

# HOUSE OF LORDS

## Delegated Powers & Regulatory Reform Committee

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9th Report of Session 2008-09

### **Policing and Crime Bill**

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

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### *The Delegated Powers and Regulatory Reform Committee*

The House of Lords appoints the Committee each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments”.

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### *Contacts for the Delegated Powers and Regulatory Reform Committee*

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

### *History*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended setting up a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. After the enactment of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act and the Committee became the Select Committee on Delegated Powers and Deregulation. In April 2001, the Regulatory Reform Act 2001 expanded the order-making power to include regulatory reform and the Committee, renamed the Delegated Powers and Regulatory Reform Committee, took on the scrutiny of regulatory reform proposals under that Act. The Committee now scrutinises legislative reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.

# Ninth Report

## POLICING AND CRIME BILL

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### **Introduction**

1. This Bill had its Second Reading on 3 June. Only Part 1 of the Bill is concerned with policing. Parts 2-8 amend various aspects of the criminal law, with Chapter 2 of Part 8 containing a miscellany of changes which include, importantly, new powers to make provision about the retention and destruction of fingerprints, samples etc. taken in the course of criminal investigations. The Home Office has prepared a memorandum, printed at Appendix 1, explaining each of the delegations of power conferred or affected by the Bill, and the level of parliamentary control which is to apply in each case.

### **Clause 2 (Police Senior Appointments Panel)**

2. Clause 2 inserts new sections into the Police Act 1996, establishing a statutory Police Senior Appointments Panel, which will replace the existing non-statutory panel. New section 53B(1) provides that the panel is to be constituted “in accordance with arrangements made by the Secretary of State”. There is a case for these arrangements to be set out in a statutory instrument subject to negative procedure, but, as the functions of the panel set out in the Bill are purely to advise the Secretary of State and police authorities, on balance the Committee does not consider the absence of any Parliamentary control inappropriate. However, under new section 53D(1) further functions may be conferred on the panel by order, and any new functions need not necessarily be purely advisory. The Committee is content with this arrangement, as any such extension of functions would be exercisable by statutory instrument subject to negative procedure, when both Houses could consider whether the new functions are suitable for a Panel constituted in accordance with Ministerial arrangements rather than regulations.

### **Clause 95 (criminal records: applications)**

3. At present, a person who applies to the Criminal Records Bureau for a criminal record certificate etc. must do so in the manner and form prescribed in negative regulations. Clause 95 substitutes for this requirement a power for the Secretary of State to determine “the form, manner and contents” of an application, with no parliamentary oversight. Although, at first sight, the loss of parliamentary control over procedural forms may not seem to be particularly important, a requirement to apply on a particular form commonly involves a requirement to provide information specified in the form, which generally *is* a matter which may be suitable for parliamentary scrutiny.
4. The form currently in use (set out in S.I.2002/233) requires the provision of personal information – for instance, the sort code and account number of the applicant’s bank account – but Parliament is at least in a position to consider and, if not satisfied, to veto the extent and depth of the information sought

by the prescribed form. Because clause 95 removes, rather than confers, a power to make regulations, there is no explanation in the memorandum why it is thought appropriate to remove the opportunity for parliamentary scrutiny.

5. A very similar point arises in clause 81, by which the Secretary of State is given the power to determine “the form, manner and contents” of a monitoring application under the Safeguarding of Vulnerable Groups Act 2006.
6. **The Committee draws to the attention of the House the change made by clause 95, and the provision made in clause 81, so that the Minister might be given the opportunity to explain the proposed absence of parliamentary control in these instances.**

