU Obligations**

**Subsections (1) and (2)**

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

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

Reason for delegating the power

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

Reason for the selected procedure

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

**Subsections (3) and (4)**

***Power conferred on:*** *Secretary of State*

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

78. This clause also gives the Secretary of State power to direct the Board and consortia about their exercise of any delegated functions relating to EU obligations. This would allow the Secretary of State to indicate to the Board and consortia the manner in which the delegated functions should be carried out in order to remain compliant with EU obligations.

79. Directions could be addressed to an individual consortium, if it were considered to be in breach of EU obligations. This is one of only three instances in the Bill where the Secretary of State could, if necessary, direct an individual consortium (the others being the power to decide in local authority appeals against service reconfigurations and under the Secretary of State's emergency powers). This power is to allow the Secretary of State to address quickly those infractions which may be triggered by the actions of an individual consortium, but for which the Secretary of State ultimately remains responsible. Being able to act quickly in such a scenario is important to avoid the costs associated with full infraction proceedings against the UK.

Reason for delegating the power

80. The Secretary of State remains responsible for the UK's compliance with EU law. This means that it would be necessary for the Secretary of State to have power to issue directions on the manner in which functions should be carried out, to ensure that they were being discharged effectively and in accordance with EU law.

Reason for the selected procedure

81. The negative resolution procedure is appropriate for directions of this sort, where action may need to be taken promptly in order to ensure compliance with EU law.

**Clause 16: Regulations as to the exercise of functions by the Board or consortia**

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

***Parliamentary procedure:*** *Negative except for subsection (1)(7)(c), which allows for regulations to require the NHS Commissioning Board or commissioning consortia to do such other things, in the exercise of their functions, as the Secretary of State considers necessary for the purposes of the health service . Regulations made under this subsection would be subject to affirmative resolution procedure.*

82. This clause inserts into the NHS Act 2006 new section 6E, subsection (1) of which states that regulations (to be known as "standing rules") may be used to impose requirements on the Board and consortia. Standing rules that impose a requirement on consortia must apply to all consortia or to a group of consortia (more than one). The intention is that it will not be possible to use wording in the standing rules which would single out an individual consortium.

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

a) commissioning functions of the Board or consortia: the provisions in subsections (2) and (3) are intended to allow the continuation of the existing arrangements for Continuing Healthcare (where the NHS is responsible for delivering social care to individuals who have a primary health need) and the continuation of certain rights in the NHS Constitution, which are currently given legal effect through directions to Primary Care Trusts. For example, regulations under subsection (2)(c) would replicate the legal basis of the right to choice in the NHS Constitution, which is currently achieved through directions to Primary Care Trusts;

b) NHS contracts: (1) specifying matters which must be included in contracts which the Board or consortia enter into with providers of health care services, for example resilience planning and technical matters required commercially, such as payment terms and notice terms; (2) requiring the Board to draft terms and conditions relating to those matters;

c) the provision of information;

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

84. There is also a power to make regulations imposing such other requirements on either the Board or consortia as the Secretary of State considers necessary for the purposes of the

health service. This would support the Secretary of State to fulfil the duty to promote the comprehensive health service and to respond flexibly to changes in the system over time. Unlike the other standing rules, this regulation-making power would be subject to the affirmative procedure.

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

i. that any other person exercising functions in relation to the health service or providing services for its purposes is free to exercise those functions or provide those services in the manner that it considers most appropriate; and
ii. that unnecessary burdens are not imposed on any such person.

Reason for delegating the power

86. Most of the standing rules would be technical, and require more detail than would usually be included on the face of a Bill. The standing rules set out the basic framework for the commissioning system, so changes and adjustments could be required as the system develops. Delegating the power allows the Secretary of State to respond flexibly to these changes, if necessary.

87. The standing rules would allow for existing activities, such as Continuing Healthcare and certain rights under the NHS Constitution, to continue to function as they do at present. Continuing Healthcare and rights under the Constitution currently operate through directions given to Primary Care Trusts and local authorities, so the standing rules would enable these directions to be replicated for the Board and consortia through regulations.

Reason for the selected procedure

88. Most of the rules would be non-controversial, as they are an established part of the current system. The negative resolution procedure enables the legislation to be more easily adjusted to respond to differing or changing circumstances.

89. The only exception to this is the power to make regulations imposing such other requirements on either the Board or consortia as the Secretary of State considers necessary for the purposes of the health service. As this is potentially a broad power, it is subject to the affirmative procedure.

**Clause 17: Functions of Special Health Authorities**

**New subsection (1) in section 7 of the NHS Act 2006**

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

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

91. The Secretary of State would be able to direct a Special Health Authority to exercise functions of the Secretary of State or another body or bodies. If the Secretary of State planned to direct a Special Health Authority to exercise the function(s) of another body or bodies, the

Secretary of State would be under a duty to consult with that body or bodies prior to making the direction (see new subsection (1A)).

Reason for delegating the power

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

Reason for the selected procedure

93. The direction-making power replicates current arrangements and so the current provision is retained – see section 272(4) of the 2006 Act. The directions may be given in writing, without any Parliamentary scrutiny or control, or by regulations subject to the negative procedure. In general, the existing power is exercised by directions in writing rather than in regulations.

**New subsection (1B) in section 7 of the NHS Act 2006**

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

94. New subsection (1B) of section 7 of the NHS Act 2006 gives the Secretary of State the power to confer additional functions on a Special Health Authority, as specified in regulations, provided those functions are in relation to the health service. These would be new functions – that is, functions which, at the time of making the regulations, were not exercised by the Secretary of State or any other person or body. This is similar to the power to confer additional functions on the Board, set out in new section 13T of the NHS Act 2006, as inserted by clause 19, and provides flexibility to respond to changes over time.

Reason for delegating the power

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

Reason for the selected procedure

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

*Further provision about the Board*

**Clause 19: The NHS Commissioning Board: further provision**

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

**New section 13A: Mandate to Board**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Imposition of requirements equivalent to directions*
***Parliamentary procedure:*** *None*

98. New section 13A in the new chapter makes provision for the Secretary of State to publish and lay before Parliament before the start of each financial year a document to be known as “the mandate”. The Secretary of State’s mandate to the Board would include the totality of the Government’s requirements and expectations for the NHS over what is likely to be a three-year period, updated annually. The mandate would have to specify the objectives that the Secretary of State thinks that the Board should seek to achieve during the year and any requirements necessary for the purpose of ensuring that it meets those objectives.

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

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

Reason for delegating the power

101. The mandate would need to be updated on an annual basis to reflect current priorities for the NHS, so it would not be appropriate to set out this detail on the face of the Bill. Delegating the power allows the Secretary of State to respond flexibly to changing priorities over time.

Reason for the selected procedure

102. The mandate would be updated on an annual basis and regulations would not be suitable for a Government publication of this kind, so a power to impose requirements with no Parliamentary procedure is appropriate. However, the mandate would be subject to consultation and the Secretary of State would have to lay any document before Parliament, which would ensure that the Secretary of State remained accountable to Parliament in relation to the Board.

**New section 13S: Exercise of functions**

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

103. New section 13S confers a regulation-making power on the Secretary of State to provide that Special Health Authorities, consortia or any other body specified in the regulations (such as the Care Quality Commission) may exercise any functions of the Board jointly with it, or on behalf of it. For example, the regulations may provide that certain functions of the Board may be exercisable by the Care Quality Commission.

Reason for delegating the power

104. Regulations provide flexibility to specify what functions of the Board may be exercised with or by another body.

Reason for the selected procedure

105. This provision is similar to the current regulation-making power in section 14 of the NHS Act 2006 in respect of Strategic Health Authorities. The power concerns not, for example, what functions consortia should have but instead whether the bodies listed can exercise those functions jointly with the Board or on behalf of the Board. The negative resolution procedure nevertheless gives Parliament the opportunity to debate the matters covered by the regulations if it wishes to do so.

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

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

106. New section 13T would give the Secretary of State the power to confer additional functions on the Board, as specified in regulations. This provides flexibility to respond to changes over time.

107. Only powers conferred on the Secretary of State could be moved and the Secretary of State would not be able to confer powers on to the Board which were not connected to another function of the Board.

Reason for delegating the power

108. New functions may emerge, which would require the Secretary of State to empower the Board to act. In addition, it may emerge that functions retained by the Secretary of State could be better managed in future by the Board. In such situations, it would be appropriate to move functions without primary legislation.

Reason for the selected procedure

109. As this is potentially a broad power, it would be subject to the affirmative resolution procedure to ensure that Parliament is able to scrutinise any additional functions that the Secretary of State wishes to confer on the Board.

**Section 13U: Failure by the Board to discharge any of its functions**

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

110. New section 13U confers powers on the Secretary of State to direct the Board in cases of serious failure by the Board as to how to carry out any of its functions.

111. The power is similar to the Secretary of State's powers under section 82 of the Health and Social Care Act 2008 in relation to the Care Quality Commission. It enables the Secretary of State to give the Board a direction if, under exceptional circumstances, the Secretary of State considers the Board is failing or has failed to discharge any of its functions, or is failing or has failed to discharge any of its functions properly. The direction can direct the Board to discharge those functions in a manner and within a period specified in the directions. If the Board fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State.

Reason for delegating the power

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

Reason for the selected procedure

113. The power would concern an operational matter (how an existing function should be exercised in particular circumstances) rather than a matter of principle (such as what functions there should be). A direction-making power is therefore considered to be appropriate. This is consistent with similar powers of relevance to other arm's length bodies such as the Care Quality Commission.

**Clause 20: Financial arrangements for the Board**

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

114. This clause inserts new sections into the NHS Act 2006 that set out the financial arrangements of the Board. These sections include six delegated powers, at new sections 223B, 223C, 223D, 223E and 223G.

115. Subsection (4)(a) of new section 223B gives the Secretary of State a power to direct the Board as to the maximum sum that may be spent on matters relating to administration by both the Board and consortia taken together. Regulations would set out what are to be considered as administrative matters. Under subsection (4)(b) of new section 223B the Secretary of State may also direct the Board as to how much it may spend on such matters.

116. Subsection (5) of new section 223B gives the Secretary of State a power to give directions to the Board with respect to the payment of sums by it to the Secretary of State in respect of charges or other sums referable to the valuation or disposal of assets.

117. New section 223C gives the Secretary of State the power to direct that the Board's use of resources in a given financial year must not exceed a specified amount. The Secretary of State may change the amount, either with the Board's agreement or in exceptional circumstances.

118. Subsection (2) of new section 223D gives the Secretary of State direction-making powers to determine what is and what is not to count as expenditure when calculating whether the Board has exceeded the amount allotted to it for a particular financial year under new section 223B. This power is similar to that which the Secretary of State currently has in relation to Strategic Health Authorities and Special Health Authorities under sections 224 – 227 of the NHS Act 2006.

119. Subsection (3) of new section 223D gives the Secretary of State a power (similar to that in section 226(7)(c) of the 2006 Act) to determine in directions the extent to which, and the circumstances in which, sums received by the Board under new section 223B but not yet spent must be treated for the purposes of this section as part of the expenditure of the Board, and to which financial year's expenditure they must be attributed.

120. Subsection (4) of new section 223D gives the Secretary of State a power to give directions as to the purposes for which the Board must use banking services specified in the direction in respect of any monies allotted and any balances held.

121. New section 223E gives the Secretary of State a power to give directions that specify what uses and descriptions of resources must, or must not, be taken into account by the Board in its requirement to keep within its resource allocation for a financial year.

122. Finally, subsections (1) and (2) of new section 223F place duties on the Board to ensure its capital expenditure and revenue expenditure do not exceed sums specified by the Secretary of State. The Secretary of State may vary the sums specified under subsections (1) and (2). Subsection (5) of new section 223F gives the Secretary of State a direction-making power in relation to the types of expenditure which must or must not be considered under subsections (1) and (2). Under subsection (3) the Board must also ensure its expenditure on administrative matters (as defined in regulations under subsection (4) of new section 223B) does not exceed

the amount specified by the Secretary of State in directions under subsection (4)(b) of new section 223B.

Reason for delegating the power

123. These direction-making powers are necessary in order for the Secretary of State to provide the required level of detail as to what will be taken into account in determining whether the Board remains within its expenditure and resource limits. This is a level of detail which is subject to change and updating and would not be appropriate for inclusion in primary legislation. It is necessary for the Secretary of State to have powers concerning payments to be made by the Board to the Secretary of State to ensure that capital receipts in particular are applied to the best effect within the wider Department and NHS. The power also prevents sums of cash accumulating in the Board in situations where the Board may not have either the need or the authority to spend that cash. The powers under new section 223B to set limits in relation to administrative costs are necessary to ensure that the Department of Health does not exceed the limits set the Treasury, in line with Government commitments in this area. It is a Treasury requirement that all NHS money is held in Government Banking Service (GBS) accounts. However, under the proposals in the Bill, the Secretary of State will not have general powers of direction over the Board. The Government needs to ensure that all allocations to consortia are held by the Board in GBS accounts, that these are the accounts in which the Board keeps its allocation and that the monies allocated to the Board stay in GBS accounts until paid out (although there may be circumstances in which other commercial accounts may be held). This money is held in the GBS to offset the national debt.

Reason for the selected procedure

124. The directions would deal with non-contentious financial details and it is not considered necessary to require Parliamentary scrutiny. For the power of direction under subsection (4) of new section 223D, it is a Treasury requirement that all NHS money is held in GBS accounts and therefore it must be a Secretary of State responsibility to ensure that the Board uses this service. For this reason, it is the Secretary of State who must hold this power. It is not considered appropriate to set these matters out in regulations, as the Secretary of State might need close control over what monies are to be held by the Board in the GBS to offset the national debt.

*Further provision about commissioning consortia*

**Clause 21: Commissioning consortia: establishment etc**

125. This clause inserts into Part 2 of the NHS Act 2006 a new Chapter A2, which contains the following delegated powers.

**New section 14A: General duties of Board in relation to commissioning consortia**

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

126. This power allows the Secretary of State to specify, in writing, the day from which the Board must ensure that all providers of primary medical services (that is, all GP practices) are members of a consortium and from which the Board must also ensure that the areas specified in each consortium's constitution cover the whole of England and do not coincide or overlap. This would ensure that there are no gaps in the coverage of commissioning arrangements when Primary Care Trusts are abolished and that there is no ambiguity as to which consortium is responsible for a person who, for instance, is not registered with a GP practice or who needs access to emergency care. The specified day would mark the end of the 'initial period' – the transition period – defined in Paragraph 1 of Schedule 6.

Reason for delegating the power

127. The transitional arrangements for consortia are clearly described in Schedule 6. The need to specify a date from which the Board can carry out its functions, moving out of transition, is a necessary administrative step once the system of consortia is established.

Reason for the selected procedure

128. Given the administrative nature of the step, it is considered that a specification in writing is sufficient. The powers that the Board would exercise from this date are subject to Parliamentary scrutiny as they are outlined on the face of this Bill.

**New section 14B: Applications for the establishment of commissioning consortia**

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

129. New section 14B(3)(c) enables the Board to specify other information which must accompany an application for establishment as a consortium in addition to the proposed constitution of the consortium required under new section 14B3(a) and the name of the person whom the consortium wishes the Board to appoint as its accountable officer under new section 14B(3)(b).

Reason for delegating the power

130. This power would be used by the Board to specify clearly the additional documents and information that the Board would expect to see as part of the application process. It is appropriate for the Board, rather than the Secretary of State, to have this power, so that the Board can obtain through the application process the information it needs to make decisions about a prospective consortium's readiness to become established.

Reason for the selected procedure

131. This is an administrative power, designed to assist the Board in discharging its functions as conferred by new section 14C which sets out the matters that the Board would need to be satisfied of before granting an application. Given the administrative nature of the task, it is considered that a specification in writing would be appropriate.

**New section 14C: Determination of applications**

***Power conferred on****: Secretary of State*

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

132. The matters in relation to which the Board, if satisfied, would need to grant an application for the establishment of a consortium are set out in subsection (2)(a)-(e) of new section 14C. Regulations under subsection (2)(f) may set out other matters that the Board must be satisfied about.

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

134. Regulations under these powers would also set out procedural matters. It is intended that these would include matters such as how applications may be made, the manner in which decisions are to be notified, and overall timetables for the process.

Reason for delegating the power

135. This power enables the Secretary of State to prescribe, through regulations, further matters that the Board must be satisfied of when determining an application for establishment as a consortium, factors that the Board must and may take into account in its decision-making in relation to determining applications for establishment, and the procedure for making and determining applications. Secondary legislation is appropriate for setting out the detail of the establishment process. It also provides the necessary flexibility to amend the requirements and procedures to respond to experiences gained during the early stages of the establishment of consortia and any further changes that may become necessary.

Reason for the selected procedure

136. The principal matters that the Board is to be satisfied of before it must grant an application for establishment are already set out on the face of the Bill. The regulations could add additional matters, set out the evidence to be provided to the Board, and deal with the process for application. The last two of these are in part procedural matters. Negative resolution procedure ensures that there can be Parliamentary debate of the regulations if necessary.

**New section 14E: Applications for variation of constitution**

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

137. Under new section 14E a consortium may apply to the Board to vary its constitution. Subsection (3) provides that regulations may make provision about the procedure to be followed in relation to applying for, and determining applications for, a variation, and the circumstances in which the Board must or may grant, or must or may refuse, an application, and the factors that the Board must or may take into account in determining whether to grant such an application.

Reason for delegating the power

138. The circumstances in which the Board must or may grant or refuse an application and the factors that it will be appropriate for the Board to take into account when deciding whether to grant a consortium's application to vary its constitution are likely to be broad in scope and will need to take into account a variety of operational and administrative matters. This regulation-making power allows the Secretary of State to determine the circumstances where changes to a constitution on the application of a consortium must or must not be made – and under what other circumstances the Board itself has the power to grant or refuse a change to a constitution at its own discretion**.**

Reason for the selected procedure

139. The regulations will deal with administrative matters, and the negative resolution procedure allows for Parliamentary debate should that be required.

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

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

140. New section 14F gives the Board powers to vary a consortium's constitution otherwise than on application by the consortium. The Board may change the area specified in a consortium's constitution and may add, or remove, a provider of primary medical services to or from a consortium's membership list. The Board can exercise this power only after consulting the consortium concerned and any other consortium that the Board considers might be affected by the variation. Powers can be exercised only if the consortium whose constitution is to be varied agrees to the change, or if the Board considers that it is necessary to make the variation to discharge its duties under new section 14A. There is a power in subsection (5) to make regulations to confer powers on the Board to vary the constitution of a consortium and to make provision as to the circumstances in which those powers are exercisable and the procedure to be followed before they are exercised.

Reason for delegating the power

141. Under the proposals in the Bill, the Board will have a duty to ensure a comprehensive system of commissioning consortia across the country. In order to fulfil that duty, the Board might need to make changes to the membership or to the area of a consortium, for instance where a GP practice ceases to operate and arrangements are made for a new GP practice to take over responsibility for those patients. Where possible, it would be desirable for any such changes to be made by agreement with the relevant consortium. Where it is necessary for the Board to make such arrangements without the consortium's agreement, it is considered appropriate to allow for regulations to set out the circumstances and procedure for doing so and to grant the necessary authority for the Board to do so. Setting these matters out in regulations would allow these requirements to evolve quickly, where necessary, to take account of operational experience.

Reason for the selected procedure

142. We envisage that the regulations would largely concern operational or administrative matters, so the negative resolution procedure would allow for the appropriate degree of Parliamentary scrutiny.

**New section 14G: Mergers**

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

143. Subsection (2)(b) of new section 14G means that the Board may specify, in a document, other information that consortia must produce when applying to merge, that is, for the consortia to be dissolved and for a new consortium to be established in their place. This information is in addition to the proposed consortium's constitution and the proposed Accountable Officer for the new consortium. The other information that the Board might specify could be, for example, an explanation as to why the applicant consortia consider it is appropriate for them to merge to form a new consortium, and the timeframe for the proposed merger.

Reason for delegating the power

144. It is likely that the Board would want to specify the operational and administrative matters that it needs to know about before it allows a new 'merged' consortium to be established. The proposed power would enable the Board to produce a document specifying these matters. It would also provide flexibility to modify these requirements quickly to take account as necessary of any unforeseen operational or administrative issues .

Reason for the selected procedure

145. We envisage that the regulations would largely concern operational or administrative matters, so the negative resolution procedure would allow for the appropriate degree of Parliamentary scrutiny.

**New section 14H: Dissolution**

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

146. New section 14H provides for a consortium to apply to the Board to be dissolved. Regulations under subsection (2) may make provision about the circumstances in which the Board must or may grant, or must or may refuse, applications under this section; the factors that the Board must or may take into account in determining whether to grant those applications; and the procedure for the making and determining of applications.

Reason for delegating the power

147. This mirrors the regulation-making power in new section 14E to vary the constitution of a consortium on application. It is considered important that interactions between consortia and the Board are conducted in a transparent rules-based manner, so that consortia are aware of the expectations upon them and that there are appropriately circumscribed powers for the Board.

Reason for the selected procedure

148. We envisage that the regulations would largely concern operational or administrative matters, so the negative resolution procedure would allow for the appropriate degree of Parliamentary scrutiny.

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

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

***Parliamentary procedure:*** *None*

149. Where dissolutions of commissioning consortia take place (whether as a result of a merger under new section 14G or application under new section 14H), or variations to a constitution are made (under new sections 14E or 14F), property and liabilities, including in relation to employment, might need to be transferred between consortia or between consortia and the Board. New section 14I gives the Board the power in such cases to make property and staff transfers scheme transferring liabilities, to the Board or another consortium. Part 3 of Schedule 2 to the Bill, which would become Schedule 1A to the NHS Act 2006, contains further provisions about the scope of these transfer schemes (see below).

Reason for delegating the power

150. Where a consortium's constitution is varied (for instance, because there is a change in the membership of the consortium), or where a consortium is dissolved, it may be essential for legal and operational purposes to transfer property or staff, or associated rights or liabilities, to the Board or another consortium. As the national body responsible for oversight of the commissioning function, the Board will be best placed to determine what transfers are needed and will need powers to effect such transfers swiftly.

Reason for the selected procedure

151. Transfer schemes provide a clear written record of the detail of the transfer. The power would be similar to existing powers under the NHS Act 2006, whereby the Secretary of State can transfer property from a Primary Care Trust to an NHS Trust by Transfer Order. This process is not currently subject to Parliamentary procedure.

**New section 14J: Guidance about the establishment of commissioning consortia, etc**

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

152. New section 14J gives the Board powers to publish guidance about the making of applications for establishment as a consortium, including guidance as to the form, content and publication of constitutions. This would enable the Board, for instance, to issue guidance on how good governance principles (such as the Nolan principles of public life) might be reflected in a consortium's constitution. The Board could also issue guidance regarding applications by consortia to vary their constitution, merge, or be dissolved. There would be no legal obligation on consortia or prospective consortia to take this guidance into account, but failure to do so might affect their ability to prepare themselves to apply successfully for establishment, or to vary their constitution, merge, or be dissolved.

Reason for delegating the power

153. The power would enable the Board to provide guidance in an accessible format and to ensure a smooth and efficient process for making and determining applications.

Reason for the selected procedure

154. Given the procedural content of the guidance, it is considered unnecessary for the guidance to be subject to procedures for Parliamentary scrutiny. It is appropriate that the Board, as opposed to the Secretary of State, has the power to issue guidance as, under the proposals in the Bill, the Board will be responsible for granting consortia's applications for establishment. The Board will need to have the ability to set out the procedure for making applications so that it can set up and run an efficient process.

**Schedule 2**

155. Clause 21 also introduces Schedule 2 to the Bill, which inserts a new Schedule 1A into the NHS Act 2006. The schedule includes the following delegated powers.

**Paragraph 8: Staff**

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

156. Paragraph 8 of the Schedule provides a power for the Secretary of State to make regulations setting out the information that consortia must publish in relation to the remuneration of their employees.

Reason for delegating the power

157. The regulation-making power would enable the Secretary of State to ensure transparency about remuneration of employees of consortia and for the required information to be updated to keep pace with good practice.

Reason for the selected procedure

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

**Paragraph 8: Staff**

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

159. Paragraph 8(4) of Schedule 1A gives the Board a power to publish guidance for consortia on the determination of remuneration for their employees.

Reason for delegating the power

160. The power to publish guidance would enable the Board to provide accessible and up-to-date information, for instance benchmarking data on senior pay, to support consortia in making decisions on remuneration. This complements the regulation making power at paragraph 8(3) that enables the Secretary of State to specify the information that consortia must publish about the remuneration of their employees.

Reason for the selected procedure

161. Given the technical content of the guidance, it is considered unnecessary for this to be subject to procedures for Parliamentary scrutiny.

**Paragraph 12: Accounts and audits**

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

162. Paragraph 12 of the Schedule gives the Board powers to direct a consortium, with the approval of the Secretary of State, to prepare accounts in respect of a period or periods of time. Powers are conferred on the Board to direct consortia, with the approval of the Secretary of State, as to the form and content, and methods and principles, for the production of their accounts. The Board may also direct consortia as to timescales for audited annual accounts, audited interim accounts, and any other accounts, including unaudited annual accounts, to be submitted to it. The Board can also require in-year accounts from consortia and can direct that these are audited if required.

Reason for delegating the power

163. The Secretary of State will remain accountable to the Treasury for the Department of Health's Departmental Expenditure Limit, the annual spending limit imposed on a government department arising from its agreed, long term financial settlement with the Treasury. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in the annual Financial Reporting Manual. In turn, the accounts of all bodies that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. The Board will therefore require powers to ensure that consortia's accounts are prepared in accordance with the requirements approved by the Secretary of State. Consistency of preparation of accounts throughout the healthcare system will be required in order for accurate consolidation of those accounts to be conducted.

164. It is possible that Parliament may also request in-year financial statements from the Government. Additional provision is therefore required for the Board to be able to require in-year accounts from consortia and to direct that these are audited if required.

Reason for the selected procedure

165. This is a narrow and specific power of direction in a technical area and a Parliamentary procedure is not thought to be necessary.

**Paragraph 13: Provision of financial information to Board**

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

166. Paragraph 13 of the Schedule gives the Board a power to direct a consortium to supply it with information about that consortium's income or expenditure or its use of resources, within a specified period. The required information may include estimates of future consortium income, expenditure or use of resources.

Reason for delegating the power

167. There is a wide range of financial information which may currently be required from NHS bodies during the financial year and which will in future continue to be required, including from consortia. This information is necessary to enable the Board, and in turn, the Secretary of State, to comply with Parliamentary and Treasury reporting and budgetary requirements.

Reason for the selected procedure

168. The proposed procedure is considered appropriate as the directions would concern technical and administrative matters.

**Paragraph 14: Provision of information required by the Secretary of State.**

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

169. This paragraph would require disclosure by all consortia to the Board of such information, in such form, and at such time or within such period, as the Secretary of State may require, if the Secretary State considers that information necessary for the purposes of the Secretary of State's functions in relation to the health service. It would not be possible for the Secretary of State to request information from a single consortium or a group of consortia, as the paragraph provides that the Secretary of State must exercise the power in the same way in relation to all consortia – for example, making the same request for information to all consortia.

170. The paragraph would further require the Board to provide, to the Secretary of State, any information obtained from consortia under the power above.

Reason for delegating the power

171. The Secretary of State and the Department require information both to enable the effective and efficient management of the Department's financial position against Departmental Expenditure Limits, Parliamentary Estimates and other controls and for the effective and efficient management of other Departmental business. In addition, the Department has a responsibility to provide information on bodies for which it is accountable to meet requirements that may be set by the Treasury and others on both financial and non-financial matters.

172. The information required by the Department to fulfil these functions would change regularly over time.

Reason for the selected procedure

173. The power relates to the collection of routine information required by the Secretary of State to discharge his functions effectively and efficiently: such information would vary regularly over time in line with wider Government policy. This administrative function is not expected to be controversial, and so the Department suggests that Parliamentary scrutiny is not necessary.

**Clause 22: Commissioning consortia: general duties etc**

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

**New section 14P: Public involvement and consultation by commissioning consortia**

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

175. New section 14P sets out requirements for public involvement and consultation. Consortia must make arrangements to involve individuals to whom services are being or may be provided in planning commissioning arrangements; in developing and considering proposals for changes in the commissioning arrangements where those proposals would have a significant impact on how services are provided or the range of health services available; and in decisions affecting the operation of commissioning arrangements that would likewise have a significant impact. Under subsection (3), the Board may publish guidance for consortia on how to discharge their functions under this section, and consortia must, under subsection (4), have regard to any such guidance.

Reason for delegating the power

176. Under the proposals in the Bill, the Board has a duty to promote public and patient involvement in commissioning arrangements. This power is designed to help it discharge that function by giving guidance to commissioning consortia about how to carry out their functions in relation to public and patient involvement. The Board could, for instance, give guidance on effective ways of engaging and seeking views from members of the public, including how to engage people who do not regularly access healthcare services or who are from disadvantaged communities. The Board could also give guidance to help consortia decide in what circumstances the duty to involve might most appropriately be met by providing information and in what circumstances a consortium should actively seek people's views through consultation.

Reason for the selected procedure

177. Statutory guidance is considered an appropriate form for this delegated power as it allows the information to be conveyed to consortia in an accessible format, for instance by including case studies or best practice examples and by including links to other useful resources. The requirement to publish the document is considered to provide the necessary degree of transparency and scrutiny.

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

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

178. Regulations may be made under new section 14R to allow any prescribed functions of a consortium to be exercised jointly with a Local Health Board. Local Health Boards are the bodies responsible for commissioning and providing health services in Wales. Regulations may make provision for any such functions to be exercised by a joint committee of the consortium and the Local Health Board.

Reason for delegating the power

179. Regulations would provide flexibility to keep under regular review which functions of consortia may be exercised jointly with Local Health Boards.

Reason for the selected procedure

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

**New section 14U: Responsibility for payments to providers**

***Power conferred on:*** *NHS Commissioning Board*

***Power exercised by:*** *Specification in writing*
***Parliamentary procedure:*** *None*

181. New section 14U gives the Board the power to publish a document specifying circumstances in which a consortium is liable to make payments to a provider for services provided under arrangements commissioned by another consortium and how the amount of any payment is to be determined. A consortium is obliged to make payments in accordance with any such document published by the Board. The Board may, under subsection (6), also publish guidance to assist consortia in understanding and applying this written specification.

Reason for delegating the power

182. Regulations under clauses 9 and 10 would set out the legal framework as to which consortium is responsible for commissioning services for particular persons. In broad terms, these powers will be used to make provision akin to that in regulation 3(7)-(10) of the NHS Functions Regulations[5]. The policy intention is that the responsibility for payment for those services should also be clear and that there should be mechanisms in place to enable providers to recover payment from the appropriate consortium without placing undue burdens on consortia. It is intended that the general proposition should be that the consortium with responsibility for commissioning the service should have responsibility for paying for that service. As a matter of law it must be implied that, if a consortium has legal responsibility for the commissioning of a service unless otherwise provided, that consortium is legally responsible for payment for that service. However, there are to be exceptions to this and this provision would, for instance, enable the Board to specify that, where a person uses an urgent care service commissioned by a consortium other than the consortium that is ordinarily responsible for that person's healthcare, the cost of that service is charged to the latter consortium. Taking a delegated power to enable the Board to make the specification described above enables the Board to set out the detail of such arrangements and provides the flexibility to modify the details specified if changes are required.

183. The Board would not be obliged to adopt such arrangements. It could, for instance, decide that consortia should be left to agree mutual arrangements for sharing costs where

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

patients from a number of different consortia use the same urgent care service. The Board might be required to use such arrangements if circumstances show that such mutual arrangements are not operating effectively.