#### **Clauses 96 to 98 – Retention and destruction of samples etc.**

7. Clause 96 inserts new sections 64B and 64C into the Police and Criminal Evidence Act 1984 (‘PACE’) conferring wide powers on the Secretary of State to provide by affirmative regulations for the retention, use and destruction of the material (for instance, fingerprints or DNA or other samples taken in the course of a police investigation) described in section 64B(2). The regulations may confer functions on a body established by the regulations, including the function of keeping their operation under review, and may also amend or repeal any Act, including this one, possibly by conferring further delegated legislative powers. As is acknowledged in paragraph 61 of the memorandum, these new powers are extensive, albeit exercisable only in the context of the materials described in section 64B(2). Clause 96 makes provision for England and Wales; clauses 97 and 98 provide for the armed forces and for Northern Ireland respectively.
8. The context is explained in some detail in paragraphs 57-71 of the memorandum by reference to the Government’s response to the decision last December of the European Court of Human Rights in the case of *S. and Marper –v- UK*. Paragraphs 63 onwards explain the tension which the Government sees between the need to take time properly to develop a coherent policy in response to the decision and the need to comply with the decision without undue delay. The choices of legislative vehicle are seen as threefold: provision in this Bill, provision in a subsequent Bill and provision in subordinate legislation.
9. The legislative provision to be made about the retention and destruction of samples will be important, controversial and complicated. As the Government memorandum notes, “the judgment raises complex issues which need to be properly thought through” (paragraph 64). It seems clear to the Committee that Members of both Houses will want, and should have, the opportunity to propose and debate amendments to this legislation. The proposal in the Bill, for regulations subject to the normal affirmative procedure, would not allow for this. **The Committee therefore concludes that the extremely wide delegated powers in clauses 96 to 98 should not be allowed to remain in the Bill in their present form.**
10. **In principle, leaving aside any timing considerations, the Committee considers that provision about this important and complex subject should be in primary legislation, giving the usual opportunity for detailed scrutiny by Parliament. If the House is convinced by the**

**Government's case that the matter cannot be left to future primary legislation, then only a super-affirmative procedure would be appropriate.** Under such a procedure a proposed set of regulations would be laid, and both Houses and its Committees (and others) would have the opportunity to debate and comment on them. The Government would then consider, in the light of this scrutiny, whether to make amendments before laying a new set of Regulations before both Houses for formal approval. The Committee anticipates that consideration might be given to proposing a remedial order under section 10 of the Human Rights Act 1998. Such an order would be subject to the super-affirmative procedure set out in Schedule 2 to the 1998 Act, allowing representations on an initial draft to be made to the Government (explicitly including "any relevant Parliamentary report or resolution"), before a (possibly revised) draft was formally submitted for approval by both Houses. The Committee notes that, though a super-affirmative procedure would allow both Houses to propose amendments, it would be up to the Government what changes it included in the draft instrument laid before Parliament for final approval, and that (unlike Bills) there is no mechanism for reconciling differences of view between the two Houses.

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

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### **Overview of the proposal**

11. This Legislative Reform Order (LRO)<sup>1</sup> was laid on 13 May 2009, together with an Explanatory Document (ED) by the Department for Business, Enterprise and Regulatory Reform. It was laid under section 1 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act"), which focuses on the removal or reduction of burdens.
12. The main legislation governing insolvency proceedings in England and Wales is contained within the Insolvency Act 1986 ("the 1986 Act") and the Insolvency Rules 1986 (SI 1986/1925) ("the Rules"). The 1986 Act provides for various insolvency procedures and the Rules provide the fine detail of the insolvency procedures themselves. The Rules in particular have been substantially amended over the years.
13. The purpose of the LRO is to amend miscellaneous provisions of the 1986 Act in order to reduce burdens on users of the legislation. The provisions contained in the LRO are one part of a substantial project to modernise insolvency law. The stated aim of the project generally is to reduce the costs and administrative burdens associated with insolvency law, so as to increase dividends to creditors and enable them to otherwise benefit from more flexible procedures.
14. The LRO seeks to make amendments in relation to seven different proposals:
  - relaxing the requirements for attendance at meetings
  - extending the use of websites to provide documents
  - permitting the use of e-mail for sending documents

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<sup>1</sup> [http://www.opsi.gov.uk/si/si2009/draft/ukdsi\\_9780111479391\\_en\\_1](http://www.opsi.gov.uk/si/si2009/draft/ukdsi_9780111479391_en_1)

- reducing the number of documents which must be sworn by affidavit (and instead requiring a statement of truth)
- removing the requirement for a liquidator to hold an annual meeting of creditors and/or members
- reducing the obligations on Insolvency Practitioners to file routine court reports
- removing the requirement to obtain sanction for a compromise in relation to the realisation of an asset that is owned by, or a debt or claim that is owed to, the company or bankrupt.