Reason for the selected procedure

184. The Board is considered the appropriate organisation to whom to delegate this power as the Board is to be responsible for ensuring that consortia work together effectively to commission services and manage their finances. A specification in writing ensures that the arrangements are set out clearly for all parties. Since the power is concerned with operational and administrative matters in the context of the responsibilities conferred by clauses 9 and 10, additional Parliamentary scrutiny is considered unnecessary.

**New section 14V: Guidance on commissioning by the Board**

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

185. Under the proposals in the Bill, a key function of the Board will be to provide support to consortia as consortia fulfil their commissioning functions. New section 14V provides that the Board must publish guidance for consortia on the discharge of their commissioning functions and that consortia must have regard to this guidance.

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

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

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

Reason for delegating the power

189. Giving the Board a duty to produce statutory guidance would help ensure that the Board is able to play its envisaged national leadership role, for instance in relation to promoting quality improvement, promoting public and patient involvement and patient choice, and reducing inequalities in access to healthcare and healthcare outcomes.

Reason for the selected procedure

190. Statutory guidance is an appropriate form for this delegated power as it allows the information to be conveyed to consortia in an accessible format. Given the content and detailed nature of the guidance and the provisions in the new section about how it is to be produced, a procedure involving Parliamentary scrutiny is considered unnecessary.

**New section 14W: Exercise of functions by the Board**

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

191. New section 14W provides that the Board may act on behalf of a consortium and arrange the provision of services if requested to do so by a consortium. Regulations may provide that the power does not apply to services or facilities of a prescribed description.

Reason for delegating the power

192. It is the intention that consortia have the flexibility to ask the Board to exercise functions on their behalf. The rationale for this is that there may be occasions where it is considered that

some services might be better commissioned on a national basis (for example, if it is decided that demand for a service becomes so low that only a limited number of treatment packages need to be commissioned across the country). However, it is considered appropriate that the Secretary of State should be able to circumscribe how far the Board takes on additional commissioning functions. The rationale for these reforms is that commissioning decisions should, as far as possible, be led by the primary care practitioners who best know the healthcare needs of their patients. This regulation-making power would enable the Secretary of State to ensure that responsibility for commissioning services remains, in the main, with consortia.

Reason for the selected procedure

193. Decisions about those services that consortia should not be able to arrange for the Board to commission are likely to involve considering a number of technical and operational factors. The regulations that give effect to those decisions are considered suitable for the negative resolution procedure.

**New section 14Y: Commissioning plan**

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

194. New section 14Y makes provision with regard to commissioning plans and reports. Section 14Y(1) stipulates that each consortium must prepare a plan before the start of each financial year to set out how it will exercise its functions. The plan must in particular explain how the consortium proposes to discharge its duties to seek continuous improvement in the quality of services (under new section 14L) and its financial duties (under new sections 223I to 223K). This plan must be published and sent to the Board before a date specified by the Board in a direction.

Reason for delegating the power

195. Under the proposals in the Bill, it will be a statutory duty for consortia to produce commissioning plans. As the Board will be the recipient of all consortia's commissioning plans, it will be necessary for the Board to be able to specify the date by which it must receive these plans. A definite date by which plans are required ensures that all consortia comply with the need to produce plans, which are an essential part of the commissioning process.

Reason for the selected procedure

196. It is considered unnecessary to require a procedure involving Parliamentary scrutiny of what would be essentially an administrative requirement.

**New section 14Z: Reports by commissioning consortia**

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

197. Under new section 14Z, each financial year a consortium must prepare and provide to the Board an annual report on how it has discharged its functions in the previous financial year. The report must in particular explain how a consortium has fulfilled its duties to seek continuous improvement in the quality of services (new section 14L) and its duties as to public involvement and consultation (new section 14P). It must also report on the outcomes of any public consultations that have taken place about proposed commissioning decisions. The consortium must publish the report and present it at a public meeting. Under subsection (3), the Board can give directions to consortia on the form and content of an annual report. For example, directions could specify that the report include a review of joint arrangements with local authorities. Under subsection (4), a consortium must give a copy of its annual report to the Board before a date specified by the Board in a direction.

Reason for delegating the power

198. A consortium's annual report provides a means by which it can describe how it has discharged its statutory functions. The Board is responsible for ensuring that consortia are discharging their functions, so it is suitable for the Board to be able to specify the nature and

specific content that the annual report needs to cover and the date by which it must be sent to the Board.

Reason for the selected procedure

199. The Board must be able to give directions about the annual report since the Board is the national organisation principally responsible for ensuring that consortia are discharging their statutory functions. Some aspects of the form and content of the annual report may need to be altered on an annual basis. Consortia's reports may also need to be consistent in terms of content and structure, if the Board considers this necessary to enable effective comparison between the reports of different consortia.

200. It seems unnecessary to require a procedure involving Parliamentary scrutiny of what would be essentially an administrative requirement.

**New section 14Z4: Power to require explanation**

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

201. New section 14Z4 sets out the Board's power, where the conditions in section 14Z1 are met, to require an explanation, either written or orally, at such time and place as the Board may specify, regarding any matter relating to the consortium's exercise of its functions. That explanation can include an explanation of how the consortium is proposing to exercise its functions.

Reason for delegating the power

202. The power to specify the time and place at which a consortium must give an explanation orally assists the Board to discharge its oversight and accountability functions in relation to consortia. The time and place may vary depending on operational circumstances and so it is appropriate for the Board to be able to exercise flexibility in this regard.

Reason for the selected procedure

203. It is considered unnecessary to require a procedure involving Parliamentary scrutiny of what would be essentially an administrative requirement.

**New section 14Z6: Power to give directions, dissolve consortium etc**

***Power conferred on:*** *NHS Commissioning Board*
***Power exercised by:*** *Directions in writing or scheme*
***Parliamentary procedure:*** *None*

204. New section 14Z6 sets out the Board's powers to intervene where it considers that a consortium is failing or has failed to discharge any of its functions, or there is a significant risk that it will fail to do so. The Board will need a range of powers, which are set out in new section 14Z6, to intervene in order to avoid financial or service failure.

205. The powers set out in new section 14Z6 are powers to:

- direct a consortium as to how to discharge specified functions and the period in which it is to do so;
- direct a consortium or accountable officer of the consortium to cease to perform any functions for a specified period, so that those functions can instead be performed on the consortium's behalf by the Board or by another consortium;
- direct another consortium to carry out those functions on the failing consortium's behalf;
- make a scheme to transfer, or provide for the transfer, to the Board or another consortium of any property or liabilities (including criminal) of a consortium that has been dissolved or varied by the Board in exercise of powers under subsections (6) or (7) of new section 14Z6.

206. Where the Board exercises the power to dissolve or vary the constitution of a consortium (in cases where the membership is to be changed for example), property and liabilities including in relation to employment, might need to be transferred from the consortium in question to the Board or another consortium. In such cases, subsections (11) to (13) of new section 14Z6 give the Board the power to make a scheme transferring property and liabilities to

the Board or another consortium. Part 3 of Schedule 2 to this Bill, which would become Schedule 1A to the NHS Act 2006, contains further provisions about the scope of transfer schemes.

Reason for delegating the power

207. Intervention powers may need to be exercised in a timely fashion so as to minimise the effects of a consortium's failure to discharge its duties. Directions in writing provide a means by which the Board can deploy intervention powers quickly when necessary. Where the power is exercised to dissolve or vary a consortium's constitution, it may be essential for legal and operational purposes to transfer property or staff, or associated rights or liabilities, to the Board or another consortium. As the national body responsible for oversight of the commissioning function, the Board would be best placed to determine what transfers are needed and would need powers to effect such transfers swiftly.

Reason for the selected procedure

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

**New section 14Z7: Procedural requirements in connection with certain powers**

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

209. In addition to the intervention powers in new section 14Z6, the Bill includes provisions in new sections 14Z3 and 14Z4 to require documents and information or to require explanation where the Board has reason to believe that a commissioning consortium might have failed, might be failing, or might fail, to discharge any of its functions. New section 14Z7 provides for regulations to be made setting out procedural requirements which the Board must follow before

exercising the powers in new sections 14Z3, 14Z4 and 14Z6. This allows the Secretary of State to set out a clear and transparent framework within which the Board must operate when exercising these powers.

Reason for delegating the power

210. The procedural requirements that the Board must fulfil before it dissolves a consortium are already set out in the Bill itself: the Board must consult with that consortium, its patients, any relevant local authority and any other persons the Board considers appropriate, and provide those persons with a statement explaining its proposed actions and reasons for them. The Board must also publish a report in response to this consultation and, where it decides to exercise its power to dissolve a consortium, explain in the report its reasons for doing so. Intervention by the Board to dissolve a consortium would be the most significant form of intervention, used rarely and only in severe circumstances, so it is appropriate to set out on the face of the Bill the procedural requirements the Board must follow before using that power.

211. Regulations would set out in more detail the procedure that must be followed before the Board can exercise its other intervention powers, which we envisage would be used in less severe circumstances.

Reason for the selected procedure

212. Setting out the detail in regulations would help ensure that the intervention regime is operated fairly and equitably, with all parties knowing what is expected of them. The negative resolution procedure provides a degree of oversight over production of the regulations, whilst also allowing changes to the intervention regime to be made relatively quickly when these are considered necessary.

213. The Board would be required to publish guidance as to how it proposes to exercise the powers conferred by these sections, to ensure that the intervention process is clear and consortia know how they will work with the Board to remedy any challenges should they arise. This will further help to ensure that the intervention process is as transparent and rules-based as possible.

## Clause 23: Financial arrangements for consortia

### New section 223(H): Means of meeting expenditure of commissioning consortia out of public funds

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

214. Under new section 223H(6), the Board may direct that sums paid to a consortium as part of an increase in a consortium's allotment are spent in a certain way. The direction would apply only to the amount by which the allotment has increased, rather than the total allotment. The Board may also direct that the consortium pay money to the Board in relation to costs that the Board incurs in respect of charges or other sums that relate to the valuation of disposal of assets.

Reason for delegating the power

215. The Board may direct that a specific increase in the allotment is spent in a certain way – for instance where additional funds have been made available to make a specific service or therapy more widely available. Such a power may be necessary particularly during the first few years of consortia development. For example, it provides reassurance that there is a delivery mechanism where the Board is required to deliver certain services and commitments by other government departments which fall to the NHS. It is necessary for the Board to have this power of direction, as the Board would be the organisation responsible for oversight of the functioning of consortia as commissioners and would be responsible for holding consortia to account for the management of their finances.

Reason for the selected procedure

216. Directions are an appropriate form for this power as the direction to the consortium is in relation to a specific amount of money to be used, or required by the Board from consortia, for a specific purpose.

**New section 223I: Financial duties of commissioning consortia: general**
**New section 223J: Financial duties of commissioning consortia: use of resources**
**New section 223K: Financial duties of commissioning consortia: restriction on certain types of expenditure**

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

217. Under powers provided by new sections 223I(2)(a), 223I(2)(b) and 223J(3), the Board may by directions determine what is and what is not to be treated as a sum allotted or received by a consortium when calculating whether the consortium has remained within the budget for the cash amount and resource limit allotted to it for that year.

218. Subsection (2)(c) of new section 223I gives the Board a power to determine in directions the extent to which, and the circumstances in which, sums received by consortia but not yet spent must be treated for the purposes of this section as part of the expenditure of the consortium, and to which financial year's expenditure they must be attributed.

219. Subsection (3) of new section 223J gives the Board a power to give directions that specify the uses and descriptions of resources that must, or must not, be taken into account by the Board in determining whether or not a consortium has met its requirement to keep within its resource allocation for a financial year.

220. New section 223K gives the Board powers to specify specific maximum sums that consortia must not exceed in terms of capital spend, revenue spend, or expenditure on prescribed matters relating to administration.

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

221. Delegating these powers is necessary in order for the Board to provide the required level of detail as to what will be taken into account in determining whether a consortium remains within its expenditure and resource limits. This is a level of detail which is subject to change and updating and would not be appropriate for inclusion in primary legislation.

222. The power is also necessary to ensure that consortia do not spend more than a specified amount of their funding on the administrative matters associated with the commissioning of healthcare services.

Reason for the selected procedure

223. The detail in these regulations is not contentious and not considered appropriate for Parliamentary approval.

**New section 223K: Financial duties of commissioning consortia: restriction on certain types of expenditure**

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

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

225. Subsection (3) of section 223K also gives the Secretary of State the power to set, and vary, in regulations what is meant by administration costs. We envisage that the specification would include the cost of employing or engaging staff to carry out commissioning functions and the cost of paying for an external organisation to provide commissioning support.

Reason for delegating the power

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

Reason for the selected procedure

227. The regulations will deal with an administrative and technical matter, and the negative resolution procedure ensures that it is subject to Parliamentary oversight.

**New section 223I: Secretary of State's power to direct consortia to use the Government Banking Service**

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

228. This provides a power of direction enabling the Secretary of State to give directions as to the purposes for which consortia must use banking services specified in the direction in respect of any monies allotted and any balances held.

Reason for delegating the power

229. It is a Treasury requirement that all NHS money is held in Government Banking Service (GBS) accounts. However, under the proposals in the Bill, the Secretary of State will not have general powers of direction over consortia. The Government needs to ensure that all allocations to consortia are held by consortia in GBS accounts, that these are the accounts in which consortia keep their allocation and that the monies allocated to consortia stay in GBS accounts until paid out (although there may be circumstances in which other commercial accounts may be held). This money is held in the GBS to offset the national debt.

Reason for the selected procedure

230. It is a Treasury requirement that all NHS money is held in GBS accounts and therefore it must be a Secretary of State responsibility to ensure that all consortia use this service. For this reason, it is the Secretary of State who must hold this power. It is not considered appropriate to set these matters out in regulations as the Secretary of State might need close control over what monies are to be held by consortia in the GBS to offset the national debt.

**Clause 24: Requirement for primary medical services provider to belong to consortium**

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

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

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

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

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

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

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

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

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

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

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

238. New section 89(1A)(a) is in support of the requirement that each contractor that provides services to persons who are registered as patients is to be required to be a member of a commissioning consortium. New section 89(1A)(b) provides that a contractor may be required to nominate an individual to act on its behalf in dealings with the consortium. This is to ensure that joining the relevant consortium is not a passive act but one that requires participation. New section 89(1A)(c) permits regulations to set out requirements about how the nominated individual carries out those dealings. This could include matters such as engaging regularly with all members of the contractor's practice both to provide information about the activities of the consortium and to provide an effective conduit for practice members to feed into the work of the consortium and to ensure the active participation of the contractor. New section 89(1A)(d) enables the regulations to provide that the contract holder delivers services under the contract with a view to supporting the consortium in the delivery of its functions and

meeting its obligations under its constitution, for example a requirement to have regard to the consortium's duty to manage its affairs effectively, efficiently and economically.

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

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

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

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

243. Currently, section 94 of the NHS Act 2006 provides a broad regulation-making power to impose general requirements that may be included in Personal Medical Services (PMS) agreements. Section 94(1) requires that the regulations must include a provision that participants other than the Board must be able to withdraw from the agreement if they wish. This provision is currently translated, as it relates to Primary Care Trusts and Strategic Health Authorities, into secondary legislation by paragraph 100 of Schedule 5 of the PMS Regulations.[7]

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

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

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

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

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

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

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

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

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

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

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

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

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

Reason for delegating the power

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

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

Reason for the selected procedure

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

*Further provision about local authorities' role in the health service*

**Clause 25: Other health service functions of local authorities under the 2006 Act**

**Dental public health**

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

257. Currently section 111 of the NHS Act 2006 contains a regulation-making power to prescribe dental public health functions, which must be exercised by primary care trusts. These functions include oral health promotion programmes, dental inspection of pupils in attendance at schools maintained by local education authorities and the provision of oral health surveys. Subsection (2) of clause 29 amends the section, so that the power is to prescribe that such functions are exercisable by local authorities rather than primary care trusts. Functions that are likely to be prescribed under this sub-section include school screening and oral health

Reason for delegating the power

258. The clause makes a change consequential on the abolition of Primary Care Trusts and transfer of their public health functions. Where the regulation-making power currently relates to Primary Care Trusts, the Bill would make it relate to local authorities. The dental public health needs of the population will not remain constant and regulations would allow for flexibility in deciding what dental services will be provided under a General Dental Services (GDS) contract and what services will be provided as part of the local authority dental public health functions to reduce oral health inequalities in that particular area.

Reason for the selected procedure

259. Much of the detail within the regulations will be technical but the negative resolution procedure will give flexibility for Parliament to debate any future amendments where necessary.

**Joint working with the prison service**

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

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

Reason for delegating the power

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

Reason for the selected procedure

262. Much of the detail within the regulations would be technical but the negative resolution procedure would give flexibility for Parliament to debate any future amendments where necessary.

**Clause 26: Appointment of directors of public health**

**New section 73A(1)(f)**

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

263. This clause inserts new section 73A into the NHS Act 2006, to provide for the appointment of directors of public health by local authorities, acting jointly with the Secretary of State. Paragraphs (a) to (f) of new section 73A(1) list the responsibilities of the director of public health which must be appointed under this section. The list covers the various public health functions in the Bill, but subsection (2)(f) also enables the Secretary of State to prescribe in regulations any other functions relating to public health to which the duty applies.

Reason for delegating the power

264. The power would enable the Secretary of State to add any public health functions conferred by regulations to the list of functions: for example, the function of providing vitamins under the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 (SI 2005/2362), which is currently conferred on Primary Care Trusts but is to be transferred to local authorities. There may be various functions set out in regulations, which need to be covered by this provision, and the list of such additional public health functions exercised by local authorities may change over time. The Department needs the flexibility to be able to include those functions in the responsibilities of the Director of Public Health.

Reason for the selected procedure

265. Public health functions under subsection 2(f) would enable the Secretary of State to prescribe in regulations any other functions which are to be the responsibility of the director. Those functions would typically be functions specified in regulations made subject to the negative procedure (such as the Healthy Start regulations). The procedure enables a degree of Parliamentary scrutiny.

**New section 73A(4)**

***Power conferred on:*** *Secretary of State*

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

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

267. The Secretary of State may exercise the power if the Secretary of State considers that the director of public health has failed or may have failed to discharge (or discharge properly) the relevant responsibilities. The Secretary of State would be able to use this power to direct the local authority to review and investigate the alleged failures and the director's performance in relation to those matters, or to consider instituting a process for disciplinary action. The Secretary of State's power would be limited to directing the local authority to consider particular remedial or disciplinary measures. The Secretary of State could also direct the local authority to report back on the action it had taken.

Reason for delegating the power

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

Reason for the selected procedure

269. The proposed power is a power of direction which is not subject to Parliamentary procedure. The power would enable effective governance and accountability between the Secretary of State and the directors of public health. It would not be necessary to legislate to achieve this. The power relates to individual authorities and the position of individual directors,

rather than being a power to make general provision for local authorities. Parliamentary scrutiny is neither appropriate nor necessary.

**Clause 27: Exercise of public health functions of local authorities**

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

270. This clause inserts new section 73B of the NHS Act 2006 which provides for a local authority to have regard to any document published by the Secretary of State for the purposes of this section and for the Secretary of State to issue guidance in relation to local authorities' public health functions. The powers would be used by the Secretary of State to publish a public health outcomes framework to which local authorities must have regard and to publish guidance. New section 73B(2) specifies the functions where the local authority must have regard to the document. The list covers the various public health functions in the Bill, but subsection (2)(f) also enables the Secretary of State to prescribe in regulations any other functions relating to public health to which the duty applies.

Reason for delegating the power

271. The power would enable the Secretary of State to add any public health functions conferred by regulations to the list of functions under which local authorities must have regard to the public health outcomes framework: for example, the function of providing vitamins under the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 (SI 20/2362), which is currently conferred on Primary Care Trusts but is to be transferred to local authorities. There may be various functions set out in regulations, which need to be covered by this provision, and the list of such additional public health functions exercised by local authorities may change over time. The Department needs the flexibility to be able to cover those functions in its guidance.

Reason for the selected procedure

272. Public health functions under subsection 2(f) would enable the Secretary of State to prescribe in regulations any other functions relating to public health to which the duty applies. Those functions would usually be conferred by regulations made subject to the negative resolution procedure which enables a degree of Parliamentary scrutiny.

*Functions relating to mental health matters*

**Clause 30: Approval functions**

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

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

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

275. At present, both these approval functions are delegated by the Secretary of State to Strategic Health Authorities by means of directions under section 7 of the NHS Act 2006[8]. The Secretary of State could also use directions under that section to delegate the functions to Primary Care Trusts or a Special Health Authority, but has chosen not to do so (although, in the case of approved clinicians, the Secretary of State's directions permit Strategic Health Authorities themselves to delegate the function to Primary Care Trusts).

[8] In respect of section 12 doctors, see regulation 3(3) of and Schedule 2 to (as well as regulation 7 of) the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002 (SI 2002/2375). In respect of approved clinicians, see The Approved Clinician (General) Directions 2008, available at www.dh.gov.uk/en/Healthcare/Mentalhealth/InformationontheMentalHealthAct/DH_106657

276. Under the proposals in the Bill, Strategic Health Authorities and Primary Care Trusts are to be abolished. New section 12ZA therefore empowers the Secretary of State to arrange with any willing party for that party to exercise either or both of the approval functions, in general or only to a more limited extent (for example, only in respect of a particular area of England). The section does not place any limits on who that other party might be. It could, for example, be a statutory regulatory body, a professional body, or even a body formed specifically for the purpose.

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

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

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

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

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

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

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

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

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

Reason for delegating the power

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

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

Reason for the selected procedure

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

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

**Clause 32: After-care**

***Power conferred on:*** *Secretary of State*

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

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

291. The main effect of this clause is to transfer the duty on Primary Care Trusts to commissioning consortia.

292. Currently, section 117(3) says that responsibility falls on the local social services authority and the Primary Care Trust (or Local Health Board) for the area in which the person concerned "is resident or to which he is sent on discharge by the hospital in which he was detained". Case-law[9] has established that, in most cases, this means that the duty falls on the local social services authority and Primary Care Trust (or Local Health Board) for the area in England or Wales where the person was resident before being detained (whether or not that body is responsible for other aspects of the person's health or social care.) If there is no such area, the duty falls on the authorities for the area to which the person is sent on leaving hospital.

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

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

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

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

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

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

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

298. As the Board's commissioning responsibilities under the NHS Act 2006 are to be determined in regulations, the Department considers it would be impracticable for the Board's

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

responsibilities under section 117 to be set out on the face of the legislation. Similarly, the distribution of responsibility between consortia under section 3 of the NHS Act may be determined, at least in part, in regulations. Again, the Department believes it would be impractical – and likely to lead to new anomalies – if there were not a corresponding regulation-making power in respect of section 117.

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

Reason for the selected procedure

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

*Miscellaneous*

**Clause 40: New Special Health Authorities**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *Special Health Authority establishment orders are subject to the negative resolution procedure, but affirmative resolution would be required to extend their existence (and primary legislation would be required to establish the Special Health Authority permanently as a Non-Departmental Public Body).*

301. This clause inserts new section 28A into the NHS Act 2006. New section 28A applies in relation to an order under section 28 of the National Health Service Act 2006, which provides for the establishment of Special Health Authorities. Section 28A proposes limitations on the

Secretary of State's power when establishing these bodies. The new provision would apply to all such Authorities established after this provision is brought into force.

302. Section 28A(2) and (3) require that a new Authority's establishment order must specify a date on which it is to be abolished, which must be within three years of establishment. Section 28A(3) gives the Secretary of State the power to vary that order so as to provide for the abolition of the Authority earlier or later than the day specified in the original order.

303. The Secretary of State would be able, by an order made in advance of the end of the specified period, to abolish a Special Health Authority at an earlier date, or make provision for the transfer of its staff, property or liabilities on abolition to a person other than the Secretary of State. Such an order would be subject to the negative procedure.

304. The Secretary of State would also be able to make an order for the body to continue to exist for a further period of up to three years, but such an order would be subject to the affirmative procedure. (Alternatively, the functions, staff and property of the Special Health Authority could be transferred to a new body established as a Non-Departmental Public Body: this would require primary legislation.)

Reason for delegating the power

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

Reason for the selected procedure

306. The negative procedure is the existing procedure for a Special Health Authority establishment order and continues to be appropriate. – it permits a degree of Parliamentary scrutiny. In order to discourage the proliferation of Special Health Authorities without

Parliament's agreement, however, the provision for extending their lifespan beyond the initial three year period is subject to the affirmative resolution procedure.

**Clause 41: Primary care services: directions as to exercise of functions**

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

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

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

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

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

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

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

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

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

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

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

313. New section 98A(3) provides that the Board may direct a commissioning consortium to exercise the Board's functions relating to the provision of primary medical services on its behalf and section 98A(4) provides that the Board may direct the consortium as to how it exercises any function. It is envisaged that the Board would be able to involve commissioning consortia in commissioning and managing primary medical care services to enable it to take advantage of local intelligence and the relationships between individual practices and the consortium of which they are members. It is envisaged that commissioning consortia will play some part in monitoring primary medical service contractors and that they may have a role in commissioning some enhanced primary medical services on behalf of the Board.

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

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

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

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

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

Reason for delegating the power

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

Reason for the selected procedure

320. These direction-making powers replace the existing direction-making powers in sections 7 and 8 of the NHS Act 2006. The directions made by virtue of these replacement provisions are expected to be those required to replace the directions currently made to Primary Care Trusts or Strategic Health Authorities under section 7 or 8. The current directions would need to be replaced following the abolition of Primary Care Trusts and Strategic Health Authorities and to take into account the fact that the Board would take over the commissioning of primary care. Detailed documents concerning matters such as those contained in the NHS (General Medical Services – Premises Costs) (England) Directions 2004 go beyond that which is normally set out in regulations. However, in respect of those delegated powers set out in section 98A(5) and 125(A), an element of Parliamentary scrutiny is required as the power relates to what can or cannot be delegated by the Board. Negative resolution procedure provides an appropriate level of scrutiny.

**Clause 42: Charges in respect of certain public health functions**

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

321. This clause inserts new section 186A into the NHS Act 2006 and provides for the making of charges in relation to steps taken under the proposed duty on the Secretary of State to take steps to protect public health (new section 2A) and the new local authority duty to take steps to improve the health of people in their area (new section 2B). Subsection (4) confers on

the Secretary of State the power to make regulations providing for the making and recovery of charges in respect of the taking of steps by a local authority under section 2A (by virtue of regulations under section 6(1) and steps under section 2B. Subsection (5) enables the Secretary of State to make provision as to how such charges may be calculated.

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

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

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

Reason for delegating the power

325. The Bill preserves the status quo by specifying that services under new section 2B are part of the health service and subject to the prohibition of charging in section 1(3) of the NHS Act 2006. However, the new power would allow the Secretary of State to specify circumstances where local authorities could charge for services where appropriate. The Department would intend to involve the Local Government Association in discussions on the type of services to be included. The power would allow the necessary flexibility to amend the circumstances and conditions where charging is appropriate without needing to amend primary

legislation. It would also provide flexibility to deal with new services or changes to services where charging may be appropriate. This approach is similar to other provisions of the NHS Act 2006 under which charges may be imposed by way of regulations for example prescription charges under section 172.

Reason for the selected procedure

326. Regulations made under this power would be subject to the affirmative resolution procedure. There is likely to be significant interest in allowing local authorities to charge for services which may currently be provided by the NHS free of charge and the Department considers that consideration by Parliament would be appropriate to ensure that the regulations are appropriate and proportionate. Most of the other powers in the Act which enable charging are subject to the negative resolution procedure. The Department has proposed a higher level of scrutiny for this power due to the transfer of functions from NHS bodies to local authorities which are independent, elected bodies.

**Clause 43: Pharmaceutical services expenditure**

327. This clause inserts new Schedule 12A to the NHS Act 2006.

**Paragraph 2: Pharmaceutical remuneration to be apportioned among consortia**

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

328. Paragraph 2 of the Schedule requires the NHS Commissioning Board, in the manner it sees fit, to determine the elements of pharmaceutical remuneration which it apportions amongst GP consortia in relation to the relevant financial year, to notify each consortium of its determination and for that determination to be treated as expenditure of the consortium for that year. Subparagraph 2(6) enables the Board to deduct the amount of that determination from the overall sum it would otherwise pay the consortium under section 223 H(1) and requires the Board, under subparagraph (8), to take account of the effect of this Schedule when paying that overall sum. Subparagraph 2(7) enables the Secretary of State to direct the Board not to

include certain elements within its determination of pharmaceutical remuneration. The effect of this new power would enable the Secretary of State to direct the Board as to elements of pharmaceutical remuneration which should remain the responsibility of the Board and not be apportioned among commissioning consortia.

Reason for delegating the power

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

Reason for the selected procedure

330. The directions and determinations made by virtue of these provisions are required to replace the designations and determinations currently issued to Primary Care Trusts which need to happen in respect of each financial year and may need to be amended in-year to reflect new developments (for example, if a new payment commenced during the relevant year). As such, they continue the existing level of scrutiny. No Parliamentary procedure applies in respect of their making. It would place an undue burden on parliamentary business and time to require additional scrutiny. Therefore, it is not considered appropriate to require that determinations by the Board and the Directions issued by the Secretary of State should be contained in a statutory instrument.

**Paragraph 3: Other pharmaceutical remuneration**

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

331. Paragraph 3 of new Schedule 12A provides that the NHS Commissioning Board may require reimbursement of elements of pharmaceutical remuneration which are not designated

elements under paragraph 2 or other remuneration of a prescribed description. The Board would, for example, be able to require reimbursement from an NHS Foundation Trust for the costs of the drugs prescribed by one of its employees which are dispensed in the community by a pharmaceutical contractor. However, a power is taken to prevent the Board from using this power to recover costs from a third party, if they are of a prescribed description.

Reason for delegating the power

332. The Department considers that there needs to be some control over the ability of the Board to recover costs for services that it pays for, so that for example there is no unintended recovery of costs by the Board, where the Secretary of State has determined that no recharging should take place. For example, prescriptions written in another part of the United Kingdom and dispensed in England are budgeted for as part of the NHS in England. It is therefore considered appropriate to be able to control the powers of the Board in this particular type of situation.

Reason for the selected procedure

333. Section 275 of the NHS Act 2006 provides that where a matter is prescribed in the Act then it must be prescribed in regulations made by the Secretary of State. The powers in paragraph 3 would be exercised through regulations for which the appropriate level of scrutiny is considered to be the negative resolution procedure. To require a higher level of scrutiny would impose an undue burden on Parliamentary business.

**Paragraph 4: Exercise of functions**

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

334. Paragraph 4 of new Schedule 12A to the NHS Act deals with the exercise of the functions of the Board regarding pharmaceutical services remuneration. This power enables the Board, with the consent of the Secretary State, to direct that a special health authority or

another person can carry out defined functions of the Board in relation to pharmaceutical remuneration specified in the Directions.

Reason for delegating the power

335. This would enable certain existing arrangements to continue. It is envisaged that some of the functions conferred on the Board by new Schedule 12A will continue to be carried out by the NHS Business Services Authority, for example payment of fees to and reimbursement of drug costs incurred by pharmaceutical contractors in their provision of services.

Reason for the selected procedure

336. As the current delegation to the NHS Business Services Authority of the payment of fees to and reimbursement of drug costs incurred by pharmaceutical contractors in their provision of services is not currently contained in a statutory instrument, no Parliamentary procedure is proposed in respect of the Board issuing Directions under this provision. We consider it would place an undue burden on Parliamentary business and time to require additional scrutiny. However, as the Secretary of State is required to consent to any direction by the Board, we consider that this provides an appropriate level of scrutiny for any such directions.

**Clause 45: Amendments related to Part 1 and transitional provision**

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

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

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

**Parts 1 to 3**

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

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

**Part 1**

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

342. Section 12B of the NHS Act 2006 enables the Secretary of State to make regulations making provision about the use of direct payments, for example about the circumstances in which direct payments may be made or stopped, the conditions that apply to the making of the payment, and the calculation of the payment amount. References in this section to Primary

Care Trusts making or stopping direct payments, requiring the repayment of a direct payment, providing support in relation to direct payments and recovering as a debt a sum repayable under conditions imposed by the regulations would be replaced with references to the NHS Commissioning Board or a commissioning consortium. Subsection (5) of section 12B, which provides that a service can be considered to have been provided or arranged by the Secretary of State or Primary Care Trust where a direct payment has been made, and that a Primary Care Trust's role in providing mental health after-care services can be displaced, would be amended likewise. The power, under section 12A of the NHS Act 2006, for Primary Care Trusts to make direct payments for mental health after-care services if the regulations under section 12B so provide, would be removed, and subsection (9) of section 12C amended to reflect this. See paragraphs 10 to 13 of Schedule 4 to the Bill. The combined effect is to enable the making of regulations to provide for the Board and consortia to make direct payments in relation to services which they arrange.

**Part 2**

343. Section 28 of the NHS Act 2006 allows the Secretary of State to establish Special Health Authorities. Subsection (5) of that section provides that when a Special Health Authority is abolished, the criminal liabilities may be transferred to an NHS body. Under paragraph 14 of this Schedule the definition of "NHS body" in subsection (6) of section 28 would be omitted. A new definition, which removes the reference to Strategic Health Authorities and Primary Care Trusts, and includes the NHS Commissioning Board and commissioning consortia, is inserted into section 275 of the Act by paragraph 129 of Schedule 4 to the Bill.

344. Section 66 of the NHS Act 2006 enables the Secretary of State to make intervention orders where an NHS body (other than a foundation trust) is not performing its functions adequately or at all, or where there are significant failings in the way it is being run. Section 67 makes provision regarding the effect of an intervention order – for example, it might provide for the removal or suspension of members or employee members. Paragraph 15 of this Schedule removes Strategic Health Authorities and Primary Care Trusts from the lists of bodies whose members can be made subject to an intervention order. References to the NHS Commissioning Board and commissioning consortia are not inserted, as they are subject to separate powers provided for in Part 1 of the Bill.

345. Section 71 of the NHS Act 2006 is a regulation-making power for the Secretary of State, enabling him to establish schemes whereby specified bodies can make provision to meet losses and liabilities (for example the Clinical Negligence Scheme). Paragraph 17 of this Schedule replaces Strategic Health Authorities and Primary Care Trusts with the NHS Commissioning Board and commissioning consortia in the list of bodies to whom these schemes can apply in subsection (2) of section 71, and removes Strategic Health Authorities and Primary Care Trusts and inserts the NHS Commissioning Board in the list of persons or bodies who may administer the schemes in subsections (3) and (6) of that section.

346. Section 73 of the NHS Act 2006 makes provision relating to directions and regulations made under specified sections of the Part, listed in subsection (1). Paragraph 18 of this Schedule removes sections 14, 15, 19 and 20 from the list, since these deal only with Strategic Health Authority functions and directions and Primary Care Trust functions.

**Part 3**

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

348. Section 81, subsection (3) of the NHS Act 2006 allows the Secretary of State to give directions to specified NHS bodies to make the services of their staff available to local authorities and other public bodies, in certain circumstances. Paragraph 27 of this Schedule removes Strategic Health Authorities and Primary Care Trusts from the list of specified NHS bodies – references to the Board and consortia are not inserted as those bodies are not to be subject to Secretary of State powers of direction. Schedule 6 to the Act also makes provision for the Secretary of State to make regulations and give directions to Special Health Authorities about transferring staff to, making staff available to and furnishing information to, amongst other bodies, Strategic Health Authorities – paragraph 22 of this Schedule removes the references to Strategic Health Authorities.

**Parts 4 to 7**

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

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

**Summary of minor changes**

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

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

351. The following delegated powers are subject to limited changes but only insofar as they relate to the body who is to be subject to the regulations made or the directions issued by the

Secretary of State under existing powers. These are listed in the following table (where Primary Care Trust has been abbreviated to PCT, and Strategic Health Authority to SHA):

| Schedule reference | NHS Act 2006 reference | Details |
|---|---|---|
| Paragraph 28(3) | Section 83(3) | Replace PCT with the Board |
| Paragraph 30 | Section 86(1) | Replace PCT with the Board |
| Paragraph 31 | Section 87(3)(d) | Replace PCT with the Board |
| Paragraph 32(1) | Section 89 | Replace PCT with the Board |
| Paragraph 33 | Section 91 | Replace PCT with the Board |
| Paragraph 35(2) | Section 93(1) | Replace SHA with the Board |
| Paragraph 36(4) | Section 94(6) | Replace PCT with the Board |
| Paragraph 39(4) | Section 97(6) | Replace PCT with the Board |
| Paragraph 40(4) | Section 99(3) | Replace PCT with the Board |
| Paragraph 42 | Section 102(1) | Replace PCT with the Board |
| Paragraph 43 | Section 103(3)(d) | Replace PCT with the Board |
| Paragraph 44 | Section 104 | Replace PCT with the Board |
| Paragraph 45 | Section 106 | Replace PCT with the Board |
| Paragraph 47(2) | Section 108(1) | Replace SHA with the Board |
| Paragraph 48(4) | Section 109(6) | Replace PCT with the Board |
| Paragraph 51(4) | Section 113(6) | Replace PCT with the Board |
| Paragraph 52(2) & (5) | Section 115(1) & (5) | Replace PCT with the Board |
| Paragraph 54 | Section 118(1) | Replace PCT with the Board |
| Paragraph 55 | Section 119(1) | Replace PCT with the Board |
| Paragraph 56 | Section 120(3)(d) | Replace PCT with the Board |
| Paragraph 57 | Section 121 | Replace PCT with the Board |
| Paragraph 58 | Section 123 | Replace PCT with the Board |
| Paragraph 60(4) | Section 125(7) | Replace PCT with the Board |
| Paragraph 61(2) | Section 126(1) | Replace PCT with the Board |
| Paragraph 62(2) | Section 127(1) | Replace PCT with the Board |
| Paragraph 63 (2) & (4) | Section 128(1) & (5) | Replace PCT with the Board |

| Schedule reference | NHS Act 2006 reference | Details |
|---|---|---|
| Paragraph 64(1) | Section 129(1) | Replace PCT with the Board |
| Paragraph 65 | Section 130 | Replace PCT with the Board |
| Paragraph 66(2) | Section 131(1) | Replace PCT with the Board |
| Paragraph 67(2) | Section 132 | Replace PCT with the Board |
| Paragraph 68(4) | Section 133(2) | Replace PCT with the Board |
| Paragraph 70 | Section 136(1) | Replace PCT with the Board |
| Paragraph 72 | Section 138 | Replace PCT with the Board |
| Paragraph 73(2) | Section 140 | Replace PCT with the Board |
| Paragraph 75(2) | Section 148(1) | Replace PCT with the Board |
| Paragraph 76(2) | Section 150A | Replace PCT with the Board |
| Paragraph 87(3) | Section 164(4A) | Replace PCT with the Board |
| Paragraph 88(2) | Section 166 | Replace PCT with the Board |
| Paragraph 89(5) | Section 167(6) | Replace PCT with the Board |
| Paragraph 91(3) | Schedule 12(2) | Replace PCT with the Board |
| Paragraph 91(4) | Schedule 12(3) | Replace commissioning body with commissioner and PCT with the Board |

Reason for delegating the power

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

Reason for the selected procedure

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

**Paragraph 36**

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

354. Paragraph 36, subparagraph (3) of Schedule 4, inserts a new paragraph (ca) into subsection (3) of section 94 (Regulations about section 92 arrangements) of the NHS Act clarifying, for consistency with section 84(4)(b), that a Personal Medical Services agreement can include services performed outside England. As with the similar general medical services provision, it is not the intention that the Board will commission services on a widespread basis outside England, but it will be the case that, for example, a GP practice working on the border with Wales or Scotland may have patients who do not reside in England.

Reason for delegating the power

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

Reason for the selected procedure

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

**Paragraph 48**

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

357. Paragraph 48, subparagraph (3) of Schedule 4, inserts a new paragraph (ca) into subsection (3) of section 109 (Regulations about section 107 arrangements) of the NHS Act clarifying, for consistency with section 100(3)(b), that a Personal Dental Services agreement can include services performed outside England. As with the similar general dental services provision, it is not the intention that the Board will commission services on a widespread basis outside England, but it will be the case that, for example, a dental practice working on the border with Wales or Scotland may have patients who do not reside in England.

Reason for delegating the power

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

Reason for the selected procedure

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

**Paragraph 52**

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

360. Paragraph 52(7) of Schedule 4 extends the scope of the regulation making power in subsection (9)(b) of section 115 of the NHS Act so that it applies to all of the categories of persons described in section 115(2)(a) to (e). The amendment to this power removes an unintentional restriction in the existing power which only applies to the categories of persons currently described in section 115(2)(a) to (d). The amendment allows the delegated power to apply to such other descriptions of persons as may in the future be prescribed in regulations and will therefore ensure that the scope of the power remains up to date.

Reason for delegating the power

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

Reason for the selected procedure

362. The existing regulation making power in section 115(9) of the NHS Act is subject to the negative resolution procedure. It is considered that the negative resolution procedure continues to be appropriate for the amended power and will provide the appropriate level of scrutiny.

**Paragraphs 64 and 67**

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

363. Paragraphs 64(4) and 67(4) of Schedule 4 amend sections 129 and 132 of the NHS Act so as to require that regulations about the preparation of lists of persons providing pharmaceutical services are prepared by reference to the area in which the premises from which the services are provided are situated.

364. It is expected that the Board will prepare such lists in relation to the geographical areas of pharmaceutical needs assessments as published and updated currently by Primary Care Trusts and by Health and Well-Being Boards in future.

Reason for delegating the power

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

Reason for the selected procedure

366. The powers being inserted by this Bill mostly replace existing regulation making powers in the NHS Act which were subject to the negative resolution procedure. It is therefore considered that the negative resolution procedure will provide the appropriate level of scrutiny for these new powers.

**Paragraphs 74 and 91**

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

367. Paragraph 74 of Schedule 4 amends section 144 and paragraph 91 amends Schedule 12 to the NHS Act so as to enable the Secretary of State to establish a new Local Pharmaceutical Scheme instead of Strategic Health Authorities, which are abolished by provision elsewhere in the Bill.

368. A new delegated power is provided in the new sub-paragraph (2C) which is inserted by paragraph 91(2)(d) of Schedule 4 to the Bill. This new power enables regulations to prescribe the only circumstances in which the Board is able to provide local pharmaceutical services under an Local Pharmaceutical Scheme.

Reason for delegating the power

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

itself have the power to be a provider – usually as a matter of last resort where alternative options are not available.

Reason for the selected procedure

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

**Part 8**

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

**Paragraphs 94 and 95**

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

372. In Part 8 of the NHS Act the regulation making powers in section 180 (Payments in respect of cost of optical appliances) and section 181 (section 180: Supplementary) are subject to minor amendment as set out in paragraphs 94 and 95 of Schedule 4, which include the amendment of certain references to the Secretary of State or relevant body to the Board in section 180(1). The regulation making power is amended to include a new subsection (6A) which contains a new power for the Secretary of State to prescribe in regulations other bodies to whom directions may be issued by the Board in respect of the exercise of the Board's functions under regulations made under section 180.

Reason for delegating the power

373. A new direction making power has been included in subsection (6A) of the existing regulation making power in section 180 of the NHS Act, which has been structured to allow bodies to be prescribed in regulations. This delegated power is considered necessary

because the Board may wish to direct other bodies to undertake activities such as making payments and other functions associated with providing primary ophthalmic services. There are a number of bodies who could undertake functions in this area and listing those bodies who may be directed on the face of the Bill would require primary legislation to be amended each time a body needed to be added or deleted, which would run counter to the flexibility given to the Secretary of State to make Regulations in these sections.

Reason for the selected procedure

374. The existing regulation making powers in section 180 of the NHS Act are subject to the negative resolution procedure. It is considered that the negative resolution procedure is also appropriate for the new regulation making power in subsection (6A) having regard to the matters to be legislated for and will provide the appropriate level of scrutiny.

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

375. Paragraph 94 of Schedule 4 inserts a new subsection (6A) into section 180 of the NHS Act which allows the Board to direct a Special Health Authority or any other body prescribed in regulations to exercise the Board's functions under regulations under that section.

Reason for delegating the power

376. This new direction-making power relates to operational matters which it is reasonable to delegate rather than having on the face of legislation as the directions may go into considerable detail. Day-to-day operational responsibility is a matter for the Board and it is reasonable for it to be able to direct other bodies to carry out functions on its behalf.

Reason for the selected procedure

377. These powers relate to operational matters that are carried out within the context of wider regulations. It is usual practice for matters of this sort to be carried out through directions rather than regulations.

**Part 10**

**Paragraph 106**

378. Paragraph 106 amends section 213 which confers a power on the Secretary of State to transfer trust property by order between 'relevant health service bodies' and removes the reference to a Primary Care Trust. The power in section 213 of the NHS Act, exercised by order, continues to be conferred on the Secretary of State but the amendment ensures that the Secretary of State is also able to transfer trust property to and from trustees for the NHS Commissioning Board and commissioning consortium as relevant 'health service bodies'.

**Paragraph 107**

379. Paragraph 107 amends section 214 of the NHS Act, which contains a power for the Secretary of State to transfer all trust property by order from any special trustees to certain health service bodies. The amendment does not affect the Secretary of State's powers in section 214; instead it makes provision for the NHS Commissioning Board and commissioning consortia as bodies to whom all trust property can be transferred and removes the references to Primary Care Trusts.

**Paragraph 111**

380. Paragraph 111 amends the power in section 222 of the NHS Act. Section 222 contains a power for the Secretary of State to exclude, by way of directions, specified descriptions of activities that NHS Bodies (other than Local Health Boards) undertake in order to raise money.

***Power conferred on:*** *NHS Commissioning Board and Secretary of State*
***Power exercised by:*** *Instrument in writing (directions)*
***Parliamentary procedure****: None*

381. The amendment takes account of the establishment and responsibilities of the new health service bodies. Paragraph 111 amends the direction-making power to enable (a) the NHS Commissioning Board to make directions excluding specified descriptions of activities in

relation to a commissioning consortium and (b) the Secretary of State to make directions excluding specified descriptions of activities in relation to any other NHS body (other than Local Health Boards).

Reason for delegating the power

382. The direction-making power is extended to the NHS Commissioning Board in addition to the Secretary of State to enable the Board to specify what descriptions of activities in relation to a commissioning consortium are excluded activities for the purposes of raising money under section 222 and reflects the understanding that fundraising and related activities are varied in nature and circumstance. This allows the Secretary of State and the Board to exclude activities, by way of direction, that would otherwise be included in part (3)(f) ("other similar activities") as and when they would deem appropriate.

Reason for the selected procedure

383. The Department considers this a minor matter on which Parliamentary debate would not be warranted.

**Paragraph 114**

384. Paragraph 114 amends section 226 of the NHS Act, which contains a power for the Secretary of State to give directions to Strategic Health Authorities and Special Health Authorities with regard to their financial duties. The amendment removes the reference to Strategic Health Authorities, since these would be abolished by the Bill.

**Paragraph 115**

385. Paragraph 115 amends section 227 of the NHS Act, which contains a power for the Secretary of State to give directions to ensure that Strategic Health Authorities and Special Health Authorities operate within their resource limits. The amendment removes the reference to Strategic Health Authorities, since these would be abolished by the Bill.

**Paragraph 117**

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

386. This paragraph amends section 236 of the NHS Act 2006, which deals with payments to doctors who have examined patients with a view to deciding whether to recommend their detention in hospital under the Mental Health Act 1983.

387. The duty to pay fees would in future fall on the "prescribed commissioning consortium". By virtue of section 275(1) of the NHS Act 2006, that would mean the commissioning consortium prescribed in regulations by the Secretary of State.

388. The paragraph therefore empowers the Secretary of State to use regulations to determine which consortium would be responsible in any give case. This would enable the Secretary of State to align consortia's duty under this section with their other duties under the NHS Act 2006, the distribution of which between consortia would itself be subject to regulations.

Reason for delegating the power

389. For the distribution of the duty under section 236 to be determined on the face of the legislation would risk misalignment between that duty and the other functions of consortia. The Department's view is that it is more sensible for this to be left to regulations.

Reason for the selected procedure

390. The Department's view is that the use of the negative resolution procedure is appropriate, being consistent with the use of that procedure for other regulations distributing functions between consortia, including those under section 3 (as amended).

**Part 11**

**Paragraph 121**

391. Paragraph 121 amends section 246 of the NHS Act 2006 which enables the Secretary of State to vary Schedule 17 to the NHS Act by order. The power itself is not amended but a consequential amendment is made to this section to reflect the fact that section 12A(4) is being omitted.

**Part 12**

**Paragraph 122**

392. Paragraph 122 amends section 256 which contains a direction-making power for the Secretary of State to prescribe conditions relating to payments under section 256. The amendment replaces references to Primary Care Trusts with references to commissioning consortium and the NHS Commissioning Board to ensure they have powers to make payments towards expenditure on community services.

**Paragraph 124**

393. Paragraph 124 amends section 258 of the NHS Act. Section 258 confers a regulation making power on the Secretary of State to provide for any functions exercisable by Primary Care Trusts, Strategic Health Authorities, Special Health Authorities or Local Health Boards in relation to the provision of certain facilities to be exercisable by the body jointly with one or more NHS body (other than an NHS Foundation Trust). The amendment replaces the references to Strategic Health Authorities and Primary Care Trusts with references to the NHS Commissioning Board and commissioning consortia.

**Paragraph 125**

394. Paragraph 125 of Schedule 4 makes changes to section 259 (Sale of Medical Practices) of the NHS Act 2006 to introduce a new delegated power.

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

395. Section 259 of the NHS Act 2006 describes the persons who are prohibited from selling the goodwill in a medical practice. The section is structured to capture any medical practice that has provided primary medical care services to the NHS during its entire existence, starting with provision under the NHS Act 1946. Subsection (2) captures general medical services provision under former provisions whilst subsection (3) captures the provision of personal medical services under former provisions. Subsection (4) captures post April-2004 provision under both the NHS Act 1977 and the 2006 consolidation. New subsection (4A) captures the effect of the ending of direct provision of primary medical services by Primary Care Trusts under the provisions in this Bill. However, the ban does not apply where the person no longer provides or performs the services mentioned, and has never carried on the practice "in a relevant area".

396. The current definition of "relevant area" is in subsection (5) and links to the area of the organisation for whom the person provided or performed services (that is, a Primary Care Trust area or an area of a former Executive Council or Health Authority). Following the move of primary medical services commissioning to the Board the logic would be that the relevant area would in future be England. However, this would substantially extend the restriction on the sale of goodwill without any proper justification. For example, if a person provided general medical services under a contract in Surrey and then moved to Cumbria and provided there NHS services that are not caught by the ban (for example, out of hours services), that person would not currently be caught by the ban as regards the Cumbrian medical practice; if on the other hand the "relevant area" was the whole of England, he would be caught and indeed anyone who had ever provided services to a registered list of patients pursuant to a GMS contract or a PMS agreement with the Board would be caught.

397. The Department wishes to discuss this with those who represent general practitioners and these discussions need to consider what might be a suitable definition of "relevant area" for the purposes of section 259. The discussions might consider whether a local authority area would be appropriate. Paragraph 112(4) provides the space for these considerations by inserting a regulation making power in respect of this aspect of the definition of "relevant area".

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

398. Defining the areas that need to be covered in the definition of “relevant area” in a way that provides a historical audit trail of organisations is made more complex by the removal of specific local geographical areas defined by reference to local NHS bodies. There is no wish to extend the extent of the “relevant area” that applies to a particular contractor but until the final shape of the new NHS architecture is in place it is not possible to determine how best to maintain the localism associated with this provision of section 259. There will be a number of issues to discuss with the representatives of general practice as the new NHS architecture proposed in the Bill is implemented and this issue is best left to those discussions. This requires a delegated power to implement the outcome of those consultations.

Reason for the selected procedure

399. As the current definition is on the face of primary legislation it is appropriate that the delegated power has a level of Parliamentary scrutiny. Given the technical nature of the consequent provisions, the Department considers that the negative resolution procedure is appropriate. This is consistent with the existing delegated power in section 259(4) and with the wider delegated regulatory powers that apply in Part 4 (Medical Services) of the NHS Act 2006.

**Paragraph 129**

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

400. This paragraph makes a consequential amendment to section 75 of the NHS Act 2006, which amends the meaning of "NHS body" in section 75(8) to include the NHS Commissioning Board and each commissioning consortium.

401. The Secretary of State has the power under section 75 to make regulations to make provision for, or in connection with, enabling NHS bodies and local authorities to enter into arrangements in relation to the exercise of prescribed functions if the arrangements are likely to lead to an improvement in the way in which those functions are exercised. For example, this

clause would allow NHS commissioning consortia and local authorities to establish pooled budgets to allow joint commissioning of services.

Reason for delegating the power

402. The amendment does not create a new delegated power but updates an existing one to take account of the changed arrangements for NHS commissioning.

Reason for the selected procedure

403. The existing powers are subject to the negative resolution procedure and this would continue. This is a consequential amendment, and there is nothing in the amendments to those powers which necessitates additional scrutiny from Parliament

**Schedule 5: Part 1: Amendments of other enactments**

404. This Schedule includes the following changes to delegated powers.

**Paragraph 2: Health Services and Public Health Act 1968**

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

405. Under the Health Services and Public Health Act 1968, the Secretary of State has power to provide, or make arrangements for the provision of, such instructions as appear conducive for persons employed or contemplating employment in hospital authorities or certain activities connected with health and welfare. Section 63(5A) of the Act enables the Secretary of State to make regulations providing for these functions to be exercisable jointly between relevant health service bodies. This paragraph of the Schedule removes references to Strategic Health Authorities and Primary Care Trusts. These references are not replaced with references to commissioning consortia or the NHS Commissioning Board.

**Paragraphs 26-31: Crime and Disorder Act 1998**

406. Paragraphs 26-31 amend provisions on delegated powers in the Crime and Disorder Act as follows.

**Section 38**

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

407. Paragraph 27 of the Schedule amends section 38 of the Crime and Disorder Act 1998, which places a duty on Strategic Health Authorities and Primary Care Trusts to co-operate with the local authority to secure youth justice services are available for their area. The Secretary of State may by order extend, restrict or otherwise alter the definition of "youth justice services". This provision amends the section to remove references to Strategic Health Authorities and Primary Care Trusts, and replace them with references to Commissioning Consortia. In all other respects these powers remains the same, and so the Department does not consider it necessary to amend the associated Parliamentary procedures.

**Section 41**

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

408. Paragraph 30 amends section 41 of the Act, under which the Secretary of State may, by order, add to, subtract from or alter any of the functions of the Youth Justice Boards established under section 41 of the Crime and Disorder Act 1998, and may issue them with guidance and direction. Paragraph 30 amends this section to remove references to Strategic Health Authorities and Primary Care Trusts, and replace them with references to commissioning consortia. In all other respects these powers remain the same, and so the Department does not consider it necessary to amend the associated Parliamentary procedures.

**Section 42**

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

409. Paragraph 31 amends section 42(3), which allows the Secretary of State to issue guidance relating to the youth justice provisions of the Crime and Disorder Act 1998, and requires Strategic Health Authorities and Primary Care Trusts to act in accordance with it when carrying out their duties. This provision amends that section to remove references to Strategic Health Authorities and Primary Care Trusts, and replace them with references to commissioning consortia. In all other respects these powers remains the same, and so we do not think it necessary to amend the associated parliamentary procedures.

**Paragraphs 35-37: Community Care (Delayed Discharges etc) Act 2003**

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

410. Section 9 of the Community Care (Delayed Discharges etc) Act 2003 allows the Secretary of State to make regulations relating to the provision of panels appointed by Strategic Health Authorities in England and by Local Health Boards in Wales to assist in the resolution of disputes between two or more public authorities about matters relating to delayed discharges. These paragraphs remove references to Strategic Health Authorities. These references are not replaced, as under the proposals in the Bill neither commissioning consortia nor the NHS Commissioning Board will be responsible for providing panels for dispute resolution.

**Paragraph 40: Criminal Justice Act 2003**

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

411. Section 325(8) of the Criminal Justice Act 2003 allows the Secretary of State to issue guidance to "responsible authorities" on the discharge of the functions conferred by section 325 (Arrangements for assessing etc risks posed by certain offenders). This paragraph inserts references in section 325 to local authorities (in their capacity as a person exercising functions as part of the health service) and commissioning consortia as "responsible authorities", and removes references to Strategic Health Authorities and Primary Care Trusts. In all other respects these powers remains the same, and so the Department does not think it necessary to amend the associated parliamentary procedures.

**Paragraphs 58-70: Health and Social Care Act 2008**

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

412. These paragraphs replace references to Primary Care Trusts and Strategic Health Authorities in sections 30 and 39 of the Health and Social Care Act 2008 with references to the NHS Commissioning Board and commissioning consortia. Section 30 allows the Secretary of State to make regulations defining which bodies the Care Quality Commission must notify when applying for the urgent cancellation of a person's registration. Section 39 allows the Secretary of State to make regulations defining which bodies the Care Quality Commission must notify in respect of regulated activities. The amendments do not alter the scope of either regulation-making power, and simply replace references to bodies being abolished with references to new bodies in the proposed new NHS architecture.

413. The consequential amendment made to section 59 of the Health and Social Care Act 2008 excludes the NHS Commissioning Board and commissioning consortia from reference in subsection (1) to "English NHS bodies". This means that the Secretary of State will not have the power to give the Care Quality Commission additional functions relating to improving the

economy, efficiency and effectiveness, or the management or operations of the NHS Commissioning Board or commissioning consortia.

**Paragraphs 74-76: Health Act 2009**

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

414. Section 8 of the Health Act 2009 concerns duties on providers of NHS services to publish a Quality Account in accordance with regulations. Paragraph 76 removes references to Primary Care Trusts, as they are to be abolished under the proposals in the Bill. These references are not replaced with references to commissioning consortia, as it is not the intention that consortia will provide services themselves.

**Paragraphs 77-78: Coroners and Justice Act 2009**

**Section 19**

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

415. Section 19 of the Coroners and Justice Act concerns the appointment of medical examiners by Primary Care Trusts and Local Health Boards. Section 19(4) enables regulations to make provision in respect of the appointment, payment, training and functions of medical examiners. The amendment made by paragraph 77 removes references to Primary Care Trusts and replaces them with references to local authorities. In all other respects the power remains the same, and so the Department does not think it necessary to amend the associated parliamentary procedure.

**Section 20(5)**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Regulations made by statutory instrument*
***Parliamentary procedure:*** *Negative resolution, save for where the affirmative resolution procedure applies when increasing the fee by more than is necessary to reflect changes in the value of money.*

416. Section 20 of the Coroners and Justice Act 2009 is a regulation-making power enabling the Secretary of State to make regulations about the preparation, scrutiny and confirmation of medical certificates of cause of death. Section 20(5) allows regulations to be made which enable a fee to be payable to a Primary Care Trust or Local Health Board in relation to services provided by the medical examiner. The amendment removes the reference to Primary Care Trusts and replaces it with a reference to local authorities. In all other respects the power remains the same, and so we do not think it necessary to amend the associated parliamentary procedure.

**Schedule 6: Part 1: Transitional Provision**

**Paragraph 2: Exercise of Secretary of State's functions in relation to Primary Care Trusts**

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

417. During the initial period (the period beginning with the commencement of clause 21 and ending with the date specified by the Secretary of State for the purposes of new section 14A), the Secretary of State may (under paragraph 2) direct the Board to exercise any of the functions of the Secretary of State that relate to Primary Care Trusts, but not including powers or duties the Secretary of State has to make orders or regulations, as those are not thought to be appropriate functions for the Board to carry out on behalf of the Secretary of State.

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

418. The Secretary of State can currently direct a Strategic Health Authority to exercise any of the Secretary of State's functions relating to the health service that are specified in the directions (under section 7 of the NHS Act 2006). In the same way the provision in paragraph 2 of the Schedule would allow the Secretary of State to direct the Board, at any time during the initial period, to exercise any of his functions that relate to Primary Care Trusts and are specified in the direction. The exercise of this power would be limited to the initial period.

Reason for the selected procedure

419. Directions in writing are considered appropriate as this mirrors the current provision for the Secretary of State to direct a Strategic Health Authority to exercise any of his functions relating to the health service. These powers would be able to be used only in the initial period. Directions in writing provide a clear record as to what functions the Secretary of State has delegated to the Board in the initial period.

**Paragraph 3: Conditional establishment of commissioning consortia**

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

420. Paragraph 3 of the Schedule makes time-limited provision for the conditional establishment of consortia during the initial period as a transitional measure. Regulations may be made authorising the Board to grant initial applications to establish consortia where the Board is not satisfied of the matters that it must be satisfied of to grant an application for establishment under new section 14C of the NHS Act 2006. Regulations may authorise the Board to impose conditions on the grant of the initial application, and may authorise the Board to direct the consortium not to exercise specified functions or give directions about the exercise of any of its functions. If the regulations authorise the Board to make such a direction they may also authorise or require the Board to exercise any functions specified on behalf of the consortium, or arrange for another consortium to exercise those functions on behalf of the consortium. Regulations may also make provision requiring the Board to keep any conditions imposed or directions given under review and must make provision authorising the Board to vary or remove any conditions imposed or directions given by virtue of the regulations.

Paragraph 3(6) enables regulations to be made making modifications to the NHS Act 2006 as far as it applies to consortia established on the grant of an initial application. These regulations may provide that the Board's power to dissolve a consortium (in new section 14Z5) applies where a consortium established with conditions fails to comply with those conditions. The regulations may also make provision about the factors that the Board must or may take into account when exercising these powers, and the procedures to be followed. Paragraph 3(12) provides that, where a conditionally established consortium ceases to be subject to any conditions or directions, it is deemed to have been established under new section 14C.

Reason for delegating the power

421. Regulations made under new sections 14E, 14F, 14G and 14H would enable the Secretary of State to set out the overall framework in regulations within which the Board would consider applications for establishment. These time-limited transitional provisions concerning authorisation for establishment of consortia with conditions complete the framework of regulatory provision for the establishment process. Secondary legislation enables the precise detail of the establishment process to be set out. It also provides the necessary flexibility to amend the requirements and procedures to respond to experiences gained during the early stages of the establishment of consortia and any future changes that may become necessary.

Reason for the selected procedure

422. Setting out these matters in regulations will ensure that the process of granting applications for establishment is transparent. The Bill already sets out the principal matters that the Board should be satisfied of before granting an application for a consortium to be established. The Department's view is that, when these conditions are not met, a rules-based system is necessary to determine when a consortium can be established with conditions. However, since the principal matters that the Board must be satisfied of are on the face of the Bill, the principles regarding the formation of consortia are clearly for discussion as part of the Bill. Furthermore, such conditional establishment would only be for a limited time-period, whilst the consortia in question is supported to develop up to the standards required for full establishment. The Department considers that the negative resolution procedure provides the appropriate Parliamentary scrutiny .

**Paragraph 4: Exercise of functions of consortia during initial period**

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

423. Under the proposals in the Bill, there would be an initial period from the time that the Board begins determining applications for the establishment of consortia and the date that the Secretary of State specifies for the purposes of new section 14A . During this period the Board may direct a consortium that has been established under new section 14D that it exercise only functions that are specified by the Board. Consortia would essentially have two types of function during this time: carrying out commissioning functions on behalf of Primary Care Trusts who will retain commissioning responsibility until April 2013; and taking on undertaking preparatory work to enable them to carry out their functions fully after April 2013 (developing local plans, undertaking assessments of need etc). Clearly these two broad types of function may overlap.