### Consultation

15. The consultations undertaken by the Department are summarised in paragraphs 64 to 78 of the ED (and annexes A to G, I and J). The ED states that “the overall response to the consultation was generally very positive with widespread support for the majority of the proposals” (paragraph 68). Some of the initial proposals which were consulted on, but which did not attract clear support, were not included in this LRO (paragraphs 73 to 78).

### Opinion of the Committee

16. An LRO must satisfy certain preconditions, set out in the 2006 Act. The Committee is concerned that in one respect this LRO, as it is currently drafted, may not meet the precondition that the provision does not remove any necessary protection (section 3(2)(d)). Annex E to the ED makes it clear that an integral safeguard for the proposal to abolish the liquidator’s annual meeting of creditors and/or members is a requirement to provide progress reports (paragraphs 11, 12 and 15 of Annex E). Indeed paragraph 18 of Annex E indicates that the favourable response on consultation was conditional upon creditors or members continuing to receive the relevant information by other means. But the requirement to provide that information does not appear in this LRO: it is proposed to be the subject of rules under the 1986 Act. The relevant rules are made by the Lord Chancellor with the Secretary of State’s consent, following consultation with the Insolvency Rules Committee, and are subject to the negative procedure.
17. We accept that it is the Secretary of State’s intention that rules will be made containing the relevant safeguard. But there is a consultation process. There is therefore no guarantee that, if the House passes this LRO and thereby approves the removal of the requirement to hold an annual meeting, subsequent rules will introduce the “*necessary protection*” of a requirement to provide progress reports. Nor is there any guarantee that, if such rules are made, they will not be amended at some point in the future. Even if the relevant information might be available at a cost from the Registrar of Companies, **the Committee considers that the principle that the liquidator should be required to provide progress reports to creditors and/or members is sufficiently important to be included in the primary legislation as amended by this LRO, with only the details of how such reports are to be provided, and what they should contain, left to rules.**

## Parliamentary procedure

18. **The Minister has proposed the super-affirmative procedure for this Order. Given the amendment we recommend, the Committee agrees.**

## APPENDIX 1: POLICING AND CRIME BILL

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### Memorandum by the Home Office

#### Introduction

1. This Memorandum identifies every provision of the Policing and Crime Bill, as introduced into the House of Lords, which confers power to make delegated legislation; and explains in each case the purpose of the provision, the reason why the power has been taken and the nature of, and reason for, the Parliamentary scrutiny procedure proposed.

#### **Clause 2 (Police Senior Appointments Panel): power to confer additional functions on the Police Senior Appointments Panel**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Negative resolution

2. This clause amends the Police Act 1996 (“the 1996 Act”) to provide for the establishment of a Police Senior Appointments Panel. The key functions of the Panel are set out in the Bill. However, as the Panel is a new body, it is important that there is sufficient flexibility for necessary additional functions to be conferred on the Panel. For example, the Government is likely to want the Panel to have a role in the co-ordination of appointment rounds for senior officer posts. Accordingly, new section 53D(1) of the Police Act 1996, inserted by clause 2(1), confers a power on the Secretary of State to give that flexibility and to enable additional functions to be conferred on the Panel.
3. This power is subject to the negative resolution procedure. The Department considers that this is an appropriate level of Parliamentary scrutiny. The nature of the power is to add functions, and before the power can be exercised the Secretary of State is required to consult the Panel. The Panel’s members will include persons from the police service as its members include persons nominated by the Secretary of State, the Association of Police Authorities and the Association of Chief Police Officers. The Secretary of State will therefore be able to take into consideration the views of key policing stakeholders.