424. However, Primary Care Trusts will retain commissioning responsibility until April 2013. This power of direction is necessary to avoid concurrent exercise of commissioning functions by Primary Care Trusts and consortia and enable the Board to retain control over what powers each consortium exercises prior to them taking on the full exercise of functions at the end of the initial period.

Reason for delegating the power

425. It is anticipated that the Board will need powers to make different provision in respect of different consortia. It is proposed that the Board should have a direction making power to ensure that it can exercise effective co-ordination over which organisation does what over this time. These restrictions would also be in place for a limited time.

Reason for the selected procedure

426. Having regard to the limited timeframe, and the likely content of the directions, it is not thought necessary to require a procedure involving Parliamentary scrutiny.

## PART 3: ECONOMIC REGULATION OF HEALTH CARE SERVICES

427. Monitor is currently the independent regulator for NHS foundation trusts. It is responsible for determining whether NHS trusts are ready to become foundation trusts, ensuring foundation trusts comply with the conditions of their authorisations, and supporting their development. This legislation proposes to turn Monitor into an economic regulator for the whole NHS-funded health care sector. The intention is that Monitor will have three core functions as an economic regulator: promoting competition where appropriate; setting or regulating prices; and supporting the continuity of services. To support its functions, Monitor will have the power to licence providers of NHS-funded care. These proposals draw upon lessons from the utilities, rail and telecoms industries, and we have borrowed provisions where applicable, but tailored others to the particular circumstances of the health sector.

428. The delegated powers being sought often relate to operational matters such as governance arrangements, exemptions from the licensing requirement, or specific rules about good procurement. They often require a level of detail unsuitable for primary legislation, are highly technical in their content, or are likely to require regular adjustments in future. These sorts of powers will benefit from the flexibility of scope and application that will be most effectively achieved through regulations, directions or orders rather than primary legislation.

## CHAPTER 1: MONITOR

### Clause 51: Monitor

429. This clause gives effect to Schedule 7, which includes the following delegated powers.

### Schedule 7: Monitor

#### Paragraph 8: Superannuation

***Power conferred on:*** *Minister for the Civil Service*
***Power exercised by:*** *Direction*
***Parliamentary procedure****: None*

430. Paragraph 8 makes provision for the Minister for the Civil Service to direct Monitor to pay to the Minister such sums as the Minister may determine in respect of any increase attributable to sub-paragraphs (2) and (3) of that paragraph. These provisions apply to persons taking the position as chair of Monitor who are active or deferred members of a pension scheme under the Superannuation Act 1972. The Minister for the Civil Service may determine that the person's office as chair is to be treated for the purposes of the scheme as service in the employment by reference to which the person is a member. The power of direction is intended to ensure that appropriate pension contributions are paid in respect of persons who have served as chair.

Reason for delegating the power

431. This is an existing power found in paragraph 5 (superannuation) of Schedule 8 to the National Health Service Act 2006, which is being carried over into Schedule 7 which replaces Schedule 8 of the 2006 Act.

Reason for the selected procedure

432. The existing power of direction is not subject to any Parliamentary procedure and this also seems appropriate in this case.

**Paragraph 17: Accounts of NHS Foundation Trusts**

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

433. Paragraph 17 gives the Secretary of State power to direct Monitor, with the approval of the Treasury, to prepare the consolidated accounts of foundation trusts in respect of such period as is specified. The directions may specify the methods and principles according to which the accounts should be prepared (including the format), and the content. They may also require the consolidated accounts to be sent to the Comptroller and Auditor General, accompanied by such other reports and information as is directed.

434. The Comptroller and Auditor General is to examine, certify and report on any consolidated accounts received by him. The Secretary of State may direct the Comptroller and Auditor General to send a copy of any such reports on the consolidated accounts to him and to lay copies of the accounts before Parliament.

435. The Secretary of State will remain accountable to both Parliament and HM Treasury (HMT) for the Department's Departmental Expenditure Limit. From 2011-12, under the Treasury's alignment legislation (Constitutional Reform & Governance Act 2010), the Department's annual Resource Account will, for the first time, consolidate the individual accounts of all NHS organisations, including foundation trusts. This is a very significant change in Government accounting practice. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in their annual Financial Reporting Manual. In turn, the accounts of all those bodies that are consolidated into the Department's Resource Account must also be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that the accounts of NHS foundation trusts are prepared in accordance with the requirements set by HMT, and powers to direct Monitor are considered appropriate for this purpose.

436. It is likely that Parliament will, in the short to medium term, also require the Department to prepare interim accounts. The Secretary of State may therefore direct Monitor to prepare an in-year consolidated account in respect of all NHS foundation trusts and to direct that such an interim account is audited if required. The Secretary of State will also have the power to specify the form and content of any interim account, and the method and principles under which it would be prepared.

437. From a date to be specified by the Secretary of State under clause 140 (accounts: variations to initial arrangements), all the powers, duties and responsibilities exercised by Monitor in respect of the preparation of a consolidated foundation trust account, or in relation to individual foundation trust accounts, during or at the end of any financial year, will instead be exercised by the Secretary of State.

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

438. It is necessary for the form of foundation trust accounts to be specified centrally. This is so they are fit for purpose, are consistent across the sector and have been audited to a consistent and appropriate standard so they can be consolidated into the Department's statutory Departmental Resource Accounts. Furthermore, accounting requirements are likely to change over time, so it is not desirable to set them in primary legislation.

Reason for the selected procedure

439. It is standard practice to set accounting requirements for public bodies in directions. The level of operational detail and the non-controversial nature of the powers suggest that Parliamentary scrutiny is not necessary. There is a power for the Secretary of State to direct that copies are laid before Parliament – so Parliament can scrutinise the actual accounts rather than the process for preparing them.

**Paragraph 18: Accounts of Monitor**

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

440. Paragraphs 18 to 20 give the Secretary of State power, with the approval of the Treasury, to direct Monitor as to the content and form of its accounts, and the methods and principles according to which they must be prepared. With Treasury approval, the Secretary of State can also direct Monitor to prepare interim accounts which may cover any periods other than the financial year as directed by the Secretary of State, and to send a copy to the Comptroller and Auditor General.

441. The Comptroller and the Auditor General must examine, certify and report on any interim accounts of Monitor sent to him. The Secretary of State may direct the Comptroller and Auditor General to send a copy of the report on accounts to him and to lay copies of the accounts before Parliament.

442. The Secretary of State will remain accountable to HM Treasury (HMT) for the Department's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in their annual Financial Reporting Manual. In turn, the accounts of all bodies that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that the accounts of Monitor are prepared in accordance with the requirements set by HMT and powers to direct Monitor are considered appropriate for this purpose.

Reason for delegating the power

443. It is standard practice to set accounting requirements for public bodies in directions.

Reason for the selected procedure

444. The level of operational detail and the non-controversial nature of the powers suggest that Parliamentary scrutiny is not necessary.

**Paragraph 21: Reports and other information**

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

445. Monitor is to prepare an annual report on how it has exercised its functions. Paragraph 21 (4) requires Monitor to provide other reports and information about the exercise of its functions to the Secretary of State on request. It also requires Monitor to provide any information about NHS foundation trusts that it has in its possession to the Secretary of State on request.

Reason for delegating the power

446. Delegating the power allows the information Monitor is required to provide to be modified as necessary.

Reason for the selected procedure

447. The power will be used to require the provision of information, and the Department does not consider its use requires a procedure involving Parliamentary scrutiny. Use of the power will support the Secretary of State in discharging his responsibility to account for Monitor and NHS foundation trusts.

**Clause 53: Power to give Monitor functions relating to adult social care services**

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

448. Clause 53 confers a power on the Secretary of State to make provision, by regulations, for specified functions of Monitor also to be exercisable in relation to adult social care.

Reason for delegating the power

449. The Department of Health, working with the Department for Communities and Local Government, is considering the proposed role for Monitor in regulating adult social care with respect to potential anti-competitive behaviour and/or provider failure, ensuring that such a role does not duplicate existing functions.

450. Subject to the outcome of the joint review by the Department of Health and the Department for Communities and Local Government, the Government anticipates that these regulations would be limited to potential anti-competitive practice and/or provider failure.

451. The reason for delegating this power is to future-proof the legislation. Regulations will provide the option to include adult social care services within the remit of Monitor's functions if the conclusion is that this would be the appropriate option for the social care sector in the future.

452. The regulation-making power gives flexibility for the Secretary of State to decide which of Monitor's functions should be exercisable in relation to adult social care services. The adult social care market is more mature than that of health care and therefore different provisions are likely to be required.

Reason for the selected procedure

453. Given the potential impact of extending Monitor's economic regulation functions to the adult social care sector and the need to make consequential amendments to the provision of the Bill as a result of such an extension, the affirmative resolution procedure is the appropriate level of scrutiny.

**Clause 59: Failure to perform functions**

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

454. This clause confers powers on the Secretary of State to direct Monitor in cases of serious failure by Monitor to carry out any of its functions.

455. The power is similar to the Secretary of State's powers under section 82 of the Health and Social Care Act 2008 in relation to the CQC. It enables the Secretary of State to give Monitor a direction if, under exceptional circumstances, the Secretary of State considers Monitor is failing or has failed to discharge any of its functions, or is failing or has failed to discharge any of its functions properly. The direction can direct Monitor to discharge those functions in a manner and within a period specified in the direction. If Monitor fails to comply with such a direction, the Secretary of State may discharge the function that the direction relates to or make arrangements for another person to discharge the function on behalf of the Secretary of State.

Reason for delegating the power

456. It would not be possible to set out in primary legislation exactly what intervention would be necessary in what circumstances, so this power provides the Secretary of State with flexibility to respond accordingly to failures by Monitor and at speed. These powers might be needed, not necessarily because of any fault on the part of Monitor, but because of circumstances outside its control, for example, a serious infection affecting many of its staff and therefore its ability to perform its duties. If such an event should occur it is appropriate that the Secretary of State should have a mechanism to give direction to Monitor, or should the problem be serious, to make alternative arrangements for the carrying out of Monitor's functions.

Reason for the selected procedure

457. In the event that such an intervention by the Secretary of State is required, it will be important that he can act quickly, and a direction-making power (with no procedure) is therefore felt to be most appropriate. This is consistent with similar powers of relevance to other Arms Length Bodies such as the CQC.

**CHAPTER 2: COMPETITION**

**Clauses 63 and 64: Ensuring good procurement practice**

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

458. This clause enables the Secretary of State to make regulations imposing requirements on the NHS Commissioning Board and commissioning consortia in relation to arranging the provision of NHS services. Those purpose of the requirements is to:
ensure that commissioners adhere to good procurement practice;
protect and promote patients' rights to make choices in respect of NHS treatment; and
promote competition in the provision of services for the NHS.

459. The regulations may, in particular, impose requirements relating to competitive tendering and the management of anticipated conflicts between the interests involved in

commissioning services and the interests involved in providing services. The regulations may also provide for Monitor to have powers in relation to the requirements imposed by the regulations to investigate complaints and deal with breaches of the regulations.

460. Clause 64 also makes provision for the regulations to confer certain powers on Monitor in relation to requirements imposed under clause 63. Those powers include being able to enable Monitor:

- to investigate complaints made about the compliance by the NHS Commissioning Board or commissioning consortia with the regulations;
- to require the NHS Commissioning Board and commissioning consortia to provide information in connection with any investigation;
- where there is a breach of the regulations that is sufficiently serious, to declare that an arrangement for the provision of services is ineffective and, following such a declaration, to direct the NHS Commissioning Board or consortium to put the provision of the services out to tender;
- to direct the NHS Commissioning Board or consortium to take certain measures to prevent failure to comply with the regulations, to mitigate or remedy such failures;
- to direct the NHS Commissioning Board or consortium to carry out functions in a particular way, or to vary or withdraw invitations to tender or arrangements for the provision of services, in certain circumstances.

Reason for delegating the power

461. The Bill contains detailed provision about what requirements the regulations may impose and the powers Monitor has associated with those requirements. The power to impose those requirements has been left to delegated legislation to avoid placing too much detail on the face of the Bill. It is also important that these requirements can be changed as necessary based on evidence on the procurement practice of NHS commissioners to ensure that appropriate requirements are in place. A regulation making power therefore seems appropriate.

Reason for the selected procedure

462. The negative resolution procedure allows flexibility to ensure that the procurement rules to remain up to date. The Bill contains detailed provision about what requirements the regulations may impose and the powers Monitor has for enforcement of those requirements and the negative resolution procedure therefore seems appropriate.

**CHAPTER 3: DESIGNATED SERVICES**

**Clause 72: Designations affecting more than one commissioner**

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

463. This clause places a requirement on the NHS Commissioning Board to make arrangements for facilitating agreement between commissioning consortia in designating services.

464. Where commissioning consortia fail to reach agreement on designating services under such arrangements, the NHS Commissioning Board will be able to determine the matter.

465. Subsection (3) gives the Secretary of State the ability by regulations to make provision as to the determination of matters where commissioning consortia fail to reach agreement.

Reason for delegating the power

466. The power to impose these requirements has been left to delegated legislation because of the technical nature of the provisions and to avoid placing too much detail on the face of the Bill.

Reason for the selected procedure

467. The regulations will deal with the ability of the NHS Commissioning Board to determine disputes between commissioning consortia, under arrangements established by the NHS

Commissioning Board, and the negative procedure seems the appropriate procedure for making provision in relation to this.

**Clause 73: Guidance**

***Power conferred on**: Monitor*
***Power exercised by:** publishing guidance*

468. This clause requires Monitor to publish guidance that develops the principles for designation of services further, for instance setting out how the designation process will work and giving examples of the types of service or cases when it might expect a service to be designated.

Reason for delegating the power

469. The guidance will provide guidance to commissioners and providers on how the designation process will work and on the carrying out of reviews of designation to see if they are still necessary. The guidance will need to be updated as necessary as the system of designation develops and therefore it seems appropriate for no Parliamentary process to apply.

**CHAPTER 4: LICENSING**

470. It should be possible to combine regulations relating to licensing in one instrument, regardless of the fact that they may be subject to different Parliamentary procedures. Any such combined instrument would be subject to the procedure requiring the highest level of Parliamentary scrutiny specified in respect of the combined powers, i.e. the affirmative resolution procedure (see clause 277(5)).

*Licensing requirement*

**Clause 74: Requirement for health service providers to be licensed**

***Power conferred on:** Secretary of State*

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

471. Where two or more legal entities are involved, in different capacities, in providing a service, regulations may set out who will be treated as the service provider for the purposes of licensing. The power enables the Secretary of State expressly to exclude employees and to resolve any uncertainties. It is intended that the regulations will provide that it will be the legal person responsible for ensuring the service complies with the licensing requirements laid out in this (and any other relevant) legislation. This power is based on section 10(2) of the Health and Social Care Act 2008, where the same provision is made in relation to CQC registration.

Reason for delegating the power

472. This power is delegated because it is intended to be used to clarify the requirement to hold a licence, which may need to change from time to time.

Reason for the selected procedure

473. The negative resolution has been selected for this power because it is in response to a technical element of the licensing process (i.e. the legal entity which will need to hold the licence).

**Clauses 76 and 77: Exemption regulations**

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

474. Subsection (1) provides that the Secretary of State may make regulations specifying exemptions from the requirement to hold a licence. All providers of health care services for the English NHS would be required to hold an economic licence, unless they or the service they provide have been exempted from such requirement by regulations made by the Secretary of State.

475. There are broad parameters for the way in which the exemptions can be set. For example, the Secretary of State can specify that a particular exemption can apply generally, e.g. to a whole group of providers, or more specifically, e.g. to a subsection of that group. Provision can also be made for exemptions to be granted subject to conditions, which can include a requirement to comply with any direction given by Monitor about matters specified in the exemption.

476. Exemptions would be designed to target licensing at those parts of the health sector where it is necessary, e.g. large providers of designated services. They should also ensure that regulatory burden is not imposed where it is not needed, keeping the system targeted and proportionate.

477. The Secretary of State also has the power to revoke exemption regulations. Regulations can be made under subsection (1) and (2) of clause 77 to revoke exemptions in relation to either an individual provider or a whole group of providers. Under subsection (3), an exemption can be withdrawn by a direction from the Secretary of State for a particular provider within a group, whilst the exemption remains in place for the rest of that group. When the exemption withdrawal is not for an individual provider at their request, the Secretary of State must consult Monitor, the NHS Commissioning Board, the CQC and Healthwatch England about the proposed withdrawal, and give notice of the proposal.

Reason for delegating the power

478. The exemption regime would be likely to develop over time, as new regulatory approaches become necessary in order to deal with changes in particular health markets, e.g. the introduction of a national tariff that applies to services offered by a previously exempted provider type, necessitating the introduction of a licence requirement for those providers.

479. Given this potential need for adjustment, it seems prudent to allow the exemption regime to be defined and adapted in regulations rather than using the less flexible approach of prescription in primary legislation. This approach is consistent with that adopted in other regulated sectors, such as electricity.

Reason for the selected procedure

480. This is a power to grant exemptions from the general requirement to hold a licence and the negative resolution procedure therefore seems appropriate. It is the same procedure which applies to the granting of exemptions under section 5 (exemptions from prohibition on unlicensed supply etc. of electricity) of the Electricity Act 1989 (c.29), which demonstrates consistency across different sectors (see section 106(2) (regulations and orders) of that Act).

***Licensing procedure***

**Clause 86: Register of licence holders**

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

481. The information contained in the register of licence holders will be available to the public at Monitor's offices for inspection or by asking for a copy. However, this clause gives the Secretary of State power to prescribe in regulations any circumstances or pieces of information that should not be available to the public in this way.

Reason for delegating the power

482. These regulations will deal with administrative details relating to information kept on the register and it is therefore appropriate to leave this to secondary legislation.

Reason for the selected procedure

483. The negative resolution is appropriate because this is a power clearly dealing with administrative details.

***Licence conditions***

**Clause 87: Standard conditions**

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

484. This clause gives the Secretary of State a right of veto over the first set of standard licence conditions. The Secretary of State can exercise this right by directing Monitor not to determine that the standard conditions will be the draft standard conditions.

Reason for delegating the power

485. This provides a check on Monitor's power to impose licence conditions, ensuring that the Secretary of State agrees that the first set of standard conditions are appropriate, and therefore it is not necessary to make this subject to any Parliamentary procedure.

**Clause 89: Limits on Monitor's functions to set or modify licence conditions**

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

486. Subsection (2) limits Monitor to setting licence conditions for the purposes of specific regulatory functions, as specified in paragraphs (a) to (h). Paragraph (h) provides that Monitor can set licence conditions for such purposes as the Secretary of State may specify by regulations for the purpose of enabling Monitor to discharge its overarching duties under clause 52.

Reason for delegating the power

487. This power is intended to future-proof the legislation, to ensure the flexibility to enable Monitor to use licence conditions outside the parameters specified in subsection (2)(a) to (g), if this will enable it to discharge its overarching duties.

Reason for the selected procedure

488. This power is expressly limited by reference to Monitor's overarching duties, so the negative procedure seems appropriate.

**Clause 91: Modification of standard licence conditions**

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

489. Subsection (7) provides for the Secretary of State to prescribe, through regulations, an objection percentage and a share of supply percentage in relation to the modification of licensing conditions. Subsection (9) also provides for such regulations to be able to lay down a method for determining the share of supply of services of a licence holder.

490. Monitor may modify the general conditions applicable to all licences, or to licences of a particular description, but before any modifications can be made, Monitor must give notice to specified persons or bodies. Each relevant licence holder must be informed, and they have an opportunity to object. If both the objection percentage and the share of supply percentage of relevant licence holders who have given notice of objection is less than the percentages prescribed by the Secretary of State, then Monitor can adopt the proposed modification.

491. The "objection percentage" is the proportion of affected providers who are objecting. When this proportion is weighted according to the share of supply of those providers, it is known as the "share of supply percentage". This process is designed to balance the desirability of providers having a say in the design of the licence with Monitor's role to ensure that necessary licence conditions are imposed, e.g. to support access to services, or to update licence conditions to ensure that regulation does not become out of date.

Reason for delegating the power

492. The first reason for delegating the power is that it is a technical subject and a thorough market study and provider engagement exercise will need to be carried out before determining what the initial thresholds for the objection and share of supply percentages will be.

493. In addition, in other regulated sectors it has been found to be advantageous to be able to adjust the objection/share of supply percentages in response to changing conditions in the regulated sector, e.g. changes in provider size or market concentration. This is likely to be as relevant in health as in other regulated markets.

Reason for the selected procedure

494. The choice of affirmative resolution procedure follows the precedent set out in existing legislation governing other regulatory regimes e.g. s.11A(7) of the Electricity Act 1989 (see section 11A (11)).

**Clause 92: Modification references to the Competition Commission**

495. This clause gives effect to Schedule 8, which includes the following delegated powers.

**Schedule 8: References by Monitor to the Competition Commission (under clauses 92 and 128)**

**Paragraph 8: Competition Commission's power to veto changes**

***Power conferred on:*** *Competition Commission / Secretary of State*
***Power exercised by:*** *Direction*
***Parliamentary procedure****: None*

496. Paragraph 8 provides that where Monitor proposes changes to proposed licence conditions, or to proposed modifications, following a report by the Competition Commission on a reference by Monitor to it, the Commission may direct Monitor not to make the changes in question, or not all of them. The Commission can do this up until four weeks after a notice of the reference was received. However, the Secretary of State can by direction extend this period by 14 days.

Reason for delegating the power

497. This gives the Competition Commission the power to ensure that changes proposed by Monitor are in line with any changes specified in the Commission's report. This mirrors the position in relation to references to the Competition Commission to carry out investigations under other sectoral legislation (e.g. under section 14A of the Electricity Act 1989).

**Clause 93: Modification of conditions by order under other enactments**

***Power conferred on:*** *Office of Fair Trading, Competition Commission or the Secretary of State*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *orders made by the Secretary of State under sections 160 or 161, or under Schedule 7, of the Enterprise Act 2002 are subject to the negative resolution procedure, otherwise no Parliamentary procedure applies*

498. This clause gives these authorities the power to modify licence conditions by order, under various specified provisions of the Enterprise Act 2002. These provisions mean that the modifications can be made if:

- a provider of licensable services has or may have ceased to be a distinct enterprise, or a provider of licensable services will or may cease to be a distinct enterprise (i.e. in a merger situation); or
- a restriction or distortion of competition, arising from a feature of a market, is related to the commissioning or provision of services for the purposes of the NHS.

Reason for delegating the power

499. This is an extension of existing powers of the competition authorities under the Enterprise Act 2002 to modify licence conditions to remedy adverse effects on competition. The inclusion of a provision of this type is consistent with other regulatory regimes.

Reason for the selected procedure

500. This follows the precedent set in other regulatory regimes and as the relevant orders will be made under the Enterprise Act 2002 the procedures laid down in that legislation will apply.

**Clause 95: Discretionary requirements**

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

501. This clause makes provision for the Secretary of State to prescribe the manner in which turnover in England of a provider is to be calculated for the purposes of the limit on the amount of a variable monetary penalty.

Reason for delegating the power

502. The method for calculating the turnover of a provider in England is technical detail which is best left to secondary legislation. This also follows a precedent set under section 36(8) of the Competition Act 1998.

Reason for the selected procedure

503. The method for calculating the turnover of a provider in England is technical detail, but given that it will be central to calculating the limit on the amount of a financial penalty the affirmative resolution procedure is appropriate. This also follows a precedent set in relation to section 36(8) of the Competition Act 1998.

**Clause 96: Enforcement undertakings**

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

504. This clause allows the Secretary of State to prescribe additional types of action to be taken by a person who has breached licence conditions that can be accepted by Monitor in an enforcement undertaking. This is in addition to the three types of action specified in the primary legislation:

- action to stop the activity in breach of the licence, or make sure it does not happen again;
- action to restore the position to what it was before the breach occurred, so far as is possible; and
- action to compensate licence holders or commissioners affected by the breach, which could be payment of money.

Reason for delegating the power

505. This power builds flexibility into the enforcement powers, by enabling the Secretary of State to make regulations extending the scope of the enforcement undertakings which Monitor could accept from a provider.

Reason for the selected procedure

506. This power gives the Secretary of State the power to prescribe additional actions for providers to take which Monitor can accept in enforcement undertakings, thereby extending the enforcement powers of Monitor. This power is based on the power in section 50(3)(d) of the Regulatory Enforcement and Sanctions Act 2008. Orders under Part 3 of that Act are subject to the affirmative resolution procedure.

**Clause 98: Guidance as to use of enforcement powers**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *publishing guidance*

507. Monitor is required to publish guidance on the use of its enforcement powers by this clause. Guidance is intended to provide licensees with certainty as to the enforcement action Monitor will take in particular circumstances.

Reason for delegating the power

508. Requiring Monitor to publish guidance, rather than specifying the detail of how enforcement powers will be used in primary legislation, creates the flexibility to update this

guidance when necessary, for example to allow Monitor to adapt procedures to take into account experience of operating the licence regime.

Reason for selected procedure

509. As this is just guidance no Parliamentary procedure seems necessary.

***Transitional intervention powers***

**Clause 101: Designation of NHS foundation trusts during transitional period**

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

510. This clause provides for the designation of NHS foundation trusts where it is considered that there is a need for Monitor to retain powers of intervention in relation to those trusts during the transition to the new regulatory regime. Subsection (10) provides that the Secretary of State may, by order, extend the two year period that designations of NHS foundation trusts under this clause are to apply. There would be no limit on the length or number of any such extension. Any such extension would apply to all NHS foundation trusts still subject to a designation at the time that the extension took effect.

Reason for delegating the power

511. This is a reserve power to enable the Secretary of State to deal with the need to extend the length of time or number of extensions, should this be required in future. The powers may not necessarily be required.

Reason for the selected procedure

512. The affirmative resolution procedure is appropriate so that this power, which could be used to extend the duration of Monitor's powers to intervene in the running of NHS foundation

trusts (when it would not have similar powers in relation to other providers of NHS services), is only used in exceptional and justified circumstances.

## CHAPTER 5: PRICING

### Clause 104: The national tariff

***Power conferred on:*** *Monitor*
***Power exercised by:*** *publishing the national tariff*

513. This clause enables Monitor to publish, in "the national tariff" document:

- the range of services provided for the purposes of the NHS in England (in line with the structure agreed with the NHS Commissioning Board) for which prices will apply;
- the methodology that has been employed by Monitor to produce the specified prices, or maximum prices level;
- the resultant prices, or maximum prices; and
- guidance on the process for determining local prices for services not specified as being covered by the national tariff.

514. The national tariff document would also include rules under which providers and commissioners can make local modifications to the national prices.

Reason for delegating the power

515. The elements of the tariff document will require regular updates, for example if the NHS Commissioning Board and Monitor agree to extend the tariff to other services or to take into account efficiencies achieved in the provision of services. The necessity of flexibility to produce new editions of the document make this unsuitable for primary legislation.

Reason for the selected procedure

516. The national tariff will set prices payable for the provision of NHS services and will be published nationally. It does not seem necessary to subject it to any Parliamentary procedure.

**Clause 106: Responses to consultation**

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

517. Subsection (7) provides for the Secretary of State to prescribe, through regulations, an "objection percentage" for commissioners and licence holders and a "share of supply percentage" for licence holders in relation to the methodologies used for setting prices for the purposes of the national tariff. A different percentage may be prescribed in relation to commissioners and licence holders.

518. Monitor would be responsible for setting and publishing a national tariff for NHS services, but before publishing the tariff, Monitor would need to send a notice to each commissioning consortium, each licence holder and such other persons as it considers appropriate, so that they have an opportunity to object. If both the objection percentage of commissioners and the objection percentage and the share of supply percentage of relevant licence holders who have given notice of objection is less than the percentages prescribed by the Secretary of State, then Monitor would be able to proceed and publish the national tariff.

519. In addition, subsection (8) provides that the Secretary of State would also be able to prescribe in regulations the method used for determining the share of supply of a licence holder.

520. The "objection percentage" is the proportion of commissioners or affected licence holders who are objecting. When this proportion is weighted according to the share of supply of those licence holders, it is known as the "share of supply percentage". This process is designed to balance the desirability of commissioners and providers having a say in the design of the tariff with Monitor's role to ensure that appropriate tariff prices are adopted.

Reason for delegating the power

521. Delegating the power gives the Secretary of State flexibility to adjust the prescribed prescriptions in the future. This is important as it is difficult to ascertain at this stage what the optimal percentage will be as the commissioner and provider landscape changes.

Reason for the selected procedure

522. The use of affirmative resolution in prescribing the percentages necessary for a reference to be made is consistent with other regulated industries. Requiring affirmative resolution would ensure that the issues, including the best interests of the taxpayer, could be considered before the percentages were prescribed.

**Clause 109: Competition Commission's power to veto changes under clause 108**

***Power conferred on:*** *Competition Commission / Secretary of State*
***Power exercised by:*** *Direction*
***Parliamentary procedure****: None*

523. Clause 108 provides that where Monitor proposes changes to proposed methodologies for setting prices, or maximum prices, following a report by the Competition Commission on a reference by Monitor to it, the Commission may direct Monitor not to make the changes in question, or not all of them. The Commission can do this up until four weeks after a notice of the reference was received. However, the Secretary of State can by direction extend this period by 14 days.

Reason for delegating the power

524. This gives the Competition Commission the power to ensure that changes proposed by Monitor are in line with any changes specified in the Commission's report. This mirrors the position in relation to references to the Competition Commission to carry out investigations under other sectoral legislation (e.g. under section 14A of the Electricity Act 1989).

Reason for the selected procedure

525. Given the content of the direction, the Department considers that no Parliamentary procedure is warranted.

## CHAPTER 6: INSOLVENCY AND HEALTH SPECIAL ADMINISTRATION

### Clause 113: Application of insolvency law to NHS foundation trusts

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

526. The Bill would insert a new section 55A into the National Health Service Act 2006 which would oblige the Secretary of State to introduce regulations to apply existing corporate insolvency procedures to NHS foundation trusts. Those procedures are company voluntary arrangements, administration and winding up as set out in Parts 1, 2 and 4 of the Insolvency Act 1986; and schemes of arrangement and reconstruction set out in Part 26 of the Companies Act 2006. Those procedures may be applied to foundation trusts with any necessary changes. The clause obliges the Secretary of State to consult before making any regulations under these provisions.

527. Those regulations would need to be supported by further secondary legislation (rules) to make the insolvency regime for foundation trusts workable in practice. That approach would be consistent with the general insolvency framework in England. Those rules would be made in the normal way that is set out in sections 411 and 413 of the Insolvency Act 1986.

Reason for delegating the power

528. The reasons for delegating the power are to enable the technical provisions of the Insolvency Act 1986 and Companies Act 2006 to be modified so that they are applied appropriately to foundation trusts, without the need for extensive primary legislation and to allow time for detailed and technical consultation with interested parties, insolvency experts and other government departments before any regulations are made.

Reason for the selected procedure

529. Corporate insolvency procedures are set out in primary legislation (the Insolvency Act 1986) and using the affirmative procedure is a necessary safeguard.

**Clause 116: Health special administration regulations**

**Power to make regulations about health administration orders**

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

530. Clause 116 requires the Secretary of State to make regulations, referred to as "health special administration regulations" to make further provision about health administration orders.

531. The health special administration regulations may apply any provisions of Part 2 of the Insolvency Act 1986 (administration) with or without modifications and any other relevant enactment that relates to administration or insolvency under that Act. The purpose is to allow the application of the provisions of that Act to create a health special administration regime. The objective of that regime (as set out in clause 115) is to secure the continued provision of designated services in the event that the company or NHS foundation trust providing those services should become insolvent.

532. Clause 116 also makes provision for the health special administration regulations to modify Chapter 6 of the Bill, the Insolvency Act 1986 or any other relevant enactment that relates to administration or insolvency under that Act. This is a "Henry VIII" power which enables the Secretary of State to make provision for an enactment about insolvency to apply to or amend or modify an enactment about insolvency in consequence or in connection with the health special administration procedure.

Reason for delegating the power

533. These powers are necessary in order to specify technical detail and to allow for consultation on the regulations.

534. The Bill sets out the meaning of a health administration order and the broad objective of health administration. The regulations would set out the detail of the special administration regime for providers of designated services, and would include provisions enabling the transfer of those services to another provider (or a number of providers) (clause 117) and for indemnities to be given to insolvency practitioners (clause 118). That regime would be based on the process of administration set out in Part 2 of the Insolvency Act 1986 and existing special administration regimes, for example in the utilities and transport sectors.

535. The regime would also require provisions that are specific to the health sector in order to ensure the continued provision of designated services if a provider fails, and to reflect the legal status of foundation trusts as public benefit corporations.

536. Delegating this power will allow time for detailed consultation in order to ensure that the technical detail of the regime is fit for purpose.

537. The “Henry VIII” power is considered necessary because insolvency legislation is inherently complex and a special health administration regime is new. It is anticipated that unforeseen complexities may arise from the consultation and from the development of the new system of health care. Also, the law relating to insolvency is constantly evolving. It is important to include this power to ensure that the health administration regime can be appropriately applied in future. Comparable powers were taken in the Banking Act 2009 in relation to bank insolvency and bank administration.

Reason for the selected procedure

538. In view of the significance of creating a special administration regime for health, the regulation making power is to be subject to the affirmative procedure. This procedure also applies to power to make regulations about special insolvency procedures for investment banks in section 233 (insolvency regulations) of the Banking Act 2009 (see section 235 of that Act).

539. Any regulations made under the "Henry VIII" power are likely to be technical. As this power may be exercised to amend the primary legislation it is appropriate that any regulations made under this power be subject to the affirmative procedure. Comparable powers were taken in the Banking Act 2009 in relation to bank insolvency and bank administration which were also subject to the affirmative resolution procedure.

**Power to make insolvency rules**

540. In addition subsection (7) of clause 116 provides the following power.

***Power conferred on:*** *Lord Chancellor with the concurrence of the Secretary of State, and in the case of rules affecting court procedure the Lord Chief Justice*
***Power exercised by:*** *Rules*
***Parliamentary procedure:*** *Negative*

541. Clause 116 also expressly provides for insolvency rules to be made under section 411 of the Insolvency Act 1986 for the purpose of giving effect to the health special administration regime.

Reason for delegating the power

542. It is necessary to delegate the power in order to specify technical detail. In the same way that the Insolvency Rules 1986 give effect to the insolvency processes set out in the Insolvency Act 1986, the special administration rules would set out procedural matters to make the special administration regime workable in practice.

Reason for the selected procedure

543. Insolvency rules are made using the negative procedure under the provisions of section 411(5) of the Insolvency Act 1986 since they are technical rules dealing largely with procedural matters which make primary legislation workable in practice. It is anticipated that most rules made under this power will concern detailed provision about the day to day operation of the insolvency procedure.

544. The Insolvency Rules Committee (section 413 of the Insolvency Act 1986) must be consulted prior to the making of rules. The Committee is made up of insolvency experts from the judiciary and the insolvency profession.

**Clause 119: Power to make modifications to the special administration regime for providers of designated services**

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

545. This clause provides that the powers of the Secretary of State to modify or apply enactments under sections 248, 254 and 277 of the Enterprise Act 2002 includes power to make consequential changes to this Chapter of the Act or regulations made under powers set out in this Chapter.

546. Sections 248 and 277 of the Enterprise Act 2002 provide for consequential amendments and section 254 provides a power to apply insolvency law to foreign companies. The inclusion of these provisions is consistent with existing special administration regimes, for example that set out in the Energy Act 2004.

Reason for delegating the power

547. This power is necessary to ensure that any modifications made under sections 248, 254 and 277 of the Enterprise Act 2002 can be applied to special health administration in order to ensure that the regime is up to date and fit for purpose.

Reason for the selected procedure

548. The Enterprise Act 2002 provides that such changes would be made by regulations subject to the negative procedure and it also seems appropriate in this case.

**CHAPTER 7: FINANCIAL ASSISTANCE IN SPECIAL ADMINISTRATION CASES**

**Clause 124: Power to impose charges on commissioners**

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

549. This clause gives the Secretary of State the ability to make regulations that would allow Monitor to require commissioners to pay charges to be used towards the protection of designated services. By allowing commissioner charges, it will place an incentive on commissioners not to over designate and protect services that do not require protection.

550. The regulations will either prescribe the amount payable by commissioners, or lay down criteria or a method for determining the amount of the charge. The clause also sets out what must be contained in the regulations:

1. where the regulations lay down criteria for determining the amount of the charge, the regulations will require Monitor to consult on the charging methodology before imposing the charge;
2. the regulations will specify who will receive the charge;
3. when the charge becomes payable;
4. provision for the payment of interest should a payment not be received by the due date; and
5. the regulations may apply, with modifications, provision made under clauses 127 to 129 in relation to charges imposed on commissioners. This would provide for a consultation on the commissioner charge and require Monitor to calculate the amount each commissioner is to pay under the charge and notify commissioners of that amount and when it will become payable.

551. Before making the regulations, the Secretary of State must consult Monitor and the NHS Commissioning Board.

Reason for delegating power

552. The methodology to be set will be technical and require more detail than would usually be included in primary legislation. The amount to be charged, or the criteria or method for determining the charge, may also need to be varied from time to time.

Reason for the selected procedure

553. The primary legislation will lay down the general principle that commissioners can be required to pay charges, with the regulations only prescribing the amount to be paid, or the criteria or method against which the amount is to be determined. The negative resolution procedure therefore seems appropriate.

**Clause 126: Power of Secretary of State to set limit on levy and contributions**

***Power conferred on****: Secretary of State, with the approval of the Treasury*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *Affirmative*

554. This clause gives the Secretary of State the power to limit the amount Monitor is able to raise through levies on providers and contributions from commissioners, but only with the consent of the Treasury. It is the intention that this power should be used in exceptional circumstances, when the size of the financial mechanisms are excessively large to cover the risk of failure. This power will be exercised via an order.

Reason for delegating power

555. The detail of the limit could be subject to change to reflect the individual circumstances that lead to the limit being issued, therefore some flexibility is appropriate.

Reason for the selected procedure

556. An order made under this provision would limit the amount of any fund which Monitor established for the protection of designated services, when providers of those services are subject to health special administration. As with a similar power under section 178 of the

Pensions Act 2004 to limit the size of the Pension Protection Fund, the affirmative resolution procedure would ensure the appropriate level of Parliamentary scrutiny.

**Clause 128: Responses to consultation**

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

557. This clause sets out how objections to the proposed methodology for determining the amount of the levy to be imposed on providers of designated services will be handled. The proposed methodology can only be adopted when providers object to it and the percentage of objections are less than both the prescribed "objection percentage" and of the prescribed "share of supply percentage". Where this is not the case, if Monitor wants to adopt the proposed methodology it must refer it to the Competition Commission for investigation. The reason for this restriction is in recognition that there will always be some providers that are unhappy with the implications of the methodology and that a reference to the Competition Commission should only be made when there are genuine concerns over the methodology rather than concerns over the level of levies.

558. The clause allows for the objection percentage and the share of supply percentage that must be reached, in order to stop Monitor adopting the proposed methodology, to be prescribed by the Secretary of State by regulations.

Reason for delegating the power

559. Delegating the power gives the Secretary of State flexibility to adjust the prescribed prescriptions in the future. This is important as it is difficult to ascertain at this stage what the optimal percentage will be as the provider landscape changes.

Reason for the selected procedure

560. The use of affirmative resolution in prescribing the percentages necessary for a reference to be made is consistent with other regulated industries. Requiring affirmative

resolution would ensure that the issues, including the best interests of the taxpayer, could be considered before the percentages were prescribed.

**Clause 131: Power of Secretary of State to limit the level of borrowing of Monitor**

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

561. This clause gives Monitor the ability to take out loans or arrange overdrafts to contribute to the financial mechanisms to be established by it under this Chapter.

562. In the event of a shortfall in the proposed default scheme/ risk pool, or in the event of a systemic failure, it is proposed that the Secretary of State is to be able to provide financial assistance to Monitor for the purposes of the default scheme/ risk pool.

563. It is proposed that Monitor would have the power to borrow from a deposit-taker such sums as it may from time to time require for the purposes of the financial mechanisms, as well as to give security for any money borrowed by it[10]. Monitor must not however borrow if the effect would be to take the aggregate amount outstanding in respect of the principal of sums borrowed by it over such borrowing limit as the Secretary of State may specify by order, or to increase the amount by which the aggregate amount so exceeds that limit.

Reason for delegating the power

564. The detail of the limit could be subject to change to reflect the individual circumstances that lead to the borrowing limit being issued.

Reason for the selected procedure

[10] This proposed power of based on section 115 (borrowing) of the Pensions Act 2004.

565. The delegated legislation would deal with administrative detail. The Secretary of State will be obliged to lay the order before Parliament, in order to inform Parliament of the intervention.

**Clause 132: Power of Secretary of State to direct Monitor to transfer funds**

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

566. This clause gives the Secretary of State the power to direct Monitor to transfer funds to the Secretary of State if a financial mechanism has become dormant or is being wound up.

567. In this event the funds are not being used for their intention and will be reinvested in the NHS.

Reason for delegating the power

568. The power is only to be exercised in certain specific circumstances and the Secretary of State needs the discretion to exercise it at the appropriate time.

Reason for the selected procedure

569. The delegated legislation would deal with the application of funds which is not expected to be controversial. The Secretary of State will be obliged to lay the order before Parliament, in order to inform Parliament of the intervention.

**PART 4: NHS FOUNDATION TRUSTS & NHS TRUSTS**

570. This Part amends Chapter 5 of Part 2 of the NHS Act 2006 which makes provision for NHS foundation trusts. It removes various restrictions and regulation specific to foundation trusts, increases foundation trusts' decision-making powers, clarifies their governance arrangements and repeals legislation on NHS trusts. The intention is that NHS Trusts, which can be directed by the Secretary of State and have been controlled by central and regional

management, will cease to exist, which means many existing delegated powers over providers would be given up. Under Part 3 of the Bill, Monitor's powers to intervene in providers would, after an initial period, be based on designation of essential services and Monitor's powers to intervene differently in foundation trusts would be repealed.

571. Autonomy for all providers under the Bill's provisions would be matched by measures in the legislation to clarify foundation trusts' internal governance arrangements, giving governors greater powers to hold boards of directors to account. The delegated powers being sought in this legislation would reduce the Secretary of State's role (by transferring to Monitor his roles in major foundation trust transactions, such as mergers, and foundation trust failure arrangements), increase transparency over how he fulfils his functions (by giving him direct powers on information, including accounts, giving clarity on how he would manage the taxpayer investment) and ensure the primary legislative changes being made to increase local autonomy work effectively (through powers to change the date of repeal of NHS Trust legislation, the voting arrangements for new decision-making powers being given to foundation trusts and arrangements for Monitor to host an independent panel that can advise governors). If the Secretary of State chose to use the power to vary the date for repeal of NHS Trust legislation or the voting arrangements introduced by this Bill, these would be subject to the affirmative resolution procedure.

572. The delegated powers being sought are themed as follows:

573. Abolition of NHS Trusts in England: this power would give flexibility to alter the date of repeal of NHS Trust legislation from that given on the face of the Bill as a contingency power in the unlikely event it were considered to be in the best interests of the NHS.

574. Governance: these powers would allow the Secretary of State to take steps to mitigate any unintended consequences of changes made by the Bill. The Secretary of State would be able to make regulations about the membership of the new panel to advise governors to ensure its continuing independence and to vary the new voting arrangements for directors, governors or members introduced on the face of this Bill.

575. Accounts and finance: these powers provide for a more transparent approach in the relationship between the Secretary of State and foundation trusts. The Bill restricts the

Secretary of State's ability to give financial assistance, giving the Secretary of State duties to set out in legislation terms which, in the past, he has been able to decide without this transparency. They also give the Secretary of State powers to set the form and timing of foundation trust accounts both to bring arrangements in line with revised and developing Government accounting needs and to reflect the proposed changed role of Monitor as an economic regulator.

576. Mergers, acquisitions, separations and dissolutions: these powers allow Monitor to make the orders effecting mergers, acquisitions, separations and dissolutions involving foundation trusts, including necessary transfers of assets and liabilities, where due process has been followed. For mergers, where this power transfers from the Secretary of State, Monitor would lose its current powers of discretion in considering the establishment of a new foundation trust.

577. Transitional foundation trust failure arrangements: transferring to Monitor the powers of the Secretary of State to operate the regime for unsustainable providers in relation to foundation trusts. The transitional failure regime applies only until the arrangements in Part 3 of the Bill are in place, when Chapter 5A of Part 2 of the NHS Act 2006 will be repealed. The Bill amends some provisions in Chapter 5A of Part 2 of the NHS Act 2006 to provide for the appointment of "trust special administrators" for NHS trusts, foundation trusts and Primary Care Trusts in England. The proposed provisions are intended to form part of a wider process for dealing with the poor performance and failure of such NHS bodies. The provisions are designed to provide a transparent way of tackling this problem while safeguarding services.

578. In the main, the reason for delegating these powers instead of detailing them on the face of the Bill is that they transfer existing powers or relate to operational matters such as form and frequency of production of accounts. Two powers would change provisions in primary legislation (clause 143: Voting and clause 164: Abolition of NHS Trusts in England). These are both proposed to be subject to the affirmative resolution procedure. The others are proposed for negative resolution procedure or for no Parliamentary scrutiny.

**Clause 139: Accounts: initial arrangements**

***Power conferred on:*** *Monitor*

***Power exercised by:*** *Direction by Monitor, with the approval of the Secretary of State*
***Parliamentary procedure:*** *None*

579. This clause deals with the ability to direct foundation trusts on the form, content, timing and other matters relating to the production of their accounts. It amends paragraphs 24 and 25 of Schedule 7 to the NHS Act 2006 primarily to require the regulator (Monitor) to seek the approval of the Secretary of State rather than of the Treasury on foundation trust accounting matters.

580. From 2011/12, foundation trusts will move inside the Department of Health accounting boundary. This means that individual foundation trust annual accounts will be, for the first time, fully consolidated into the Department's Resource Account. This change is a consequence of the cross-Government "clear line of sight" project to simplify public sector finances following legislation taken in the Constitutional Reform and Governance Act 2010.

581. The Department is required to prepare accounts in accordance with the accounting rules and instructions set out by the Treasury in its Financial Reporting and Accounting Manual. In turn, the accounts of all bodies, including foundation trusts, which are consolidated into the Department's Resource Account must be produced in accordance with the same Treasury accounting framework, subject to any divergence agreed between the Department and the Treasury. Therefore the Secretary of State must be assured that the accounting directions issued by Monitor are in line with this framework and would produce accounts consistent with those of all other bodies consolidated into the Department's Resource Account.

582. Subsection (1) replaces the power at paragraph 24(1) for Monitor to direct foundation trusts on the form of their accounts with the approval of the Treasury. The new provision requires that Monitor seek the approval of the Secretary of State rather than of the Treasury.

583. Subsection (2) amends paragraph 25(1) and requires Monitor to seek the approval of the Secretary of State rather than of the Treasury when directing on the form of foundation trust accounts.

584. Subsection (4) requires Monitor to seek the approval of the Secretary of State rather than of the Treasury in preparing directions on the accounting principles to be followed by foundation trusts and information to be reported in the accounts.

585. As the Department must produce its accounts in accordance with Treasury guidance, these amendments would not change the consistency of foundation trust accounts with Treasury accounting guidance.

586. Subsection (3) adds a new power to allow Monitor to direct foundation trusts to produce accounts for any period other than for a financial year and to direct that these accounts are audited as required by Monitor. This power is intended to allow Monitor to require the production of in-year accounts by foundation trusts, for example quarterly, should these be required by the Department, the Treasury or Parliament.

587. In order for the Department to complete its accounts to the required deadline it will need accounts from all those bodies that are consolidated, including foundation trusts, within a specified period. Subsection (6) allows the regulator to direct the period within which the foundation trust must submit its accounts. This is to ensure sufficient time for the Department to produce its own resource accounts in line with cross-Government financial reporting deadlines.

588. Subsection (7) allows Monitor to direct on the period within which foundation trusts must submit accounts and auditor's reports produced as result of a direction given under subsection (3).

Reason for delegating the power

589. It is necessary for the form of foundation trust accounts to be specified centrally. This is so that they are fit for purpose, are consistent across the sector and have been audited to a consistent and appropriate standard so that they can be consolidated into the Department's statutory Departmental Resource Accounts. The form of the accounts will change over time as Government and wider accounting policy develops. The deadline by which accounts must be completed and submitted to the Department may also vary from year to year. The requirement

to produce accounts for a period other than a financial year may also vary over time as Departmental and Government reporting requirements develop.

Reason for the selected procedure

590. The delegated powers deal with the detailed operation of accounts, which is not expected to be controversial, so the Department suggests that Parliamentary scrutiny is not necessary. Furthermore, the provisions which are being superseded by clause 139 contained in Schedule 15 to the NHS Act 2006 are not subject to any Parliamentary procedure.

**Clause 140: Accounts: variations to initial arrangements**

***Power conferred on:*** *Secretary of State with the approval of the Treasury*
***Power exercised by:*** *Direction*
***Parliamentary procedure:*** *None*

591. The clause provides for the transfer of the powers and duties relating to the production of foundation trust accounts from Monitor to the Secretary of State. Under the proposals in the Bill the transfer is needed because in the long term the changes to the role of Monitor mean it would not be appropriate for Monitor to have a specific role in foundation trust accounts when it does not have a similar role for other regulated providers of health care. The intention is to replace the initial accounting arrangements set out in the previous clause (clause 139) with the arrangements in this clause.

592. This clause amends paragraphs 24 and 25 of Schedule 7 to the NHS Act 2006 (as amended by the previous clause) to substitute the Secretary of State for Monitor in respect of the powers and duties relating to the form, content, timing and other matters concerning the accounts of foundation trusts. The new provisions also require the Secretary of State to seek the approval of the Treasury in those cases where Monitor had been required to seek the approval of the Secretary of State.

Reason for delegating the power

593. The reasons set out above in relation to clause 139 apply equally here also.

Reason for the selected procedure

594. The delegated powers deal with the detailed operation of accounts, which is not expected to be controversial, so the Department suggests that Parliamentary scrutiny is not necessary.

**Clause 141: Annual report and forward plan**

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

595. The current position is that the power to determine the content of foundation trusts' annual reports is held by Monitor and is not subject to any Parliamentary procedure. The Bill proposes to transfer this power to the Secretary of State at a time to be determined by the Secretary of State. If the Secretary of State chooses to exercise this power, any new requirements on the content of foundation trust annual reports would need to be set out in regulations and would be subject to negative resolution.

Reason for delegating the power

596. The power to determine the content of foundation trusts' annual reports would be transferred from Monitor to the Secretary of State to set in secondary legislation, This would happen when Monitor, whose main role would be as economic regulator, becomes simply a registrar of foundation trusts. The intention is to use the new power to provide the same clarity and constancy of reporting requirements for foundation trusts as exists for charities. It is not expected that the new power would be used immediately, as Monitor's current power allows requirements for annual reports to evolve over time while foundation trusts remain relatively new, to ensure their annual reports are useful, for example to governors in fulfilling their roles. In the longer term, however, it would be inappropriate for Monitor, as economic regulator, to have a permanent role in defining the content of foundation trusts' annual reports.

Reason for the selected procedure

597. The negative resolution procedure would provide Parliament with the mechanism to scrutinise any new requirements on the content of foundation trusts' annual reports introduced by the Secretary of State. This would strengthen Parliamentary scrutiny and transparency in the exercise of this power.

**Clause 143: Voting**

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

598. This clause gives the Secretary of State the power to alter the new voting arrangements for directors, governors and members of foundation trusts which are provided for in this Bill. The Department envisages that the power would be used if the voting arrangements provided for in the Bill needed to be modified, to mitigate unintended consequences. The scope of this power would include the new provisions introduced by the Bill on voting by governors on proposed mergers, acquisitions, and separations; voting by governors on "significant transactions"; voting by governors and directors on changes to the trust's constitution; and voting by the membership on changes to the constitution that affect the powers or duties of directors. Under this power, the Secretary of State could, for example, change the size of a majority required for approving mergers or for making changes to a trust's constitution from a simple majority to a two-thirds majority, or to require that a majority is of those eligible to vote as opposed to those actually voting.

599. Existing provisions on voting which are unaffected by this Bill, such as the majority of governors required to remove a non-executive director set out in paragraph 17(2) of Schedule 7 to the NHS Act 2006, would be beyond the scope of this power as such provisions are already well established. Given that local accountability for these decisions is new, and that provisions for voting in existing foundation trust constitutions vary, these voting thresholds are new and untested, so a power to amend them if needed in practice is proposed. Consistent with the Government's wish to ensure transparency and Parliamentary accountability in its dealings with foundation trusts, the exercise of this power would be subject to the affirmative resolution procedure in both Houses of Parliament.

Reason for delegating the power

600. The Bill introduces a range of new provisions on voting by directors, governors and members in foundation trusts in addition to those in the NHS Act 2006. As Monitor would relinquish its direct supervision of foundation trusts, the Bill proposes to give foundation trusts a corresponding ability to take their own decisions. For example, whereas at present Monitor must approve any changes to a foundation trust's constitution, the Bill proposes to give foundation trusts the ability to amend their constitutions without Monitor's approval provided the governors and directors agree to the amendment. Likewise, the Bill allows foundation trusts to enter into transactions such as mergers, acquisitions and separations with the agreement of the trust's governors. In addition, the Bill gives the membership of foundation trusts the right to vote on constitutional amendments that affect the role of the governors. The Bill makes specific provisions about the majorities required in each case. For example, for amendments to constitutions, a majority of the governors and directors voting must approve the amendment in order for it to take effect. A simple majority is also required for a trust to undertake a merger, acquisition or separation, as is the case for votes by the membership on constitutional amendments affecting the role of governors. Given that these voting thresholds are new and untested, the Bill proposes to allow the Secretary of State to vary these arrangements if modifications are needed in practice.

601. The proposal to give the Secretary of State such a power is consistent with the existing provisions of section 59 of the NHS Act 2006, which allow the Secretary of State to set out regulations to make provisions about the conduct of elections for the membership of the board of governors of foundation trusts. Section 59 already gives the Secretary of State, among other things, the power to set out regulations which provide for the nomination of candidates, systems and methods of voting, and the allocation of places on the board of governors. The new power proposed by this Bill would allow the Secretary of State to make similar provisions to ensure that new voting arrangements for foundation trusts are workable and effective in practice.

Reason for the selected procedure

602. In principle, the requirements on voting thresholds for the new decisions could be set in the Bill itself or in regulations or even directions made under it. The Department believes it is more consistent with the autonomy it wants foundation trusts to have for the requirements to be in primary legislation. That, together with the proposed affirmative resolution procedure, reinforces the point that the Department does not intend to get involved with foundation trusts' functioning on a day-to-day basis.

603. The Department believes that these new voting requirements would work well, and does not expect that there would need to be changes to them. However, the Department recognises that, in practice, there may be a need to change them, in the event that they prove inappropriate. For that reason, the Department proposes to take a power to change primary legislation. Regulations made under this power would require affirmative resolution by both Houses of Parliament.

**Clause 147: Panel for advising governors**

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

604. The Bill would give the Secretary of State a "reserve" power to make regulations about membership of, appointment to, and removal from the panel to advise governors. The Bill allows Monitor to appoint the panel and gives the panel itself the ability to regulate its own procedure and to establish procedures for determining questions referred to it by governors of foundation trusts, including the ability to decide for itself whether, and to what extent, to carry out an investigation on matters referred to it. The Bill does not set out detailed provisions about the size of the panel, eligibility for membership, processes for appointment to, and removal from then panel: these would be for the panel to determine. However as the panel is a new feature of the provider landscape, the Bill proposes to allow the Secretary of State to make regulations about membership of the panel. This would ensure the panel's continuing independence from Monitor, and enable changes to the panel's procedures in the event that the arrangements provided for by the panel proved problematic in practice. For example, if the panel decided to appoint members for life, this power would enable the Secretary of State to introduce term limits or to make regulations about removal from office. .

Reason for delegating the power

605. The reserve regulation-making power for the Secretary of State is to provide for the contingency that the panel does not behave in a responsible way, causing major concern which the panel was unable to resolve itself. For example, the size of the panel might become too large, or the panel might adopt inappropriate terms of office or look into matters beyond its remit.

Reason for the selected procedure

606. This power would be subject to the negative procedure, which would give Parliament the opportunity to debate the regulations. The panel does not have any powers over foundation trusts: it is purely advisory and cannot compel foundation trusts to give information sought or to enforce the conclusions of its investigations. As a result, it is considered that this regulation-making power, unlike the power to amend voting arrangements which would directly impact upon foundation trusts, would not require affirmative resolution by both Houses of Parliament.

**Clause 148: Financial powers etc**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Secretary of State power to determine the terms of public dividend capital*
***Parliamentary procedure:*** *None*

607. Subsection (7) of this clause sets out those powers of foundation trusts which would be subject to terms that may be applied to public dividend capital by the Secretary of State under subsection (3) of section 42 of the NHS Act 2006.

608. Under the proposals in the Bill, the taxpayer investment in foundation trusts would no longer be managed through foundation trust specific statutory controls but through conditions to be applied to loans, public dividend capital and guarantees of payments under externally financed development agreements. This would enable the management of the taxpayer

investment, through the application of these conditions, by an operationally independent banking function which would be established by the Department.

609. This subsection is intended to indicate those powers of foundation trusts which may be subject to conditions set on public dividend capital. These terms are consistent with those that would be applied by any lender with a significant investment in an organisation. They would be triggered only in exceptional circumstances, so would not affect the operational freedoms of foundation trusts.

Reason for delegating the power

610. The ability to determine the terms that apply to the public dividend capital of foundation trusts is already within the delegated powers of the Secretary of State under subsection (3) of section 42 of the NHS Act 2006. This clause would enable the Secretary of State to clarify which terms would be applied under the existing power.

611. This amendment would make clear that certain powers of foundation trusts might be subject to terms that may be set on public dividend capital. It would not change or restrict the scope of the power.

Reason for the selected procedure

612. The power relates to technical financial terms, the application of which is consistent with wider practice, but the detail may vary over time and with the level of investment. This is a technical matter and it therefore seems inappropriate to require further Parliamentary scrutiny.

**Clause 151: Information**

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

613. This clause provides a power to require disclosure by a foundation trust of such information, in such form, and at such time or within such period, as the Secretary of State may

require. This would allow the Secretary of State to collect information that he considers necessary for the purposes of the Secretary of State's functions in relation to the health service directly from foundation trusts. This would replace the current system whereby Monitor collects information under powers relating to the terms of authorisation of foundation trusts which would be removed by the Bill.

Reason for delegating the power

614. The Secretary of State and the Department require information to enable the effective management of the Department's financial position against Departmental Expenditure Limits, Parliamentary Estimates and other controls. In addition, the Department has a responsibility to provide information on bodies for which it is accountable to meet requirements that may be set by the Treasury and others for both financial and non-financial matters.

615. The information required by the Department to fulfil these functions would change regularly over time.

Reason for the selected procedure

616. The power relates to the collection of routine information required by the Secretary of State to discharge his functions effectively. Such information would vary over time in line with wider Government policy. This administrative function is not expected to be controversial, and so the Department suggests that Parliamentary scrutiny is not necessary.

**Clause 156: Dissolution**

***Power conferred on:*** *Regulator (Monitor)*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *None*

617. This clause requires Monitor, in certain circumstances, to make an order effecting the dissolution of a foundation trust. Such an order could be made only when Monitor is satisfied that the foundation trust has no liabilities and that the necessary steps have been taken to

prepare for the change. Any such orders would be laid before Parliament to keep both Houses informed of any such dissolution.

Reason for delegating the power

618. This power is part of the amendment of current provisions which transfer the powers to create, change or dissolve a foundation trust, including as a result of merger, acquisition or separation, from the Secretary of State to Monitor. In this case, the existing power for the Secretary of State to make an order effecting the dissolution of a foundation trust would be adapted and transferred to the regulator. This relates to the policy to enable dissolution of a foundation trust when circumstances have led to a foundation trust existing which is no longer operating services. Consistent with the approach for mergers and separations involving foundation trusts, the power to issue the order is proposed for Monitor. The decision for such a change would be taken by the foundation trust itself with Monitor undertaking a minimal administrative function to implement it. The effect of subsection (11) of clause 157 is that, for the purposes of orders under sections 57 or 57A of the NHS Act 2006, the Statutory Instruments Act 1946 applies to Monitor as if it were a Minister of the Crown.

Reason for the selected procedure

619. The power relates to the administrative arrangements necessary to effect dissolution of a foundation trust. This could happen only when all necessary steps to prepare for the change had been taken. The Department suggests that Parliamentary scrutiny would not be needed.

**Clause 157: Supplementary**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Direction*
***Parliamentary procedure:*** *None*

620. This clause moves the power to issue an order effecting the merger of a foundation trust or trusts from the Secretary of State to Monitor and introduces a similar power in the case of separation of a foundation trust which the Bill would allow. The order would specify any properties and liabilities transferring to new foundation trusts in such a change, as determined

by the application made by the foundation trust or trusts. This clause removes Monitor's discretion in effecting a merger involving a foundation trust, the current step which precedes the Secretary of State making an order under the NHS Act 2006. Under the new delegated power, Monitor would have to make such orders to effect a merger or separation when it is satisfied that the necessary steps have been taken to prepare for the change. The orders made under this provision would provide conclusive evidence of the incorporation of the new foundation trust or trusts being established. The effect of subsection (11) of clause 157 is that, for the purposes of orders under sections 57 or 57A of the NHS Act 2006, the Statutory Instruments Act 1946 applies to Monitor as if it were a Minister of the Crown.

Reason for delegating the power.

621. The delegation of the power to Monitor to make orders effecting mergers removes the Secretary of State from involvement in the administrative process of a foundation trust merger. In conjunction with the removal of Monitor's discretion over mergers, it contributes to the Government's policy to reduce the bureaucracy involved in organisational changes being made by foundation trusts. The decision to undertake a merger would be taken by the foundation trusts themselves with Monitor undertaking a minimal administrative function to implement their decisions, so long as legal process has been followed.

622. The new power for Monitor to effect a separation is needed because, as with a merger, the ability of a foundation trust to separate into two or more trusts would involve the creation of new foundation trusts and it needs to be clear which property and liabilities are to be transferred to it. In the case of an acquisition, the trusts involved can agree the transfer of assets and liabilities without the need for any statutory step.

Reason for the selected procedure

623. The power relates to the administrative arrangements necessary to effect mergers and separations of foundation trusts. This could happen only when all necessary steps to prepare for the change had been taken. The Department considers that Parliamentary scrutiny would not be needed.

**Clause 159: Trust Special Administrators**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *None*

624. This, and subsequent provisions on the transitional foundation trust failure regime, transfer the Secretary of State's existing powers to Monitor with regard to foundation trusts only. The transitional failure regime applies only until the arrangements in Part 3 of the Bill are in place, when Chapter 5A of the NHS Act 2006 would be repealed. This provision amends the power in section 65B of the NHS Act 2006 which requires the Secretary of State to issue an order when the regime is triggered for NHS Trusts. The Secretary of State currently has the power to make an order to appoint a trust special administrator to exercise the functions of the chair and directors of a foundation trust and subsequently produce recommendations on the future of the organisation and services, This clause provides for the power to be transferred to Monitor. Monitor must be satisfied that the foundation trust is, or is likely to become, unable to pay its debts before issuing the order. The order would specify the date on which the appointment is to take effect.