**Clause 3 (regulations about senior officers): power to make provision for payments to chief officers who cease to hold office**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

4. Section 50 of the 1996 Act contains a power for the Secretary of State to make regulations as to the government, administration and conditions of service of police forces. Clause 3 amends this power so that it can be used to make provision with respect to steps to be taken in connection with the appointment or promotion of senior officers, and payments to senior officers who cease to hold office before the end of a fixed term appointment.
5. Regulations under section 50 are subject to the negative resolution procedure. In addition, if the regulations come within the remit of the Police Negotiating Board for the United Kingdom (“the PNB”), then before they are made the Secretary of State must take into consideration a recommendation of the PNB and supply the PNB with a draft of the regulations. Alternatively, if the regulations fall outside the remit of the PNB, the Secretary of State must supply a draft of the regulations to the Police Advisory Board and take into consideration any representations of that board. The Department considers that regulations made pursuant to this amendment should be subject to the same level of scrutiny. It therefore considers that the negative resolution procedure is appropriate for regulations made pursuant to this amendment.

**Clause 9(1) (police officers engaged on service outside their force etc.): power to amend definition of “relevant service”**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Negative resolution

6. Section 97 of the 1996 Act sets out a regime for police officers to undertake service outside their force in the bodies listed in section 97(1). Examples of these bodies are the National Policing Improvement Agency and the Serious Organised Crime Agency. Such service is known as “relevant service” and is essentially a police officer secondment. Clause 9 contains a Henry VIII power to amend the definition of “relevant service” in section 97(1).
7. This power is being taken to make it easier for relevant service in a wider range of organisations to be undertaken. At the moment, for an additional type of service to be added to the list of “relevant service”, primary legislation is required. This results in a significant lack of flexibility, which a working party of the Police Advisory Board for England and Wales (“the PAB”) has identified as a barrier to a wider range of secondments taking place. The power will provide flexibility in enabling changes to be made to the list of “relevant service” by secondary legislation.
8. The power is wide enough to enable transitional, consequential, incidental and supplemental provision or savings to be made. This is needed as when an organisation is added to the list of bodies in section 97(1) additional amendments

may also be required. Amendments to section 97(6) will be needed to ensure that disciplinary matters occurring during the period of relevant service can be dealt with. Amendments may also be needed to section 97(8), if an officer is to continue being a constable and treated as a member of his force for certain purposes while on relevant service. Amendments may also be needed to section 97(9) if the Secretary of State is to be vicariously liable for any unlawful conduct of an officer while engaged on relevant service. Finally, amendments may also be needed to section 100, which deals with chief officers engaged on certain types of relevant service where his force ceases to exist.

9. The power is subject to the negative resolution procedure. This is because although the power is a Henry VIII power, the changes that can be made are technical in nature. They are also permissive in that they will enable police officers to undertake relevant service in a wider range of circumstances than at present. The power cannot be used directly to impose obligations as the relevant service regime is permissive, and is used by police forces as they see fit. Before the power can be used, the Secretary of State must supply the PAB with a draft of the order and take into consideration any representations made by the PAB. The PAB continues to exist under section 63 of the 1996 Act and police officer secondments come within its remit. All the main policing stakeholders are represented on the PAB. The Department therefore considers the negative resolution procedure to be an appropriate level of scrutiny for this power.