Reason for delegating the power

625. Transfer of this and other powers relating to the trust special administrator from the Secretary of State to Monitor is in line with the Department's intention and proportionate with Monitor's transitional role in overseeing foundation trusts and their political accountability to Parliament. The intervention by Monitor would, by its nature, be particular to an individual foundation trust. The power may need to be exercised promptly, in order to take swift action to deal with a poorly performing organisation. The orders would not themselves remove or alter the trust's statutory power or duties. Although the administrator may make recommendations, a final decision in relation to the trust would be taken by Monitor.

Reason for the selected procedure

626. The power transferred to Monitor would remain the same as the current power exercised by the Secretary of State, and the Department therefore considers that the procedure by which it is exercised should remain the same. The order would be concerned

with the detailed operation and management of an individual foundation trust. Monitor would be obliged to lay the order before Parliament to inform Parliament that the regime has been triggered and to give the regime greater transparency. In addition, there would be an obligation on Monitor to publish the name of the person appointed, to ensure transparency.

**Clause 160: Procedure etc**

**Amended Section 65F (draft report)**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Directions*
***Parliamentary procedure:*** *None*

627. This power of direction is the same that the Secretary of State currently has when a trust special administrator is appointed to an NHS trust under section 65F of the NHS Act 2006. Currently the Secretary of State has the power to direct the trust special administrator to consult relevant people when preparing a draft report on a failing foundation trust. This clause would transfer this power to Monitor with regard to foundation trusts only. Section 65F would be amended in relation to foundation trusts only. It would enable Monitor to direct the trust special administrator to consult any person who commissions services from the foundation trust, in addition to consulting the local Strategic Health Authority (or the Board after Strategic Health Authorities cease to exist).

Reason for delegating the power

628. Whom the trust special administrator should consult at this stage would vary in different situations and is a matter of administrative detail. In the Department's view it remains unnecessary to specify this detail in primary legislation. For foundation trusts only, the provision would be amended to enable Monitor to specify which commissioning bodies should be consulted, rather than requiring all to be consulted. (Some may commission a very limited range of services and a requirement to consult them would be disproportionate). Section 65H contains more detailed provision on who should be consulted on the draft report itself.

Reason for the selected procedure

629. The power transferred to Monitor would remain the same as the current power exercised by the Secretary of State, and the Department therefore considers that the procedure by which it is exercised should remain the same. This power enables Monitor to direct the trust special administrator to consult relevant commissioners. The power covers administrative consultation arrangements which are not expected to be controversial, so the Department suggests that Parliamentary scrutiny is not needed.

**Amended Section 65H (consultation)**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Directions*
***Parliamentary procedure:*** *None*

630. This power of direction is the same power of direction that the Secretary of State has when a trust special administrator is appointed to an NHS trust under section 65H of the NHS Act 2006. This clause transfers the power from the Secretary of State to Monitor. The current provision would be amended so that, in relation to foundation trusts only, it enables Monitor to make directions further detailing whom the trust special administrator should consult as part of the 30 working day consultation process. For foundation trusts, the Bill amends the power in section 65H(7)(c) so that Monitor would be able, just as the Secretary of State is now, to prescribe that the trust special administrator must request a written response from Members of Parliament, relevant local involvement networks and local authority overview and scrutiny committees, as specified in the regulations. For foundation trusts, the Bill amends section 65H(10) of the NHS Act 2006 to enable Monitor to require the administrator to hold meetings with or request written responses from other persons in the same way that the Secretary of State can with regard to NHS trusts.

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

631. The power to include these provisions in secondary legislation avoids too much technical and administrative detail being on the face of the Bill and ensures that Monitor has flexibility in responding to changing circumstances, for example when organisations change their name or structure, so that legislation can be kept up to date without requiring further

primary legislation. The transfer of this power to Monitor is proportionate with its transitional role in overseeing NHS foundation trust and its political accountability to Parliament.

Reason for the selected procedure

632. The power transferred to Monitor would remain the same as the current power exercised by the Secretary of State, and the Department therefore considers that the procedure by which it is exercised should remain the same. The power covers administrative procedures which are not expected to be controversial, so the Department suggests that Parliamentary scrutiny is not needed.

**Amended Section 65J (power to extend time)**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *None*

633. This clause transfers a power currently held by the Secretary of State to Monitor in relation to foundation trusts only. The current provision would be amended so that in relation to foundation trusts the provisions would enable Monitor to make an order extending any of the time periods for preparing the draft report, conducting the consultation or providing the final report. The power would be exercisable only where Monitor considers that it would not be reasonable to expect the administrator to complete the relevant activity in the specified period.

Reason for delegating the power

634. This order enables detailed administrative arrangements to be set up within the basic structures and principles set out in primary legislation. The Department envisages that the power would be exercised in cases for example where the administrator fell ill, or where an unforeseen emergency prevented the administrator from completing the report in time. The Department is not however able to predict all the circumstances in which it may be necessary to extend the time available and the power may have to be exercised promptly.

Reason for the selected procedure

635. The power transferred to Monitor would remain the same as the current power exercised by the Secretary of State, therefore the procedure by which it is exercised would remain the same. The power covers administrative procedures which are not expected to be controversial, and the Department therefore considers that the procedure by which it is exercised should remain the same.

**Clause 161: Action following final report**

**Amended Section 65K (Monitor's decision)**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *None*

636. This clause transfers a power currently held by the Secretary of State to Monitor in relation to foundation trusts only. The current provision would be amended for foundation trusts so that Monitor is able to make an order should it decide that the foundation trust should be dissolved. The order would dissolve the foundation trust and would transfer or provide for the transfer of the property and liabilities of the trust to either another foundation trust or the Secretary of State. The liabilities may include criminal liabilities. The power could not be exercised so as to transfer the liabilities of a dissolved foundation trust to the Secretary of State unless he had given his approval to the dissolution. If he chose not to approve a dissolution, Monitor would be given a further 20 days in which to make an alternative decision.

Reason for delegating the power

637. The provision of this power to Monitor is proportionate with its transitional role in overseeing foundation trusts and its political accountability to Parliament. The decision to dissolve a foundation trust would be taken by Monitor, but since the consequences of that decision would fall upon the secretary of State, he would be given a role in approving a dissolution decision before it took effect.

Reason for the selected procedure

638. The power transferred to Monitor would remain the same as the current power exercised by the Secretary of State, and the Department therefore considers that the procedure by which it is exercised should remain the same. The power covers detailed administrative procedures which are not expected to be controversial, so the Department considers that Parliamentary scrutiny is not needed.

**Amended Section 65L (Trusts coming out of administration)**

***Power conferred on:*** *Monitor*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *None*

639. This clause would transfer a power currently held by the Secretary of State to Monitor. The current provision would be amended for foundation trusts so that Monitor is able to end the period of administration, which applies if Monitor decides not to dissolve the foundation trust. It would enable Monitor to make an order specifying the date when the appointment of the trust special administrator and the suspension of the chair and directors of the trust would come to an end. Such an order would bring to an end the administration instituted by an order under section 65D, which itself is subject to no Parliamentary procedure.

640. The foundation trust's directors would be suspended but would be restored to office at the end of the period of administration. Monitor would have the power (under section 65L) to remove and appoint directors following administration, a power which the Secretary of State currently has in relation to NHS trusts coming out of administration and which Monitor already has in other circumstances where a foundation trust is struggling (under section 52(4) of Chapter 5 of Part 2 of the NHS Act 2006). As with other powers in this section in this section, the order would not be subject to any Parliamentary procedure.

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

641. It would not be practical to set out in primary legislation the provisions that would be made in the order out. The provision of this power to Monitor is proportionate with its transitional role in overseeing foundation trusts and its political accountability to Parliament.

Reason for the selected procedure

642. The power transferred to Monitor would remain the same as the current power exercised by the Secretary of State, and the Department therefore considers that the procedure by which it is exercised should remain the same. The power covers administrative procedures which are not expected to be controversial, so the Department suggests that Parliamentary scrutiny is not needed.

**Clause 164: Abolition of NHS trusts in England**

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

643. The power would allow the Secretary of State to change from 1 April 2014 the date on which NHS trust legislation would be repealed.

Reason for delegating the power

644. This is a contingency power, in case of unforeseen circumstances which might mean that the repeal of the NHS trust legislation would not be in the interests of the NHS, perhaps because it would cause the loss of service provision to the NHS or adversely impact on the ability of organisations to provide safe, effective and efficient services to patients. The Department of Health is making arrangements to support NHS trusts to become foundation trusts and has specified that the final date for applications to be a stand-alone foundation trust would be 31 March 2013, with authorisation by 1 April 2014.

645. In the event that credible plans are not agreed and where an NHS trust is unsustainable, the Secretary of State may apply the trust administration regime set out in Chapter 5A of the NHS Act 2006. However, if the Secretary of State were to conclude that the dissolution of one or more NHS trusts on the fixed repeal date were not in the best interests of the NHS, then the Secretary of State would have to seek Parliament's approval to a new date.

The clause also gives the Secretary of State power to seek Parliament's approval to bring the date forward, but this is considered to be unlikely.

Reason for the selected procedure

646. The affirmative resolution procedure would allow full Parliamentary debate on the use of this power which, if used, would amend the date set in primary legislation.

**PART 5: PUBLIC INVOLVEMENT AND LOCAL GOVERNMENT**

**CHAPTER 1: PUBLIC INVOLVEMENT**

647. This Chapter deals with creating a new national body, HealthWatch England (HWE), which would be established as a statutory committee of the Care Quality Commission (CQC), and with LHW organisations (LHW), which would be set up as statutory organisations, replacing the current Local Involvement Networks (LINks).

648. These and related changes would be made by way of amendments to provisions for public and patient involvement in the Local Government and Public Involvement in Health Act 2007 (the 2007 Act) and provisions in the Health and Social Care Act 2008 (the 2008 Act) and the NHS Act 2006.

649. The amendments would create a small number of new delegated powers and modify existing delegated powers, to reflect the replacement of LINks with LHW.

**New powers**

650. New powers would be conferred enabling the Secretary of State to make regulations regarding the membership of LHW and HWE, to give directions to HWE, to prescribe by regulations descriptions of complaints for the purposes of arrangements for the provision of independent advocacy services, to make regulations about indemnity in relation to such arrangements, to dissolve LHW by order and to make transfer schemes. These new powers are discussed further below.

**Modifications of existing delegated powers**

651. In addition, the following delegated powers in the 2007 Act would be modified without any substantive alteration. These changes are summarised here, and are not discussed further below. In deciding to maintain the delegation of these powers the Department has been guided by the desirability of not putting detailed technical provisions on the face of the Bill and the need to ensure flexibility in responding to changing circumstances.

652. Section 221(4) enables the Secretary of State to make regulations to amend section 221 of the 2007 Act to add to the activities for which local authorities must make contractual arrangements. These activities relate to patient and public involvement in health and social care. The Bill amends section 221 to add to the current list of activities. However, the power to make regulations to add to those activities is not being amended.

653. The Bill would make changes consequential on the replacement of LINks with LHW organisations and on the new power for local authorities to contract directly with LHW organisations to each of the following sections (for example, references to "local involvement network" would be replaced with references to "Local Healthwatch organisations"):

- Section 223 requires the Secretary of State to make regulations, which provide that arrangements made under section 221(1) must require prescribed provision to be included in those arrangements.
- Section 224 enables the Secretary of State to impose duties by regulations on a services-provider (which includes a person prescribed by regulations) as regards responding to requests for information made by LINks and dealing with reports or recommendations made by LINks.
- Section 225 requires the Secretary of State to make provision by regulations for the purpose of imposing, on a services-provider (which includes a person prescribed by regulations) a duty to allow authorised representatives of LINks to enter and view, and observe the carrying-on of activities on, premises owned or controlled by the services-provider.
- Section 226 enables the Secretary of State to make provision by regulations as respects determining the time by which an overview and scrutiny committee of a local authority must acknowledge receipt of a referral of a social care matter by LINks.

- Section 227 concerns annual reports relating to LINks and requires arrangements under section 221 to include provision requiring that copies of those annual reports are to be made publicly available in such manner as the person preparing it, after having had regard to any guidance issued by the Secretary of State, considers appropriate. It also requires arrangements under section 221 to include provision that the annual reports must address such matters as the Secretary of State may direct.

*Healthwatch England*

**Clause 166: Healthwatch England**

**Subsection (2)**

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

654. This clause inserts subparagraph (1A) into paragraph 6 of Schedule 1 to the 2008 Act. This provides that a committee of the Care Quality Commission known as "the Healthwatch England committee" is to be appointed in accordance with regulations. It also inserts subparagraph (1C) which says that the regulations may include provisions about the removal or suspension of members of HWE and the payment of remuneration and allowances to members.

Reason for delegating the power

655. Delegating the power ensures flexibility for changes to be made to the membership of HWE in line with changing circumstances and operational experience. It allows detailed administrative arrangements to be set up and kept up to date within the basic structures and principles set out in the primary legislation. Rules about membership and procedure develop over time to reflect changing circumstances. Delegating the power to the Secretary of State allows for flexibility in making adjustments and adaptations to the composition of HWE in light of emerging future needs and in response to feedback. It avoids placing large amounts of detail on the face of the Bill, which might then require frequent amendment to meet changing

circumstances. If these matters were detailed on the face of the Bill, changes could only be made by way of primary legislation and could result in unnecessary delay and consumption of Parliamentary time.

Reason for the selected procedure

656. The procedure is in line with the procedure for other bodies such as the Care Quality Commission, of which HWE is a committee. Using the negative resolution procedure allows for operational matters to be dealt with in a timely manner.

**Subsection (4)**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Directions*
***Parliamentary procedure:*** *No procedure*

657. Subsection (4) of clause 166 inserts new section 45A into the 2008 Act. Subsection (8) of new section 45A provides that Healthwatch England in performing functions under section 45A must have regard to such aspects of Government policy as the Secretary of State may direct.

Reason for delegating the power

658. The Secretary of State may want HWE to take account of broad aspects of Government policy as these change over time so that these are given priority when HWE exercises its functions. For example, a direction might deal with a change in direction or focus of existing health and social care policy. This power allows the Secretary of State to direct HWE to have regard to these aspects of government policy. These requests may change over time so it would not be appropriate to set these out on the face of the Bill.

Reason for the selected procedure

659. This power might need to be exercised at short notice and a lack of Parliamentary procedure is in line with provision for other public bodies such as the CQC. It is a fall-back power, which the Department expects to be used sparingly.

**Subsection (5)**

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

660. This subsection inserts subsection (1A) into section 82 of the 2008 Act which enables the Secretary of State to give a direction to Healthwatch England if the Secretary of State considers that it is failing or has failed to discharge or properly discharge its functions. Such directions must be given in writing.

Reason for delegating the power

661. Delegating the power would give the Secretary of State the ability to give HWE specific instructions, or to set out detailed or technical requirements that would not be appropriate for primary legislation or regulations. The power to direct is appropriate as it would enable the Secretary of State to respond quickly to different circumstances as they arise. This power is necessary so that the Secretary of State can take action should HWE fail to carry out its functions properly. It is also appropriate that the Secretary of State should have a mechanism to give HWE direction in respect of a particular issue. The power to direct follows the precedent set for the Care Quality Commission, of which HWE is a committee, under section 82(1) of the 2008 Act. It is envisaged that the Secretary of State would use this power sparingly.

Reason for the selected procedure

662. This is purely an operational matter, so the Department does not consider that a Parliamentary procedure is required.

*Local Healthwatch organisations*

**Clause 167: Establishment and constitution**

663. This clause introduces Schedule 13 to the Bill, which is inserted into the 2007 Act as new Schedule 16A. The Schedule deals with the following delegated powers.

**Paragraph 2: Membership**

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

664. Paragraph 2 of the Schedule provides that the Secretary of State may make regulations regarding the membership of LHW organisations. This includes making provisions about: the number of members; conditions of eligibility for membership; the appointment of members (including who has the power to appoint); the terms of appointment; circumstances in which a person ceases to be a member or may be suspended; and the payment of remuneration and other amounts to or in respect of members.

Reason for delegating the power

665. Delegation of the power allows detailed administrative arrangements to be set up and kept up to date within the basic structures and principles set out in the primary legislation. Rules about membership develop over time to reflect changing circumstances. Delegating the power to the Secretary of State allows for flexibility in making adjustments and adaptations to the composition of LHW organisations in light of emerging future needs and in response to feedback. It avoids placing large amounts of detail on the face of the Bill, which may then require frequent amendment to meet changing circumstances. If these matters were detailed on the face of the Bill, changes could be made only by primary legislation and could result in unnecessary delay and consumption of Parliamentary time.

Reason for the selected procedure

666. The negative resolution procedure gives Parliament, if it wishes, the opportunity to debate the matters covered, and is in line with provision for other public bodies, including the Care Quality Commission.

**Paragraph 7: Accounts.**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Determination*
***Parliamentary procedure:*** *none required*

667. Paragraph (7) of Schedule 16A concerns accounts and provides that LHW organisations must :

- keep accounts in such form as the Secretary of State may determine
- prepare annual accounts in such form as the Secretary of State may determine
- send copies of annual accounts to the Secretary of State and the Comptroller and Auditor General within such period as the Secretary of State may determine.

Reason for delegating the power

668. It would be important that LHW organisations maintain accounts in the appropriate form. This might need to change over time. This power would enable the Secretary of State to ensure that accounts are maintained in the appropriate form at all times. The form of accounts and the period within which annual accounts must be sent to named persons are matters of administrative and procedural detail which are not appropriate for the face of the Bill.

Reason for the selected procedure

669. This is purely an administrative matter which is not considered to be controversial, so parliamentary debate is not considered appropriate.

**Clause 170: Independent Advocacy Services**

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

***Parliamentary procedure:*** *Negative*

670. This clause inserts section 223A into the 2007 Act which requires each local authority to make such arrangements as it considers appropriate for the provision of independent advocacy services. The definition of "independent advocacy services" includes services providing assistance to persons making or intending to make a complaint of such description as the Secretary of State may by regulations prescribe (relating to the provision of services as part of the NHS) and which is made under a procedure of a description prescribed in the regulations or gives rise or may give rise to proceedings of a description prescribed in the regulations. Section 223A also enables the Secretary of State by regulations to make provision requiring a person providing independent advocacy services to have cover against the risk of a claim in negligence arising out of the service provision.

Reason for delegating the power

671. There is a precursor to this provision in section 248 of the 2006 Act under which the duty to make arrangements for independent advocacy services falls on the Secretary of State. Apart from the power to make regulations relating to cover against a claim in negligence, the regulation-making powers are a re-statement of existing powers. Continuing to delegate this power and giving the new power, relating to ensuring cover against a claim in negligence, to the Secretary of State allows for the scope of arrangements for independent advocacy services to be expanded to reflect changing circumstances and therefore provides for flexibility. It allows the Secretary of State to impose additional requirements on persons providing advocacy services as appropriate and therefore, again, provides for flexibility.

Reason for the selected procedure

672. The negative resolution procedure is in line with that applying to the precursor to this provision, namely section 248 of the 2006 Act. This is a power to set requirements or make provision in areas that do not raise significant issues of principle. Negative resolution procedure nevertheless gives Parliament the opportunity to debate if it wishes to do so.

**Clause 172: Dissolution and transfer schemes**

**Dissolution of Local Healthwatch organisations**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Order*
***Parliamentary procedure:*** *No procedure*

673. This clause inserts section 226A into the 2007 Act, which enables the Secretary of State by order to dissolve a LHW organisation either on an application made by the local authority and HWE or on the Secretary of State's own initiative where the Secretary of State is satisfied that the circumstances require dissolution.

Reason for delegating the power

674. Delegating the power to the Secretary of State is necessary as the need for dissolution is a matter which depends on whether circumstances arise which make dissolution necessary. Therefore this is not something that can be predicted in advance. It is a fall-back power. The order would also be applicable only to individual LHW organisations, rather than to LHW organisations as a whole.

Reason for the selected procedure

675. The lack of procedure is in line with provision for other public bodies. It is a fall-back power, relating only to an individual LHW. Parliamentary debate is not, therefore, necessary. Dealing only with individual LHW organisations, it would be inappropriate for it to be placed into regulations.

**Transfer schemes in relation to Local Healthwatch organisations**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Scheme*
***Parliamentary procedure:*** *No procedure*

676. This clause also enables the Secretary of State to make a scheme for the transfer (upon dissolution) from a LHW organisation to another of property, rights and liabilities.

Reason for delegating the power

677. Delegating the power to the Secretary of State is necessary as the need for a transfer scheme is a matter which depends on whether circumstances arise which make a scheme necessary. This power is comparable to that in section 148 of and Schedule 10 to the 2007 Act in respect of transfers to the Audit Commission. The schemes would be specific in nature and would be used in individual cases. Each scheme would apply only to the particular LHW organisations and particular property, rights and liabilities specified in the scheme. The details cannot therefore be set out in primary legislation.

Reason for the selected procedure

678. Because the schemes would be concerned with operational details, the Department considers that no Parliamentary procedure is required.

**Clause 174: Transitional arrangements**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Scheme*
***Parliamentary procedure:*** *No procedure*

679. This clause enables the Secretary of State to make a scheme for the transfer of property, rights and liabilities to LHW organisations from a person with whom the local authority has made arrangements under section 221 of the 2007 Act.

Reason for delegating the power

680. This power is necessary to give effect to local authorities' powers to contract directly with LHW organisations under amendments made by the Bill. This would be a fall-back power to deal with a situation where there is overlap between the duration of existing contracts under section 221 of the 2007 Act and the commencement of the Bill's provisions on LHW organisations. Without this power a situation might arise whereby local authorities had powers

to contract with LHW organisations or other persons but were tied into the existing contracts under section 221.

681. Delegating the power to the Secretary of State is necessary as the need for a transfer scheme is a matter which depends on whether circumstances arise which make a scheme necessary. Therefore this is not something that can be predicted in advance. This power is comparable to that in section 148 of and Schedule 10 to the 2007 Act in respect of transfers to the Audit Commission. The schemes would be specific in nature and would be used in individual cases. Each scheme would be operational in nature and would only apply to the particular bodies and particular property, rights and liabilities specified in the scheme.

Reason for the selected procedure

682. Because the scheme would be concerned with operational details, the Department considers that no Parliamentary procedure is required

**CHAPTER 2: LOCAL GOVERNMENT**

*Scrutiny functions of local authorities*

683. The Secretary of State has the power to make regulations under section 244 of the NHS Act 2006 on health scrutiny functions of local authority overview and scrutiny committees (OSCs). This power would be continued in amended form as a result of this Bill.

684. The regulation-making powers would apply in relation to local authorities rather than OSCs and in relation to the new types of NHS bodies (such as GP consortia and the NHS Commissioning Board) that the Bill is creating in place of the existing ones.

685. The powers would be extended as set out below and, in some cases, clarified. For example, the Bill would enable regulations under section 244 to be extended to cover all providers of NHS services (which would include private and independent providers) so that they can be required to consult local authorities on prescribed matters, such as substantial reconfiguration. Local authorities can also be enabled to require all providers to attend meetings to answer questions and provide information.

686. The Bill would also amend section 116 of the Local Government and Public Involvement in Health Act 2007 which, amongst other things, requires local authorities and Primary Care Trusts to have regard to any guidance issued by the Secretary of State when preparing joint strategic needs assessments. This duty would apply to local authorities and consortia, instead of local authorities and Primary Care Trusts, but in practice it would be the Health and Wellbeing Boards which would discharge this duty and the duty to prepare the joint strategic needs assessments on behalf of local authorities and consortia.

**Clause 175: Scrutiny functions of local authorities**

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

687. Under section 244 of the NHS Act 2006, the Secretary of State currently has power to make regulations on health scrutiny functions of local authority OSCs. The regulations may make provision:

- as to matters relating to the health service in the local authority's area which OSCs may review and scrutinise, and on which they may make reports and recommendations to local NHS bodies, the Secretary of State and Monitor (as regulator of foundation trusts);
- as to matters on which local NHS bodies must consult OSCs, and information they must provide to OSCs (and information that they may not disclose to OSCs);
- requiring officers of local NHS bodies to attend before OSCs to answer questions.

688. This clause makes the following changes to section 244 :

- It amends section 244 so that the regulation-making power applies in relation to local authorities rather than OSCs.
- It inserts into section 244 a new subsection (2ZC) which says that regulations may provide for any provision of section 101 of the Local Government Act 1972 not to

apply in relation to the discharge by the local authority of the function of making referrals or to apply with such modifications as may be prescribed.

- It inserts into section 244 a new subsection (2ZD) which says that regulations may authorise a local authority to arrange for its scrutiny functions under section 244 to be discharged by an OSC.
- It replaces references to local NHS bodies with references to relevant NHS bodies and relevant NHS providers and inserts definitions of these terms.
- This enables the regulation-making powers which currently apply in relation to NHS bodies additionally to apply in relation to other providers of NHS services;
- It inserts into section 244 two other new subsections, (2ZA) and (2ZB). These make clear that if regulations make provision as to matters on which local NHS bodies and other providers of NHS services must consult the local authority, the regulations may also set out the circumstances in which a local authority may refer any of those matters to the Secretary of State, the regulator, or the Board. The regulations may also give powers to issue directions, in relation to matters so referred, to the Secretary of State (in relation to the Board) and to the Board (in relation to a commissioning consortium).

Reason for delegating the power

689. The clause amends powers (existing regulation-making powers) that are currently delegated powers. Those powers, as amended by the Bill, would continue to provide for matters of procedural detail which would not be appropriate for inclusion on the face of the Bill. Further, in some cases, such as the powers to confer direction-making powers on the Secretary of State and the power to provide for the circumstances in which matters may be referred by local authorities, provision already exists in the current regulations and the powers are simply included by way of clarification or continuation of powers that already exist.

Reason for the selected procedure

690. The existing powers are subject to the negative resolution procedure and this would continue as, although the powers would be extended to all providers of NHS services, they would still be applicable only to publicly funded NHS services. The negative resolution procedure as used at present would still allow for Parliamentary scrutiny and there is nothing in

those powers or the amendments to those powers under the Bill that necessitates additional scrutiny from Parliament under the affirmative resolution procedure.

*Health and Wellbeing Boards*

**Clause 178: Establishment of Health and Wellbeing Boards**

***Power conferred on:*** *Secretary of State*

***Power exercised by:*** *Statutory Instrument*

***Parliamentary procedure:*** *Negative*

691. Subsection (12) of this clause allows the Secretary of State to make regulations providing that enactments relating to local authority committees appointed under section 102 of the Local Government Act 1972 are either disapplied or applied with prescribed modifications in relation to Health and Wellbeing Boards. Section 102 of the Local Government Act governs the appointment of committees by local authorities, for example, allowing the creation of joint committees between several local authorities, or the creation of sub-committees. Subsection (11) of this clause provides for the Health and Wellbeing Boards to be treated as committees appointed under section 102.

692. Subsection (12) would allow regulations to be made disapplying or modifying legislation governing committees appointed under section 102 including legislation governing the arrangements which local authorities can make for the discharge of functions by the Health and Wellbeing Boards. For example, if two local authorities choose to establish a joint Health and Wellbeing Board to discharge their functions, this power could be used to ensure that the joint Health and Wellbeing Boards retain the same minimum membership as single Health and Wellbeing Boards. The power could also be used to prevent Health and Wellbeing Boards being able to delegate functions to an officer of the local authority.

693. This is intended to ensure that provisions which relate to committees appointed under section 102 do not adversely affect how Health and Wellbeing Boards can operate. This reflects their unusual position of being local authority committees which also involve representatives from, and require the engagement of, other organisations.

Reason for delegating the power

694. The power governs the detailed arrangements of how Health and Wellbeing Boards would operate. Delegation of the power provides for flexibility to deal with changing circumstances and operational experience within the basic structures and principles set out in the primary legislation. Rules for the operation of the Health and Wellbeing Boards are likely to need development and revision as they become established, procedures are designed and best practice developed. Delegating the power to the Secretary of State also avoids placing large amounts of detail on the face of the Bill, which may then require frequent amendment to meet changing circumstances.

Reason for the selected procedure

695. The level of detail and the non-controversial nature of the powers which largely concerns administrative and technical matters means that a high level of parliamentary scrutiny is not required. In order to ensure an appropriate degree of parliamentary scrutiny the negative resolution procedure is believed to be sufficient.

*Care Trusts*

696. Care Trusts provide opportunities for close integrated working across health and social care services, provisions for which are made through section 77 of the NHS Act 2006. The policy intention is to support the Care Trust model to operate in the reformed NHS system to maintain stability for Care Trusts that currently exist and to enable new ones to form should that be locally agreed.

697. This involves a number of changes to the current delegated powers:

- The clause would end the direct involvement of the Secretary of State in the process of forming or disbanding a Care Trust arrangement. The decision to form or disband a Care Trust would be for local bodies and for them to designate themselves as such.
- To take account of new circumstances, it would become possible for Foundation Trusts and commissioning consortia to be designated as Care Trusts;

- The Secretary of State would retain a revised power to make certain regulations setting out procedural requirements to be followed by local bodies in forming (or revoking) a Care Trust.

Outline of current delegated powers

698. Section 77 of the NHS Act 2006 outlines the provisions for NHS bodies and local authorities to be designated as Care Trusts, where they already have partnership agreements in place under section 75 of the NHS Act 2006.

699. The provisions include a power for Secretary of State to make regulations (subject to negative resolution procedure). The key regulations are:

*Statutory Instrument (SI) 2001 No.3788 The Care Trusts (Applications and Consultation) Regulations 2001 covering who can enter Care Trust arrangements as well as requirements for application and consultation*

- This sets out the arrangements for designating (or revoking the designation of) a Care Trust. Currently, those bodies wishing to form a Care Trust must seek and apply (following a particular process) to the Secretary of State for approval. The Secretary of State is able to set out a number of conditions, for example, that designation would be likely to be beneficial in terms of the body designated as Care Trust carrying out the health-related functions of the local authority in conjunction with the functions of the NHS body. They also enable Secretary of State to set out the functions which can be the subject of partnership arrangements and areas that Care Trusts can cover.
- It sets out that the bodies concerned are required to carry out a consultation with the people who would be affected by the proposals prior to submitting to the Secretary of State for designation.
- It also specifies that the name of the NHS body being designated should be changed through an order (under section 18 or section 25 of the NHS Act 2006) to include the words “Care Trust”.

*SI 2001 No.3786 The National Health Service Trusts (Membership and Procedure) Amendment (No.2) 2001 (England) Regulations covering membership of boards for those NHS Trusts that have sought designation as a Care Trust*
*SI 2001 No.3787 The Primary Care Trusts (Membership, Procedure and Administration Arrangements) Amendment (No.2) (England) Regulations 2001 covering membership of boards for those Primary Care Trusts that have sought designation as a Care Trust.*

- These set out the changes to governance arrangements for the NHS body involved. It sets out the requirement for the governance arrangements of the NHS body forming the Care Trust to include someone with experience of the health related functions of a local authority. It also covers a range of areas in terms of appointment of executive directors and non-executive directors for Care Trusts, details of who can appoint them as well as arrangements for termination of appointments.

**Clause 184: Care Trusts**

700. The clause removes the direct involvement of the Secretary of State in the process of designating or revoking Care Trusts but retains a revised power for the Secretary of State to make regulations setting out procedural requirements to be followed by local bodies in forming (or revoking) a Care Trust. This is to ensure the bodies concerned are satisfied that the arrangement would lead to an improvement in the health or care outcomes for their local populations and that the Care Trust exercises its functions effectively. A more detailed explanation of where powers have been removed, amended or retained is given below.

**Power to designate or revoke the designation of a body as a Care Trust**

***Power conferred on:*** *NHS bodies and local authorities*
***Power exercised by:*** *-*
***Parliamentary procedure:*** *None*

701. The clause removes the power of the Secretary of State to designate or revoke the designation of a body as a Care Trust and transfers the responsibility to the local bodies concerned. At the same time, it removes the requirement for the NHS body to incorporate the words “Care Trust” in its name and for the governance arrangements of NHS bodies forming the Care Trust to include someone with experience of the health related functions of a local

authority. In future, these matters would be a local decision, agreed between the local authority and NHS body who have decided to enter into the arrangement.

Reason for delegating the power

702. The decision to become a Care Trust should be a wholly local one without permission needing to be sought from the Secretary of State. It would be up to local bodies to determine if the Care Trust model is appropriate for their circumstances and therefore it seems appropriate to remove this power and transfer the responsibility to the local bodies concerned and for them to designate themselves as such. This is in line with the proposed policy approach around changes to the Secretary of State's relationship with the NHS (removing himself from day-to-day operations).

Reason for the selected procedure

703. This would be a decision to designate an individual Care Trust, taken at local level by the bodies directly concerned, after consultation and within a framework set by primary legislation agreed by Parliament, so it seems unnecessary to select a procedure requiring Parliamentary scrutiny.

**The Secretary of State's regulation-making power**

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

704. The clause envisages that before the NHS body and local authority form a Care Trust, they must satisfy themselves that certain conditions have been met. To support this, the clause envisages powers for the Secretary of State to prescribe in regulations:

- the form and manner in which the local bodies should publish the reasons why they consider that the proposed designation would be likely to promote the effective exercise by the body of prescribed health-related functions of the local authority (new subsection (1A));

- whom the local bodies must consult on the proposed designation (new subsection (1A)) and on any proposed revocation of the designation (new subsection (1B));
- whom the local bodies must notify of the designation (new subsection (1B)) or of the revocation (new subsection 5(B));
- what information the local bodies must publish following a consultation (new subsection 5(C)).

705. Repealing subsection (9)(a), (b) and (c) of section 77 of the NHS Act 2006 as well as amending subsection (9)(d) would remove the direct involvement of the Secretary of State in the process of designating or revoking Care Trusts. The proposed changes would have an effect on the scope of the regulation-making power currently provided by subsection (8). This current provision enables Secretary of State to make regulations dealing with matters that are incidental, consequential or supplementary to the formation and break up of Care Trusts. The regulation making power enables the Secretary of State to update matters from time to time or to reflect changing circumstances which may have an impact on Care Trusts in the future.

706. The Department also envisages that the regulations would make clear that consortia can discharge only those health-related functions of the local authority that are commissioning functions, and that foundation trusts can discharge only those health-related functions of the local authority that are provider functions.

Reason for delegating the power

707. Key reasons for delegating the power are:

- to enable flexibility in the future as the practical implications of some of the mechanisms become clearer.
- to enable any specific technical detail about the conditions that should be met before NHS bodies and local authorities agree to designate or revoke their designation as Care Trusts.
- to ensure that these decisions are based on effective consultation and evidence according to best practice and that those decisions are done in a transparent and open manner.

Reason for the selected procedure

708. The level of detail and the non-controversial nature of the powers suggest that negative resolution procedure would be appropriate.

**PART 6: PRIMARY CARE SERVICES**

709. Part 6 makes a number of changes to Parts 4, 5, 7 and 9 of the NHS Act 2006. Minor changes are made to Part 4 (Medical Services), Part 5 (Dental Services) and Part 9 (Charging). Part 7 (Pharmaceutical Services) also sets out a number of minor and technical changes, particularly in relation to control of entry in relation to pharmaceutical lists and the maintenance of lists relating to performers of pharmaceutical services and those assisting in the provision of pharmaceutical services. The delegated powers in Part 6 are in line with those which have been used in the past and continue to make use of the negative resolution procedure.

**Clause 187: Persons eligible to enter into general dental services contracts**

***Power conferred on:*** *Secretary of State*

***Power exercised by:*** *Regulations*

***Parliamentary procedure****: Negative*

710. Section 102 of the NHS Act 2006 (persons eligible to enter into GDS contracts) provides a power to prescribe in regulations the conditions and exceptions subject to which Primary Care Trusts (for which Schedule 4 to the Bill would substitute a reference to the Board) may enter into a general dental services contract with any person meeting the criteria laid down in paragraphs (1)(a) to (c) of that subsection. This clause amends subsection (1)(c) of section 102 so that it refers to "persons" instead of "individuals", the effect of which is slightly to widen the category of persons who meet the conditions referred to in subsection (2) to include a limited liability partnership. It also makes a consequential change to subsection (3) of that section.

Reason for delegating the power

711. These are minor changes to an existing delegated power and do not substantially affect its nature.

Reason for the selected procedure

712. Since the changes to the power are minor, and the power deals with detailed matters within a framework created by primary legislation, it is considered that the negative resolution procedure remains appropriate.

**Clause 188: Arrangements under section 107 of the National Health Service Act 2006**

***Power conferred on:*** *Secretary of State*

***Power exercised by:*** *Regulations*

***Parliamentary procedure****: Negative*

713. Currently section 108 of the NHS Act 2006 makes provision on persons with whom agreements may be made under section 107 of that Act. Subsection (1) of section 108 enables regulations to prescribe the conditions and exceptions subject to which a Strategic Health Authority (for which Schedule 4 to the Bill would substitute a reference to the Board) may enter into a general dental services contract with any person listed in that subsection who meets the conditions prescribed in regulations made under subsection (2). This clause amends subsection (1)(d) of section 108 so as to change the reference to "individuals" in that provision to "persons", the effect of which is to slightly widen the category of persons who may enter into a GDS agreement to include a limited liability partnership and dental bodies corporate.

Reason for delegating the power

714. This is a minor change to an existing delegated power and does not substantially affect its nature.

Reason for the selected procedure

715. Since the change to the power is minor, and the power is to deal with detailed matters within a framework created by primary legislation, it is considered that the negative resolution procedure remains appropriate.

**Clause 189: Payments in respect of costs of sight tests**

***Power conferred on**: Secretary of State*

***Power exercised by**: Regulations*

***Parliamentary procedure**: Negative*

716. This clause clarifies the power currently in section 180(3) of the National Health Service Act 2006 (payments in respect of costs of optical appliances) to make payments to specific eligible people who have incurred costs in obtaining sight tests. The power also applies to the cost of optical appliances. The clause makes minor amendments to subsection (3) of section 180 to take account of the creation of the Board and to clarify the persons to whom repayments can be made. (Further amendments are made to section 180 by paragraph 95 of Schedule 4).

Reason for delegating the power

717. These are minor changes to an existing delegated power and do not substantially affect its nature.

Reason for the selected procedure

718. Since the changes to the power are minor, and the power deals with detailed matters within a framework created by primary legislation, it is considered that the negative resolution procedure remains appropriate.

**Clause 191: Control of entry on pharmaceutical lists**

***Power conferred on:** Secretary of State*

***Power exercised by:** Regulations*

***Parliamentary procedure:** Negative*

719. This clause makes the following changes to the current provisions in the NHS Act 2006 that govern entry to a Primary Care Trust's pharmaceutical list for applicants who wish to provide NHS pharmaceutical services (or who wish to change their listing once admitted):

- It amends section 129(2)(c) of the NHS Act so that responsibility for determining applications for market entry in England (inclusion in the pharmaceutical list) in line with the relevant local pharmaceutical needs assessment (PNA) is transferred from PCTs to the Board;
- It introduces new provisions by inserting new subsection (2ZA) into section 129 of the NHS Act which provide that regulations may prescribe that the Secretary of State and such other persons as may be prescribed are not to be included in a pharmaceutical list;
- It amends section 129(2A) so that the Board would determine applications against the PNA relevant to the area of the premises and so that the Board would have discretion whether or not to approve an application. The Board would not be obliged to grant an application when judged against the relevant PNA;
- It also amends subsection (6)(g) of section 129 of the NHS Act to put beyond doubt that regulations under section 129 may provide for the removal of a person from the pharmaceutical list for reasons that are not connected to a person's fitness to practise, and are not the grounds specified in subsection (6)(d), but rather are other prescribed grounds;
- It amends section 130 of the NHS Act, which concerns appeals about decisions on applications for inclusion in a list. The amendments put beyond doubt that appeals are to be heard by the First Tier Tribunal only if they are related to an applicant's fitness to practise, and that the First Tier Tribunal is able to remit any re-determination of such a decision back to the Board if it allows an appeal. Appeals on all other grounds are to be made to the Secretary of State;
- It amends section 136 of and Schedule 12 to the Act relating to local pharmaceutical services (LPS) consequential to the responsibility for preparing and publishing PNAs" transferring from PCTs to Health and Wellbeing Boards ("HWBs") based in local authorities.

Reason for delegating the power

720. These are mainly minor changes to existing delegated powers and do not substantially affect their nature.

Reason for the selected procedure

721. Since the changes to the powers are minor, and the powers deal with detailed matters which the framework created by primary legislation requires to be dealt with in regulations, it is considered that the negative resolution procedure remains appropriate.

**Clause 192: Lists of performers of pharmaceutical services and assistants etc**

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

722. This clause inserts new sections 147A and 147B into the NHS Act 2006. These new sections replace the regulation-making powers previously contained in sections 146, 149 and 150 of that Act. These are in respect of the developing and maintaining by PCTs of LPS lists for those performing LPS services and supplementary lists for those assisting pharmaceutical contractors in connection with their fitness to practise. New sections 147A and 147B contain a combined power to make regulations in respect of the preparation by the Board of pharmaceutical performers' and assistants' lists.

723. The powers carry forward the ability to require certain persons to be included in lists. For example, an individual pharmacist contractor may also assist a LPS contractor in the performance of services in which case they would need to be included on both the relevant pharmaceutical list and LPS performer list.

724. However, section 147B also includes new provision which enables regulations to be made so that if an LPS performer is approved to be included on the relevant LPS performers' list, then this may also be treated as approval to be included on the relevant assistants' lists

and vice versa. This power is needed to reduce bureaucracy for all those who assist in the provision of or perform services.

Reason for delegating the power

725. These powers mostly replace existing regulation making powers in the NHS Act. It is not considered that the powers which are being inserted by this Bill are any more wide-ranging in scope than the existing powers.

Reason for the selected procedure

726. The powers that would be inserted by the Bill mostly replace existing regulation-making powers in the 2006 Act which are subject to the negative resolution procedure It is therefore considered that the negative resolution procedure will continue to provide the appropriate level of scrutiny for these new powers.

**PART 7: REGULATION OF HEALTH AND SOCIAL CARE WORKERS**

727. As part of the Government's commitment to reducing bureaucracy and administration costs and simplifying the number of NHS bodies, including arm's length bodies, the Department of Health published a review of its arm's length bodies on 26 July 2010. This included recommendations, among other things, to –

- transfer to an existing regulator some of the functions of the General Social Care Council (GSCC); and
- move the Council for Healthcare Regulatory Excellence out of the arm's length body sector to operate on a full-cost recovery basis.

728. The GSCC is an arm's length body established under the Care Standards Act 2000 responsible for the regulation of social workers and social work students in England. It also approves courses for those who are or who wish to become approved mental health professionals (AMHPs) in England under the Mental Health Act 1983. The GSCC is an executive non-departmental public body (ENDPB) answerable to the Secretary of State for Health. It was announced in *Liberating the NHS: Report of the arm's length bodies review* that

the GSCC would be abolished and the regulation of social workers in England transferred to the Health Professions Council.

729. The Health Professions Council (HPC), established by the Health Professions Order 2001, currently regulates fifteen professions. It is a public body independent of Government and answerable to Parliament through the Privy Council. The Bill would provide for the abolition of the GSCC and for the HPC to take on its functions in relation to social workers and AMHPs. The Bill would provide for the name of the Council to be changed to the Health and Care Professions Council to reflect its wider remit in regulating social work professionals in England, as well as health professionals.

730. Section 60 of the Health Act 1999 provides for Her Majesty by Order in Council to regulate, or modify the regulation of, health professionals including those regulated by the HPC under the Health Professions Order 2001. The Bill would provide for this power to be extended so that it may be used to regulate, or modify the regulation of, social workers in England and social care workers in England and to modify the functions of the HPC in relation to the education and training of AMHPs in England. Similar powers currently exist in sections 124 and 126 of the Health and Social Care Act 2008 which enable the Secretary of State to regulate, or modify the regulation, in England, of social workers and social care workers, and modify the functions of the GSCC in relation to the education and training of AMHPs in England. The Bill would revoke these powers. The Bill would instead provide for the section 60 power to be extended to provide a single power that may be used to regulate, or modify the regulation of, social workers in England and social care workers in England and to modify the functions of the HPC in relation to the education and training of AMHPs in England as well as health professionals.

*Orders under section 60 of the Health Act 1999*

**Clause 193: Power to regulate social workers in England**
**Clause 194: Training etc of approved mental health professionals in England**

***Power conferred on:*** *Her Majesty in Council*
***Power exercised by:*** *Order made by statutory instrument*
***Parliamentary procedure:*** *Affirmative*

731. The first of these clauses extends the scope of section 60 of the Health Act 1999 to enable Her Majesty by Order in Council to regulate, or modify the regulation of, the social work profession in England and social care workers in England. This would be a re-cast of the power which is currently conferred on the Secretary of State, in relation to England, in section 124 of the Health and Social Care Act 2008.

732. The second of these clauses extends the scope of section 60 to enable Her Majesty by Order in Council to modify the functions, powers or duties of the Health and Care Professions Council (which would be the new name of the HPC) that relate to the education and training of persons who are or wish to become AMHPs. Again, this is a re-cast of the power which is currently conferred on the Secretary of State, in relation to England, in section 126 of the Health and Social Care Act 2008.

733. Clause 195 amends Schedule 3 to the Health Act 1999 (which makes further provision about what may be included in orders under section 60) in connection with these proposed changes to the scope of section 60.

Reason for delegating the power

734. Section 60 of the Health Act 1999 is a Henry VIII power which was intended to enable changes to be made to the regulation of the health professions in an efficient and timely manner. Prior to the enactment of section 60, the health professions were regulated by means of a number of Acts of Parliament, which contained detailed provision about their regulation but which could only be amended by means of primary legislation. This was problematic as the detailed provisions often needed to be updated to take account of changing best practice in the field of health professional regulation, but it was difficult to secure slots in the Parliamentary legislative timetable to allow for this to happen in a timely manner. Section 60 enables changes to such detailed regulatory provisions to be made by means of an order without the need for an Act of Parliament, whilst ensuring that interested parties are consulted on any draft order and that an appropriate level of Parliamentary scrutiny is provided for, given that the power allows for the amendment of primary legislation.

735. Orders under section 60 have been used since 2000 to enable health professional regulation to keep pace with the changing needs of health professionals, without unnecessary delays due to limits on Parliamentary time.

736. The power was used to establish the HPC in 2001 and has proved to be effective in allowing the introduction of a number of changes to improve patient safety, such as modernising fitness to practise procedures and the widening of regulation to include new professional groups (the most recent being practitioner psychologists in 2010).

737. The powers in section 124 and 126 of the Health and Social Care Act 2008 were taken to enable the Secretary of State, in relation to England, to have a similar power to that under section 60. This is by means of a Henry VIII regulation making power, to regulate or modify the regulation of social workers and social care workers and modify the functions of the GSCC in relation to the education and training of AMHPs in England. The rationale behind taking this power was the same as that for section 60, that is a need to be able to amend primary and secondary legislation to take account of the changing needs and practices of these professionals and workers, without needing to await an appropriate opportunity to introduce parliamentary legislation.

738. Given that it is intended that the regulation of social workers in England, and functions relating to the approval of courses for AMHPs in England, are to be transferred in this Bill from the GSCC to the HPC (which is, as set out above, established by an order under section 60), it is appropriate to bring the powers to regulate, and modify the regulation of, social workers and social care workers in England, and to modify the functions of the HPC in relation to the education and training of AMHPs, together with the powers to regulate, and modify the regulation of, health professionals in section 60.

Reason for the selected procedure

739. Orders made under section 60, as amended by the Bill, would continue to be subject to the same requirements to consult on the order in draft and the same parliamentary procedure, that is the affirmative resolution procedure, to which section 60 orders are currently subject. The affirmative resolution procedure (which requires approval in both houses) is considered to be appropriate because orders under section 60 may amend primary legislation.

*The Health and Care Professions Council*

740. The Bill provides for the HPC to regulate social workers in England and to approve courses for those who are or wish to become AMHPs in England. This would be achieved by means of amendments made to the Health Professions Order 2001. As a consequence of this, the powers in the Health Professions Order 2001 for the Privy Council and the HPC to make delegated legislation would be extended so that these powers would also apply in relation to the regulation of social workers in England, and the approval of courses for those who are or wish to become AMHPs, in England. It is not proposed that the procedures in relation to any of these powers would be changed as a result of their extension, as it is envisaged that the powers would be exercised in the same way as they are exercised currently.

741. The above-mentioned powers to make delegated legislation which are conferred on the Privy Council or the HPC by the Health Professions Order 2001 (and which would be extended as indicated above by clauses in this Part of the Bill) include the powers listed below. The amendments to these powers would not alter the nature of the powers, or the procedures for the exercise of the powers, and so we have not provided a detailed account of each of the powers. :

- Power of the HPC to make rules in connection with registration and the register, and the payment of fees (article 7(1))
- Power of the HPC to make rules in connection with applications for renewal of registration (article 10(1))
- Power of the HPC to make rules regarding the removal of a registrant from the register at their request or following a specified period (article 11(1))
- Power of the HPC to make rules requiring registrants to undergo education, training or courses after registration (article 16(3))
- Power of the HPC to make rules requiring registrant to undertake continuing professional development (article 19(1))
- Power of the HPC to make rules requiring individuals who have not practised or have not practised for a specified period to undertake specified education or training (article 19(3))

- Power of the HPC to make rules regarding failure to comply with the standards of conduct, performance and ethics established by the Council in relation to an individual's fitness to practise (article 22(4))
- Power of the HPC to make rules for the appointment of screeners to whom allegations in relation to an individual's fitness to practise may be referred (article 23(1))
- Power of the HPC to makes rules as to the procedure to be followed by the Investigating Committee (article 26(3))
- Power of the HPC to make rules as to the procedure to be followed by the Health and Conduct and Competence Committees (article 32(1))
- Power of the HPC to make rules conferring functions on legal, medical and registrant assessors (articles 34(4), 35(3) and 36(3))
- Power of the HPC to make rules regulating appeals against decisions of the Education and Training Committee (article 37(4))
- Power of the HPC to make rules regarding the constitution of the Education and Training Committee (Schedule 1 paragraph 17(1))
- Power of the HPC to make rules with regard to the constitution of each practice committee (Schedule 1 paragraph 18(1))
- Power of the Privy Council to make on order conferring additional functions on the Council (article 3(3))
- Power of the Privy Council to make an order providing for the constitution of the Council (article 3(7A))
- Power of the Privy Council to make an order in connection with the Council's register (article 6(1) and (3))
- Power of the Privy Council to make an order with regard to the functions of legal assessors (article 40(1))
- Power of the Privy Council to approve by order rules made by the Council (given that rules made by the Council are not to come into force until so approved by the Privy Council with one exception) (articles 41(1) and 42(1))
- Power of the Privy Council to make an order making transitional provision (article 48(2)).

742. The Council for Healthcare Regulatory Excellence (CHRE) was established by section 25 of the National Health Service Reform and Health Care Professions Act 2002 (the 2002 Act) and its functions are set out in sections 25 to 29 of that Act. It is currently responsible for the scrutiny and quality assurance of the nine health professions regulatory bodies in the UK. It is currently funded by the Department of Health and the devolved administrations.

743. In *Liberating the NHS: Report of the arm's length bodies review*, the Government announced its intention to make the CHRE, which under the proposals in the Bill will be renamed the Professional Standards Authority for Health and Social Care (the Authority), self-funding through a compulsory levy on the regulatory bodies it oversees. The Bill would provide for the Authority to be funded by the regulatory bodies, while compelling the Secretary of State, the devolved administrations and the regulatory bodies to pay separately for specific commissions of advice from the Authority. As part of this, the Bill would empower the Privy Council to make regulations requiring the regulatory bodies to pay periodic fees to the Authority.

744. To reflect the change to the Authority's funding, the Bill would provide for the Secretary of State's current powers in respect of the Authority to be exercisable by the Privy Council in future. The Secretary of State's current powers to make regulations about the investigation of complaints by the Authority, and to make regulations about appointments to the Authority and to committees and sub-committees of the Authority, would be conferred on the Privy Council.

745. The Privy Council would also be given the power by order to make transitional, transitory or saving provision in connection with the commencement of provision in this Part of the Bill.

**Clause 208: Funding of the Authority**

***Power conferred on:*** *The Privy Council*
***Power exercised by:*** *Regulations*
***Parliamentary procedure:*** *Negative*

746. Section 25A, which would be inserted into the National Health Service Reform and Health Care Professions Act 2002 (the 2002 Act) by subsection (1) of this clause, would

provide for changes to the way in which the CHRE (a body established by section 25 of the 2002 Act) is funded. The name of the CHRE would be changed to the Professional Standards Authority for Health and Social Care by the Bill. Certain of the Authority's functions would be funded by a compulsory levy on the regulatory bodies listed in section 25(3) of the 2002 Act. Section 25A(1) would confer a duty on the Privy Council to make regulations requiring each of the regulatory bodies to pay periodic fees to the Authority. The regulations would be required to stipulate which of the Authority's functions are to be funded through the levy, and the method of determining the fees to be paid by each of the regulatory bodies. The functions funded by the levy would not include its functions in relation to the accreditation of voluntary registers, or requests for advice, investigations and reports made by the regulatory bodies, the Secretary of State or the devolved administrations. The regulations would also be able to make provision about the time at which fees are to be paid, the interest to be paid in the event of late payment, and the recovery of unpaid fees or interest. The Privy Council would, after consulting the Authority and the regulatory bodies, determine the fee to be paid by each of the regulatory bodies in accordance with these regulations.

Reason for delegating the power

747. The regulations would contain technical and administrative detail on the method for determining the fee to be paid by each regulatory body, on the timing of payment of the fees and on the recovery of fees, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these technical and administrative details from time to time. The Privy Council would be required to consult the Authority, the regulatory bodies and such other persons as it considers appropriate before making regulations under this section.

Reason for the selected procedure

748. The regulations would be subject to the negative resolution procedure, to retain a level of Parliamentary scrutiny appropriate to the technical and administrative nature of the provisions, while ensuring that timely changes to the regulations can be made when required. Where regulations made under this clause include provision within the legislative competence of the Scottish Parliament, the regulations would also be subject to the negative resolution procedure in the Scottish Parliament.

**Clause 209: Power to advise regulatory bodies, investigate complaints etc**

***Power conferred on:*** *The Privy Council*
***Power exercised by:*** *Regulations*
***Parliamentary procedure:*** *Affirmative*

749. Subsection (2) of this clause would amend section 28 of the 2002 Act (which has not been commenced) to confer the current power of the Secretary of State to make regulations about the investigation by the Authority of complaints made to it about the way in which a regulatory body has exercised its functions on the Privy Council instead. This is part of fulfilling the policy objective of removing Secretary of State control in relation to the Authority.

Reason for delegating the power

750. The regulations would contain detail on the nature of complaints which the Authority must investigate, and the way in which the Authority should conduct such investigations, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these details from time to time.

Reason for the selected procedure

751. Regulations made under this section would continue to be subject to the affirmative resolution procedure. The affirmative resolution procedure is considered to be the appropriate level of Parliamentary scrutiny for these regulations, given that they may make provision about matters such as the admissibility of evidence, the compulsion of witnesses and evidence by the Authority and the administration of oaths by the Authority, which Parliament may wish to debate.

**Clause 210: Accountability and governance**

***Power conferred on:*** *The Privy Council*
***Power exercised by:*** *Regulations*
***Parliamentary procedure:*** *Negative*

752. Subsection (3) of this clause amends the existing powers in paragraph 6 of Schedule 7 to the 2002 Act as part of fulfilling the policy objective of removing Secretary of State control in relation to the Authority.

753. The current powers of the Secretary of State under paragraph 6 of Schedule 7 to the 2002 Act to make regulations about the following would be conferred, instead, on the Privy Council:

- the conditions which must be fulfilled for appointment as the chair or another member of the Authority
- the tenure of office of the chair and non-executive members of the Authority
- the appointment of a member as deputy chair and the circumstances in which that member ceases to hold office or may be removed from office as deputy chair
- the appointment of, constitution of and exercise of functions by committees and sub-committees of the Authority

Reason for delegating the power

754. The regulations would contain administrative and technical detail on appointments to the Authority and to committees and sub-committees of the Authority, which would be too detailed to appear on the face of the Bill. Furthermore, making these provisions in delegated legislation would give the flexibility to revise these details from time to time.

Reason for the selected procedure

755. Regulations made under this section would continue to be subject to the negative resolution procedure, to retain a level of Parliamentary scrutiny appropriate to the administrative nature of the provisions, while ensuring that timely amendments to the regulations can be made when needed.

*Consequential provision etc*

**Clause 214: Consequential provisions and savings, etc**

***Power conferred on:*** *Privy Council*
***Power exercised by:*** *Order made by statutory instrument*
***Parliamentary procedure:*** *Negative*

756. Subsection (2) of this clause would confer on the Privy Council the power by order to make transitional, transitory or saving provision in connection with the commencement of provision in this Part of the Bill.

Reason for delegating the power

757. This order-making power is necessary to make technical transitional provisions which would be too detailed to appear on the face of the Bill and would be needed in connection with the abolition of the General Social Care Council, the transfer of various functions relating to the regulation of social workers in England to the Health Professions Council, and the changes in the functions, funding and governance of the Authority. For example, the power may be used to allow existing members of the Authority to continue in office for a limited time as if they had been appointed under the amended powers of appointment. This power may also be used to provide that cases subject to the General Social Care Council's conduct processes at the time of the transfer of the regulation of social workers in England to the Health Professions Council would continue under the same processes.

Reason for the selected procedure

758. The power would be used to make the technical provisions needed for transition, and so the negative resolution procedure is considered to be an appropriate level of Parliamentary scrutiny. Where an order made under this clause includes provision within the legislative competence of the Scottish Parliament, it would also be subject to the negative resolution procedure in the Scottish Parliament.

*The Office of the Health Professions Adjudicator*

759. The Office of the Health Professions Adjudicator (OHPA) was established under the Health and Social Care Act 2008 in January 2010, but is not yet operationally active. It was previously expected that, from April 2011, OHPA would take over from the General Medical Council the role of adjudicating on fitness to practise matters relating to doctors under the Medical Act 1983. Subsequently it was to take over from the General Optical Council the role of adjudicating on fitness to practise matters relating to opticians and optometrists under the Opticians Act 1989. In due course, consideration would have been given to providing for it to take on the adjudication role in relation to other health professionals from the remaining health regulators by means of secondary legislation under section 60 of the Health Act 1999

760. The Government has reviewed the implementation of OHPA and has decided that OHPA should be abolished. The provisions for the abolition of OHPA in this Bill are intended to bring the law back to the position prior to the Health and Social Care Act 2008 and to repeal any delegated powers that were given in relation to OHPA.

761. In consequence of OHPA's abolition the Bill removes provision relating to OHPA from the order making power in section 60 of, and Schedule 3 to, the Health Act 1999. This is explained further below.

762. In addition the Bill repeals regulation and rule making powers relating to OHPA provided for by the Health and Social Care Act 2008.

**Clause 215: Abolition of the Office of the Health Professions Adjudicator**

***Power conferred on**: Privy Council*
***Power exercised by**: Order in Council by Statutory Instrument*
***Parliamentary procedure**: Affirmative*

763. This clause introduces Part 4 of Schedule 14, paragraph 67 of which amends section 60 of the Health Act 1999, a "Henry VIII" order-making power which is used to make modifications to the regulation of the health professions, by amending section 60(1)(f) of, and paragraph 8(2A) of Schedule 3 to, that Act (which are in force) so as to remove references to OHPA. Those provisions would have enabled modification to the constitution, functions, powers or duties of OHPA.

Reason for delegating the power

764. These amendments to the existing affirmative Henry VIII section 60 power are in consequence of the proposed abolition of OHPA and involve removal of the scope of the power to cover OHPA (which would have enabled flexibility), and so restrict rather than extend existing powers.

Reason for the selected procedure

765. The amendments do not change the existing Parliamentary procedure.

**PART 8: THE NATIONAL INSTITUTE FOR HEALTH AND CARE EXCELLENCE**

766. The White Paper *Equity and excellence: liberating the NHS* (Department of Health, July 2010) set out the Government's plans to place the National Institute for Health and Clinical Excellence (NICE) on a firmer statutory footing; securing its independence and extending its remit to social care. The Health and Social Care Bill seeks to implement the Government's proposals.

767. In respect of NICE, the Bill will confer several new regulation and direction making powers on the Secretary of State, and to a lesser extent the Board. These largely reflect the Secretary of State's existing powers to give directions to NICE and seek to ensure that NICE is able to adapt and evolve in response to developments in medicines, diagnostics , technologies and social care without the need for further primary legislation. The move away from direction-giving to regulation-making powers ensures greater Parliamentary scrutiny of NICE's functions, but we are retaining direction-giving powers for issues likely to be subject to continuous evolution. The powers are more specific than those currently exercised by the Secretary of State with regard to the National Institute for Health and Clinical Excellence.

*Establishment and general duties*

**Clause 216 and Schedule 15: The National Institute for Health and Care Excellence**

768. This clause introduces Schedule 15, which includes the following delegated powers.

**Paragraph 1: Membership, appointment, etc**

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

769. Paragraph 1(5) enables the Secretary of State to make regulations requiring NICE to have a particular number of executive members on its board and for all or any of its executive members (other than the chief executive) to hold posts of specific descriptions.

Reason for delegating the power

770. The power to make regulations in relation to the number and descriptions of specific positions ensures that that there is consistency where appropriate with other public bodies and that there is flexibility without primary legislation to amend the number or to describe specific roles to reflect functions conferred on NICE by regulations, or otherwise.

Reason for the selected procedure

771. The minimum and maximum number of executive members is set out in primary legislation and regulations would specify the number of executive members within these parameters. This is therefore an operational issue and debate in parliament would not be a good use of parliamentary time. The negative resolution procedure is considered appropriate.

**Paragraph 8: Procedure**

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

772. Paragraph 8(2) enables the Secretary of State to make regulations about procedures to be adopted by NICE for dealing with conflicts of interest of members of NICE or members of its committees.

Reason for delegating the power

773. NICE Quality Standards and its other guidance, recommendations, advice and information are developed on the basis of the best available evidence by committees and it is of particular importance to the credibility of NICE's products to ensure that its work is carried out by committees free from conflict of interest. It would not be appropriate to specify the conflict of interest procedures NICE should have in place in primary legislation as the procedures may need to change over time.

Reason for the selected procedure

774. This is an operational issue and the negative resolution procedure is therefore considered appropriate.

**Paragraphs 13, 14 and 15: Accounts, Annual Accounts and Interim Accounts**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Directions in writing or regulations*
***Parliamentary procedure****: Regulations subject to negative resolution*

775. Paragraph 13(1) requires NICE to keep proper accounts and records in relation to the accounts. Paragraph 13(2) enables the Secretary of State, with the approval of the Treasury, to give directions in writing to NICE as to

(a) the content and form of its accounts, and

(b) the methods and principles to be applied in the preparation of its accounts.

776. Paragraph 14 requires NICE to prepare annual accounts in respect of each financial year. Paragraph 14(2) enables the Secretary of State to direct NICE in writing regarding the period within which NICE must send copies of the annual accounts to the Secretary of State and the Comptroller and Auditor General.

777. Paragraph 15(1) enables the Secretary of State, with the approval of the Treasury, to direct NICE to prepare interim accounts in respect of a period specified in the direction. Paragraph 15(2) enables the Secretary of State to direct NICE in writing regarding the period within which NICE must send copies of the interim accounts to the Secretary of State and the Comptroller and Auditor General. Paragraph 15(3) enables the Secretary of State to direct in writing the Comptroller and Auditor General to send a copy of the report to the Secretary of State and to lay a copy of the accounts and report before Parliament.

778. The Secretary of State will remain accountable to HM Treasury (HMT) for the Department's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by the Treasury in their annual Financial Reporting Manual. In turn, the accounts of all bodies, including NICE, that are consolidated into the Department's Resource Account must be prepared in accordance with the same Treasury accounting framework. The Secretary of State therefore requires powers to ensure that NICE's accounts are prepared in accordance with the requirements set by HMT

779. It is possible that Parliament may also request in-year financial statements from the Department. Additional provision is therefore required so that the Secretary of State can require NICE to prepare in-year accounts and the interim accounts are audited if required.

Reason for delegating the power

780. This is an operational matter and debating accounting requirements in parliament would not be a good use of parliamentary time. Accounting requirements are also likely to change over time, so it is not desirable to set them in primary legislation.

Reason for the selected procedure

781. Accounting requirements for individual public bodies are unlikely to be controversial, as reflected by the fact that it is standard practice to use directions for this purpose.

*Functions: quality standards*

**Clause 218: Quality standards**

***Power conferred on:*** *Secretary of State and/ or the Commissioning Board*
***Power exercised by:*** *Directions in writing or in regulations*
***Parliamentary procedure*** *:Regulations subject to negative resolution*

782. This clause makes provision for the relevant commissioner to direct NICE to prepare a quality standard in relation to the provision of NHS services, public health services or social care (adults' or children's) in England. Under the proposals in the Bill, the Secretary of State will be the relevant commissioner for topics relating to public health services and social care and the NHS Commissioning Board will be the relevant commissioner for topics relating to NHS services. Quality standards will be developed through a process established by NICE that includes public consultation and the relevant commissioner must endorse the quality standard before it can be published. Subsection (9) makes provision for Secretary of State and the Commissioning Board to issue a joint direction to NICE where appropriate.

Reason for delegating the power

783. This is an operational issue and the commissioning of quality standards by the Secretary of State or the Commissioning Board will be an ongoing process to ensure that the suite of quality standards reflects evolving priorities. The Bill makes provision for directions from the Secretary of State to be given by regulations although the intention is that NICE will be asked to produce quality standards by directions in writing.

Reason for the selected procedure

784. The intention is that NICE will have duties in primary legislation to develop quality standards through public consultation and to develop the processes used in the development of quality standards through consultation with interested parties. These safeguards in primary legislation are intended to ensure that the content of quality standards and the process for their development is transparent. The direction giving power is appropriate for the Secretary of State and the Board to commission NICE in an efficient and timely fashion to develop quality standards without recourse to primary legislation.

**Clause 219: Supply of quality standards to other persons**

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

785. This clause confers on the Secretary of State a regulation-making power to make provision to allow NICE to supply quality standards developed in relation to the NHS, public health service or social care in England to the devolved administrations and other third parties. Subsection (2) states that regulations may confer on NICE the power to make adjustments to the quality standards as appropriate and to make charges.

Reason for delegating the power

786. The intention is that NICE's quality standards would be developed for the Secretary of State and the Board and NICE would only be able to publish quality standards that have been endorsed by the Secretary of State or the Board. The regulation-making power ensures flexibility to allow NICE to supply quality standards to third parties and amend them as necessary.

Reason for the selected procedure

787. This is an operational matter and the negative resolution procedure is considered appropriate.

*Advice, guidance etc*

**Clause 221: Advice, guidance, information and recommendations**
**Clause 222: NICE recommendations: appeals**

***Power conferred on:*** *Secretary of State*
***Power exercised by:*** *Regulations and directions in writing*
***Parliamentary procedure****: Regulations subject to negative resolution,*

788. These provisions give the Secretary of State a regulation-making power to confer additional functions on NICE in relation to the giving of advice or guidance, or the making of recommendations or provision of information concerning or connected with the provision of NHS services, social care or public health services. The regulations would make provision for the establishment by NICE of a process through which NICE would develop its advice, guidance, information or recommendations and for NICE to consult in the development of its procedures.

789. Regulations might make provision about:

- the persons or bodies that could commission work from NICE;
- the publication or other dissemination of guidance, information or recommendations;
- NICE's ability to charge for its functions;
- appeals against NICE's guidance;
- the bodies that are required to have regard to NICE's advice, guidance or information or to comply with NICE's recommendations.

790. It is envisaged that the regulation-making power would confer on NICE similar functions to those it currently carries out including development of guidance on specific drugs and treatments, on public health matters and on best practice across a whole pathway of care. NICE's technology appraisal guidance is currently subject to appeal by interested parties and the regulations may make provision for NICE to establish an appeals process.

791. Subsections (2) and (3) provide that functions conferred by such regulations may only be exercisable on direction of the Board or the Secretary of State and may be subject to directions as to the exercise of those functions. The direction-giving powers specifically preclude the possibility of the Secretary of State or the Board directing NICE to make a particular recommendation. The Commissioning Board could be enabled under the regulations to direct NICE only to exercise functions concerning or connected with the provision of NHS services. Provision for the Secretary of State to direct NICE to exercise functions could cover matters concerning or connected with the provision of NHS services, public health services or social care in England. This might include social care for children.

Reason for delegating the power

792. The regulation-making powers would enable appropriate flexibility for the Secretary of State or the Commissioning Board to direct NICE to respond to constantly evolving developments in medicines, diagnostics, technologies, health and social care environments to meet the needs of the NHS, social care and wider health policy and to enable NICE's work to develop in dialogue with stakeholders.

793. The direction-making powers would enable the Secretary of State and the Board routinely to commission guidance and other products from NICE.

Reason for the selected procedure

794. Most of the functions of the predecessor body, the National Institute for Health and Clinical Excellence, are subject to a direction-giving power. The regulation-making power therefore enables provision for recreating the existing flexibility that enables NICE to adapt and evolve to take on additional functions and respond to developments. As the powers, including those relating to appeals, reflect current provisions for the predecessor body and the parameters within which regulations would be made are described in the Bill itself, the negative resolution procedure is considered appropriate.

795. The direction-giving powers that can be provided for in regulations are appropriate for the Secretary of State and the Board to commission NICE in an efficient and timely fashion to carry out specific pieces of work without recourse to primary legislation or further regulations.

**Clause 223: Training**

***Power conferred on:*** *Secretary of State and the NHS Commissioning Board*
***Power exercised by:*** *Regulations and directions in writing*
***Parliamentary procedure****: Regulations subject to negative resolution*

796. This clause gives the Secretary of State a regulation-making power to confer functions on NICE in relation to the provision of training in connection with the provision of NHS, public health or social care services in England.

797. Subsections (2) and (3) provide that functions conferred by such regulations may only be exercisable on direction of the Board or the Secretary of State and may be subject to directions as to the exercise of those functions. Directions may, for example, require NICE to provide training to support the implementation of a particular piece of guidance.

Reason for delegating the power

798. NICE is well-placed to provide training to support implementation of its guidance and recommendations. NICE's functions in this area may evolve over time and the delegated powers enable this to happen within the parameters described in primary legislation. NICE would perform its functions in relation to the health service in support of the Board and it is therefore appropriate for the Board, as well as the Secretary of State, to have powers to direct NICE's exercise of its functions.

Reasons for the selected Parliamentary procedure

799. The functions of the predecessor body, the National Institute for Health and Clinical Excellence, are mostly conferred on it by directions. NICE's role in the provision of training is likely to reflect functions conferred on it by other regulations provided for in this Bill and the regulation-making powers will enable flexibility for NICE's training function to adapt accordingly. As it reflects existing arrangements for conferring functions on the predecessor body and the parameters within which regulations would be made are described in the Bill itself, the negative resolution procedure is considered appropriate.

800. The direction-making powers that may be made available in regulations under the powers are appropriate. They enable the Secretary of State or the Board to commission NICE to provide specific training in an efficient and timely fashion without amending primary legislation.

**Clause 224: Advisory services**

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

***Parliamentary procedure**: Negative resolution*

801. This clause gives the Secretary of State a regulation-making power to confer functions on NICE in relation to the provision of advisory services in connection with the provision of health care or social care services or the protection or improvement of public health. Subsections (2) and (3) allow the regulations to provide for the imposition of charges in connection with such advice. The power may be used to enable NICE to carry out activities similar to the services it currently provides to foreign Governments or the pharmaceutical industry.

Reason for delegating the power

802. This is an operational activity and is largely dependent on the methods NICE puts in place and the substance of its guidance and recommendations. The regulation-making power will enable NICE's advisory services to change over time without amending primary legislation.

Reason for the selected procedure

803. The functions of the predecessor body, the National Institute for Health and Clinical Excellence, are mostly conferred on it by directions. As it reflects current provisions for NICE and the parameters within which regulations would be made are described in the Bill itself, the negative resolution procedure is considered appropriate.

**Clause 225: Commissioning guidance**

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

804. This clause allows the Board to direct NICE to exercise the Board's functions in relation to the preparation of commissioning guidance and as to the manner in and period within which NICE must exercise the functions. Subsection (3) enables the Board to require NICE to provide advice and information about commissioning guidance and disseminate commissioning guidance in the manner requested.

Reason for delegating the power

805. Under the proposals in the Bill, the Board will be responsible for the preparation and publishing of commissioning guidance to which commissioning consortia must have regard. The direction-giving power enables the Board to delegate its power to develop commissioning guidance to NICE if it wishes to draw on NICE's expertise in this area.

Reason for the selected procedure

806. Directions are appropriate to give the Board a degree of flexibility and control over NICE's supporting role in the development of commissioning guidance. The Board would be delegating functions that have been approved by Parliament, and would be delegating them to a body that will work consultatively and transparently in pursuit of its legislative functions. This is a continuation of the current approach to the commissioning from the National Institute for Health and Clinical Excellence of expert advice. Regulations are therefore not considered necessary for what is essentially a matter of day to day management of an established public body.

*Functions: other*

**Clause 226: NICE's charter**

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

807. This clause allows the Secretary of State to make regulations requiring NICE to produce a "charter" explaining its functions. The regulations may include provision about the information to be provided in the charter, the timing of its preparation, review and revision of the charter and the manner in which it must or may be published.

Reason for delegating the power

808. The Secretary of State may in future want NICE to produce a charter that explains to a wider audience what functions it carries out and how it does so. The requirements of a charter may evolve over time in line with NICE's functions and the delegated power ensures that it is possible for appropriate provision for a NICE charter to continue to be made without amending primary legislation.

Reason for the selected procedure

809. A NICE charter would reflect the functions that had been conferred on it by the Health and Social Care Bill and in subsequent regulations. The publication of a NICE charter is therefore an operational matter and the negative resolution procedure is considered appropriate.

**Clause 229: Failure by NICE to discharge any of its functions**

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

810. This clause allows the Secretary of State to direct NICE as to the discharge of its functions if NICE is failing to carry out any of these or is failing properly to discharge them. If NICE fails to comply with such a direction, the Secretary of State may discharge those functions or make arrangements for another body to discharge them on Secretary of State's behalf.

Reason for delegating the power

811. Delegating the power ensures that the Secretary of State is able to direct NICE to carry out its functions in a particular way if it is judged to be failing in any of its functions. The further powers ensure that these detailed functions can continue to be discharged effectively without the need to involve Parliament in the detailed operational matters to which the situation may give rise.

Reason for the selected procedure

812. This is an operational matter and directions would be made only in the unlikely event that NICE were failing to properly carry out a function conferred on it in primary or secondary legislation. This power is intended as a backstop to ensure that NICE's functions are properly carried out and a direction-giving power is considered appropriate to provide for a rapid resolution.

**PART 9: HEALTH AND ADULT SOCIAL CARE SERVICES: INFORMATION**

813. The White Paper *Equity and Excellence: Liberating the NHS* explained that the Government intended to centralise data collection through the Health and Social Care Information Centre. The Information Centre would therefore become the main organisation that collects information that is required to be collected centrally from health and social care bodies relating to the provision of health or adult social care services. Under regulations this Part of the Bill would empower the Secretary of State and the NHS Commissioning Board to direct the Health and Social Care Information Centre on the information to be collected from health and social care bodies for their purposes. It would also allow the Secretary of State or the NHS Commissioning Board to direct the Information Centre to exercise information functions of the Secretary of State or the NHS Commissioning Board as may be specified in the directions, or direct another body to collect information as if it were the Information Centre.

814. *"Liberating the NHS"* set out a commitment to more widespread publication of information to provide greater transparency and promote choice. The Department has consulted on proposals to make information available to allow information intermediaries to analyse and present health and social care information innovatively. This Part of the Bill would also enable the Secretary of State to establish a central accreditation scheme for information intermediaries.

**Clause 236: The Health and Social Care Information Centre**

815. This clause introduces Schedule 17, which includes the following delegated powers.

**Paragraphs 13, 14 and 15: Accounts**

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

816. Schedule 17 covers the establishment and constitution of the Health and Social Care Information Centre. Paragraph 13(2) would enable the Secretary of State, with the approval of Treasury, to give directions to the Information Centre on the content and form of its accounts, and on the methods and principles to be applied in their preparation.

817. Paragraph 14 would require the Information Centre to prepare accounts for each financial year, and send copies to the Secretary of State and to the Comptroller and Auditor General within such period after the end of the financial year as the Secretary of State directs (paragraph 14(2)). The Comptroller and Auditor General would be required to examine, certify and report on the accounts and lay copies of the accounts and the report in Parliament.

818. Paragraph 15 would enable the Secretary of State, with the approval of Treasury, to direct the Information Centre to prepare accounts for other periods ("interim accounts") and send copies to the Secretary of State and the Comptroller and Auditor General within a specified period. Paragraph 15(3) would require the Comptroller and Auditor General to examine, certify and report on any interim accounts, and, if directed by the Secretary of State, the Comptroller and Auditor General would be required to send a copy of the report to the Secretary of State, and lay copies of the accounts and the report in Parliament.

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

819. The delegated powers deal with the detailed operation of accounts that are technical and may vary over time. The provision would also allow for accounts to be required at unspecified intervals.

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

820. The legislation deals with administrative processes that do not require Parliamentary scrutiny. The Information Centre's annual accounts and the Comptroller and Auditor General's report would be laid in Parliament.

**Clause 238: Powers to direct the Information Centre to establish information systems**

***Power conferred on:*** *Secretary of State or NHS Commissioning Board*
***Power exercised by:*** *In the case of the Secretary of State, regulations or directions in writing (see clause 277(10)); in the case of the Board, in writing (see clause 277(11))*
***Parliamentary procedure:*** *Regulations – negative; writing - none*

821. Clause 238(1) provides the Secretary of State or the NHS Commissioning Board with a power to direct the Information Centre to put in place a system for collecting, analysing, publishing or disseminating health or adult social care information. In the case of the Board, the information must be that which the Board considers is necessary or expedient for the Board to have in relation to its exercise of functions in connection with the provision of NHS services. In the case of the Secretary of State, the information must be that which the Secretary of State considers is necessary or expedient for the Secretary of State to have in relation to his exercise of functions in connection with the provision of health services or of adult social care in England. The Secretary of State otherwise may give a direction if he considers it to be in the interests of the health service in England or of the recipients or providers of adult social care in England for the direction to be given. An example of the latter might be in relation to the collection of anonymised information on the incidence of violence related attendances in A&E departments of trusts for police purposes, as well as for health care purposes**.**

822. Each of the Secretary of State and the NHS Commissioning Board must consult with the Information Centre before giving a direction, so that they could be advised on methodologies, options and potential duplications, enabling the Centre to discharge its duty to minimise the burden of information collection on bodies required to provide information.

Reason for delegating the power

823. The information requirements of the Secretary of State or the NHS Commissioning Board will be technical and require more detail than is usually included in primary legislation.

Reason for the selected procedure

824. A direction giving power will provide the flexibility to define new information collections as they are needed, as the requirements of the Secretary of State and the NHS Commissioning Board will be subject to frequent change.

**Clause 239: Powers to request Information Centre to establish information systems**

**Subsection (3): power to set aside the obligation to establish information systems in prescribed circumstances**

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

825. Clause 239(3) provides for regulations setting out the circumstances where the Information Centre would not be obliged to put in place a system following a request from Monitor, the Care Quality Commission, the National Institute for Health and Care Excellence, or any other body prescribed in regulations. Whilst the intention is that the Information Centre should become the main body responsible for the collection of health and adult social care information that is required to be collected centrally, there might be situations where it would not be appropriate for the information to be collected by the Information Centre, for example the information that is required is highly technical, or highly sensitive, and it would be more appropriate for another body to collect. The regulations would set out the types of information which the Information Centre should not collect where the duty of another body is that the information must be collected.

Reason for delegating the power

826. The processes would be operational, technical and more detailed than would be appropriate for primary legislation.

Reason for the selected procedure

827. Regulations under this power would not be controversial, but the negative resolution procedure would still provide for Parliamentary scrutiny.

**Subsection (5): Power to direct the Information Centre not to collect pursuant to a request which is not a mandatory request**

***Power conferred on:*** *Secretary of State or NHS Commissioning Board*
***Power exercised by:*** *In the case of the Secretary of State, regulations or directions in writing (see clause 277(10)); in the case of the Board, in writing (see clause 277(11))*
***Parliamentary procedure:*** *Regulations – negative; writing - none*

828. Clause 239(5) would enable the Secretary of State or the NHS Commissioning Board to direct the Information Centre that it should not set up a system in response to a request for an information collection that is not a mandatory request. Subsection (1) allows any person to make a request to the Information Centre. In the case of a request that is not a mandatory request, the Information Centre would decide whether the system should be established, taking into consideration its duty to minimise the burden that would be imposed on information providers. Whilst the Information Centre may decide that a system should be established, the Secretary of State or the NHS Commissioning Board could consider, exceptionally, that the system should not be established for other reasons, for example, if the Secretary of State or the NHS Commissioning Board believed that it would interfere with the Information Centre's delivery of its core functions. Withdrawal of central funding or Secretary of State direction under clause 252 for failure to discharge any of its functions might be too slow to prevent the establishment of an information system that the Secretary of State or the NHS Commissioning Board did not agree with.

Reason for delegating the power

829. It would not be possible to set out in primary legislation precisely which information systems should not be established by the Information Centre.

Reason for the selected procedure

830. The procedure would cover an operational matter without unnecessary waste of Parliamentary time on a level of operational detail not appropriate for Parliamentary debate.

**Subsection (6): Power to direct that the Information Centre must comply with a request from a person outside the United Kingdom**

***Power conferred on:*** *Secretary of State or NHS Commissioning Board*
***Power exercised by:*** *In the case of the Secretary of State, regulations or directions in writing (see clause 277(10)); in the case of the Board, in writing (see clause 277(11))*
***Parliamentary procedure:*** *Regulations – negative; writing - none*

831. Clause 239(1) would enable persons or bodies other than the Secretary of State or the NHS Commissioning Board to request the Information Centre to put in place a system for collecting, analysing, publishing or disseminating health and adult social care information that they require. Subsection (6) would enable the Secretary of State or the NHS Commissioning Board to direct that the Information Centre must comply with a request from a person outside the United Kingdom. The power is for the Secretary of State or the NHS Commissioning Board to be able to ensure that the UK complies with its international obligations, for example its international agreements or arrangements with WHO in the compilation of health statistics for comparison.

Reason for delegating the power

832. It would not be possible to specify in primary legislation the precise requirements for an information collection for bodies from outside the United Kingdom.

Reason for the selected procedure

833. A direction-giving power would provide the flexibility to define new information collections as they are needed, as the requirements for bodies from outside the United Kingdom are likely to be infrequent and subject to change.

**Subsection (9): Power to prescribe persons who are "relevant bodies" for the purposes of section 239**

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

834. Clause 239(9) provides the Secretary of State with flexibility to specify additional bodies that are able to make requests for information to be collected that the Information Centre must comply with as they fall within the definition of mandatory requests as defined in subsection 239(4). This power is needed to future proof this provision as new bodies may need to make mandatory requests. For example, the Government has signalled its intention to create a new regulator for research that would need to be specified in regulations.

Reason for delegating the power

835. To provide flexibility in respect of determining which bodies should be able to make requests of the Information Centre that have mandatory force.

Reason for the selected procedure

836. Specifying a new body as a relevant body in respect of mandatory information collections should not be controversial. Nevertheless, the negative resolution procedure would ensure Parliamentary scrutiny of the addition of any body by regulations under this provision.

**Clause 247: Power to establish accreditation scheme**

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

837. Clause 247(1) would enable the Secretary of State in regulations to establish an accreditation scheme that might be run by the Information Centre or by another specified body. The scheme would relate to information intermediaries who take available information about

NHS, public health and/or adult social care services and process that information to add value. Subsections 247(3) and (4) set out the expected scope of the regulations, in particular that they should require the operator to publish details of the scheme including the accreditation criteria and an appeals procedure for reconsideration of decisions. The operator should also provide advice to applicants on how to meet the criteria. The accreditation scheme would essentially act as a kite mark indicating that the resulting products are of a high quality and enable those seeking the services of an information intermediary to select one that has demonstrated that it meets quality standards. The operator of the scheme would determine the accreditation criteria and would be permitted to charge a reasonable fee in respect of an application.

Reason for delegating the power

838. The accreditation scheme requirements would be technical and require more detail than would usually be included in primary legislation.

Reason for the selected procedure

839. An accreditation scheme for information intermediaries analysing and presenting aggregated health and adult social care information should not be controversial. Nevertheless, the negative resolution procedure would ensure Parliamentary scrutiny of any scheme established under this provision.

**Clause 248: Database of quality indicators**

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

840. Clause 248 would require the Information Centre, through regulations, to establish, maintain and publish a database of quality indicators relating to health and adult social care services. Quality indicators relate to measurable performance by service providers**.** Subsection (2) sets out the expected scope of the regulations in respect of how quality indicators will be determined and approved.

Reason for delegating the power

841. The description of the process for setting up the database and its contents would be technical and require more detail than would usually be included in primary legislation.

Reason for the selected procedure

842. This should not be controversial. Nevertheless, the negative resolution procedure would ensure Parliamentary scrutiny of provisions for any database established under this provision.

**Clause 249: Power to confer functions in relation to identification of GPs**

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

843. Clause 249 would enable regulations to be made allowing the Information Centre to issue Doctor Index Numbers. The process would involve the Information Centre checking the identity of the GP so that a number could be issued that is unique to that GP and used in prescribing services. The system would be necessary to ensure that only authorised GPs would be able to issue prescriptions.

Reason for delegating the power

844. The process would be technical and require more detail than would usually be included in primary legislation.

Reason for the selected procedure

845. This should not be controversial. Nevertheless, the negative resolution procedure would ensure Parliamentary scrutiny of any arrangements established under this provision.

**Clause 252: Failure by the Information Centre to discharge any of its functions**

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

846. Clause 252(1) would give power to the Secretary of State to issue a direction if the Secretary of State considers the Information Centre is failing or has failed to discharge its functions, or is failing or has failed to discharge its functions properly. The direction could direct the Information Centre to discharge those functions in any manner and within any period specified in the directions. If the Information Centre failed to comply, the Secretary of State would be able to discharge the function or functions to which the direction relates or make arrangements for another person to discharge them on behalf of the Secretary of State.

Reason for delegating the power

847. It would not be possible to set out in primary legislation exactly what intervention would be necessary in what circumstances so this power provides flexibility to respond both appropriately and at speed.

Reason for the selected procedure

848. The procedure would ensure that the Information Centre's functions were effectively discharged in the unlikely event of a failure, without the unnecessary use of Parliamentary time.

**Clause 254(1): Power of Secretary of State and Board to give directions**

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

849. Clause 254(1) provides the necessary flexibility under regulations for the Secretary of State or the NHS Commissioning Board to vary which bodies should exercise existing

information functions, primarily related to information collections or the preparation of information standards, in order to ensure that the functions are exercised efficiently, effectively and economically. The power in subsection (1)(a) complements clause 239(3), pursuant to which the Information Centre would have discretion not to comply with a mandatory request for information described in regulations. Regulations under 254(1)(a) could provide for another body to be the body to collect a mandatory collection. Direction giving powers under regulations are also needed for clause 254(1)(a), (2) and (3) to complement the direction giving powers in clause 238 and provide the necessary flexibility, exceptionally, in respect of which body should collect or analyse what information. Subsections 254(2) and (3) constrain the directions that can be made under this clause in line with the limits set out in clause 238. Regulations under clause 254(1)(c) also could assist with the duties in clause 237 which requires the Information Centre to promote effective, efficient and economic use of resources.

850. In some circumstances the Secretary of State or the NHS Commissioning Board, having consulted the Information Centre, may determine that it would not be appropriate for the Information Centre to collect certain information, for example, if the information is for a specific purpose and there is no wider interest in its publication or dissemination.. In these cases regulations under clause 254(1)(a) would permit the Secretary of State or the NHS Commissioning Board, by direction, to specify an alternative body to collect the information as if it were the Information Centre. Regulations under subsection (1)(b) might enable the Secretary of State or the NHS Commissioning Board by direction to specify that their own information functions, for example in relation to consultation or preparation of an information standard, must be exercised by the Information Centre or another health or social care body where this would be more efficient, effective or economic. Subsection (1)(c) similarly enables the Secretary of State or the NHS Commissioning Board to direct the Information Centre to carry out information functions similar to those of other bodies where centralising the functions would again result in efficiency, effectiveness or economic benefits.

Reason for delegating the power

851. Although generally the Information Centre will be responsible for central information collections, determination of which bodies are best placed to carry out which information functions will vary, depending upon both the purposes to be served and the capacity of different bodies at different times. In particular, central information collections from health and

social care bodies for administrative purposes are likely to be subject to frequent change. To attempt to set out in primary legislation precisely what information should, or should not, be collected by the Information Centre or alternative bodies, and to specify which body should exercise which function at any particular point would invite obsolescence.

Reason for the selected procedure

852. The procedure would enable the efficient administration of central information collections determined by the Secretary of State and the Board without unnecessary waste of Parliamentary time on matters of a level of operational detail not appropriate for Parliamentary debate.

**PART 11: MISCELLANEOUS**

853. Under this Part of the Bill, the Secretary of State would have the power to make schemes to transfer staff or property, rights and liabilities from one body to another as a result of bodies being abolished or created by this Bill. Schemes might make transfers of staff or property to a range of bodies, including for example local authorities, commissioning consortia, the NHS Commissioning Board, any public authority providing health services or a qualifying company[11] .

854. Schemes would be made by the Secretary of State, or by the National Health Service Commissioning Board or a qualifying company directed to do so by the Secretary of State. A qualifying company would be formed under section 223 of the National Health Service Act for the purpose of holding property transferred to it by a transfer scheme and would be wholly owned by the Secretary of State.

*Transfer schemes*

[11] A qualifying company is a company wholly or partly owned by the Secretary of State and formed under section 223 of the National Health Service Act 2006, for the purpose of providing facilities or services to the NHS. Such a company could be used, for example, as an intermediate solution to hold Primary Care Trust property before it is transferred to either local authorities, providers or consortia. Section 223 is an existing provision and has been used by Secretary of State in the past to set up a number of companies to offer services to the NHS, such as NHS Professionals Limited, Bio Products Laboratory Limited and Community Health Partnerships Limited (the LIFT delivery company).

**Clause 274: Transfer schemes**

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

855. This clause allows the Secretary of State to make staff or property transfer schemes for the transfer of staff or property from one body to another. The transfer schemes may also make supplementary, incidental, transitional and consequential provision; for example, requiring that the property transferred continues to be used for health purposes.

856. The Secretary of State may delegate this function of making transfer schemes in connection with the abolition of Strategic Health Authorities and Primary Care Trusts to the National Health Service Commissioning Board or a 'qualifying company', and direct them how to exercise that function.

Reason for delegating the power

857. The details of how transfer schemes will operate is technical, and would require more detailed consideration of the property and staff to be transferred than would usually be included in primary legislation. Moreover, the detail of what property and which staff will transfer to where will need to be determined on a case by case basis

858. The clause also allows the Secretary of State to delegate the power to prepare property or staff transfer schemes in connection with the abolition of Primary Care Trusts and Strategic Health Authorities either to the NHS Commissioning Board or to a "qualifying company". The Secretary of State may consider that these bodies are, in practice, better placed to prepare the transfer schemes and decide where PCT and SHA staff and property should be transferred after abolition; the ability for the Secretary of State to delegate this power would allow these bodies to establish schemes to undertake these transfers.

859. In circumstances where the Secretary of State has delegated this function, the Secretary of State would be able to retain the power to make directions relating to how the function will be undertaken. This power could be used to establish general rules for transfer

schemes, for example setting out where certain types of property should be transferred, while allowing the commissioning board or qualifying company the flexibility to apply these on a case by case basis to specific properties.

Reason for the selected procedure

860. The transfer schemes are likely to include more technical detail than is normally included on the face of a bill. Furthermore, transfer schemes would be made in connection with the abolition or establishment of bodies provided for in primary legislation. We therefore do not believe that it is necessary to subject the resulting transfer schemes to any parliamentary procedure.

**PART 12: FINAL PROVISIONS**

**Clause 276: Power to make consequential provision**

***Power conferred on****: Secretary of State*
***Power exercised by****: Order*
***Parliamentary procedure****: Affirmative where the order changes primary legislation, otherwise negative*

861. This clause says that the Secretary of State may by order make provision in consequence of the Bill. An order may change primary or secondary legislation and may make transitional and saving provision. The clause includes a power, where relevant, to amend Acts of the Scottish Parliament, Acts or Measures of the National Assembly for Wales, and Northern Ireland legislation.

Reason for delegating the power

862. This power is necessary to ensure that necessary or expedient transitional arrangements can be made as the Bill is commenced without creating any difficulty or unfairness. It would make it possible to modify the application of the Bill to existing situations and to ensure a smooth transition from the old law and procedures to the new.

863. The power to make supplemental, incidental or consequential provision would be used to ensure that the changes made to the law by the Bill are reflected in other legislation which refers to or is dependent on provisions repealed or amended by the Bill.

Reason for the selected procedure

864. The Parliamentary procedure to be followed depends on the content of the order. If the order amends or repeals any provision of an Act of Parliament, it may not be made unless a draft has been laid before and approved by each House of Parliament. In any other case, the negative resolution procedure applies. This combination of procedures seems to the Department to strike an appropriate balance between the need to secure a quick and smooth transition between an old and a new regime and to ensure that changes made by this Bill are reflected in other legislation, and the need to respect Parliamentary involvement where an Act of Parliament is to be amended.

**Clause 277: Regulations, orders and directions**

865. This clause sets out the procedures to be followed for regulations, orders and directions made under the powers provided by this Bill. Its contents have been taken into account in the discussion earlier of this memorandum of the individual powers concerned.

**Clause 279: Commencement**

***Power conferred on**: Secretary of State*
***Power exercised by**: Commencement Order by Statutory Instrument*
***Parliamentary procedure**: None*

866. This clause deals with the commencement of the provisions in the Bill. It identifies those provisions for which the Bill itself sets a commencement date. It provides that the other provisions in the Bill come into force on such day as the Secretary of State may by order appoint. Different days may be appointed for different purposes. An order may include transitory provision, and such provision may modify the application of a provision of the Bill pending commencement of another provision of the Bill, or of another Act, or of a provision of an Act or Measure of the National Assembly for Wales, or of subordinate legislation.

Reason for delegating the power

867. Delegating the power, and enabling transitory provision to be made modifying the application of other provisions, provides flexibility to ensure that provisions in the Bill come into force at suitable dates, for example once steps have been taken to wind up satisfactorily the affairs of bodies that are being abolished.

Reason for the selected procedure

868. Commencement orders would be made by statutory instrument. However, no Parliamentary procedure is considered necessary, given that the content of the provisions to be commenced would already have been considered by Parliament during the passage of the Bill and that any modifications made to the application of provisions would be transitory. The procedure selected is the same as for commencement orders for previous Acts relating to health and social care.