**Clause 9(2) (police officers engaged on service outside their force etc.): power to amend descriptions of service to which the Police Pensions Act 1976 applies**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Negative resolution

10. This power is related to the preceding power and will be exercised in conjunction with it. It is a Henry VIII power to amend section 11 of the Police Pensions Act 1976 (“the 1976 Act”) for the purpose of altering the descriptions of service to which section 11(1) applies.
11. The 1976 Act contains powers to make regulations relating to the pensions to be paid to and in respect of members of police forces. Section 11(1) provides that references in the 1976 Act to membership of a police force or to service or employment in a police force shall be read as if they included a reference to the types of service listed in that section. When a new type of relevant service is added to section 97(1), the Department intends also to add that service to section 11(1). This is to ensure that while on relevant service, the officer remains within the scope of his police pension scheme.
12. This power can also be used to make transitional, consequential, incidental and supplemental provision or savings. This is needed because, following an amendment to section 11(1), the Department will wish to make other amendments to the 1976 Act. An amendment will be needed to section 7(2) so that payments can be made into the Consolidated Fund and payments can be made out of moneys provided by Parliament in relation to a person who is or has been on relevant service. Further, provision will be needed to specify a police authority (under section 11(2)) for an officer while he is on relevant service.

13. The power is subject to the negative resolution procedure. This is because although the power is a Henry VIII power, the changes that can be made are technical in nature. They are also permissive in that they will enable police officers to undertake relevant service in a wider range of circumstances than at present. In addition, the power is protective in that it will ensure that an officer remains within the scope of his police pension scheme while on relevant service. Before the power can be used, the Secretary of State must supply the Police Advisory Board for England and Wales (“the PAB”) with a draft of the order and take into consideration any representations made by the PAB. All the main policing stakeholders are represented on the PAB. The Department therefore considers the negative resolution procedure to be an appropriate level of scrutiny for this power.

**Clause 25 (regulation of lap dancing and other sex encounter venues): power to make exempt premises from the requirement to be regulated as sex encounter venues**

*Power conferred on:* Secretary of State or Welsh Ministers

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Negative resolution

14. This clause creates a new concept of sex encounter venues which are to be regulated by local authorities under the Local Government (Miscellaneous Provisions) Act 1982. The effect of this is that establishments such as lap dancing clubs will be subject to the same regime as establishments such as sex shops and sex cinemas, rather than being regulated by licensing authorities under the Licensing Act 2003.
15. The clause inserts a new paragraph 2A into Schedule 3 to the 1982 Act, requiring premises to be regulated if they fall within a definition of “sex encounter venue”, the chief elements of which are the provision for gain of a live performance or a live display of nudity with the sole or principal purpose of sexually stimulating the audience. Sub-paragraph (3)(c) of the new paragraph 2A gives the Secretary of State (or, in relation to Wales, the Welsh Ministers) a power to specify or describe any premises which would fall within that definition but which are not to be considered sex encounter venues.
16. This is a reserve power, in the sense that the Department has not identified any particular form of premises which should be exempt from the requirement for regulation as sex encounter venues. Nevertheless, the Department recognises that in the future marginal cases may arise – for example where premises put on entertainment whose purpose of sexual stimulation could be considered to overlap with its artistic, literary or educational purpose – in which case it may assist legal clarity and reduce unnecessary bureaucracy if the Secretary of State can specify or describe premises which are not to be sex encounter venues.
17. Given that the effect of the exercise of such a power would essentially be deregulatory, the Department believes that the negative resolution procedure provides an adequate level of scrutiny. If the premises in question were used for other activities (such as the sale of alcohol) they might still require a licence under the 2003 Act.

**Clause 25 (regulation of lap dancing and other sex encounter venues): power to make exempt premises from the requirement to be regulated as sex encounter venues depending on the frequency of the events**

*Power conferred on:* Secretary of State or Welsh Ministers

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

18. The definition of a sex encounter establishment also excludes premises where relevant entertainment is held infrequently at the venue. Specifically, paragraph (3)(b) of new paragraph 2A of Schedule 3 to the 1982 Act will provide that a venue should not be considered as a sex encounter venue where relevant entertainment has been provided on eleven occasions or less within a year, where no one occasion during that year has lasted more than 24 hours and where there has been at least a month between the occasions in the year and any preceding occasion.
19. The clause includes a power for the Secretary of State (or, in relation to Wales, the Welsh Ministers) to repeal this exclusion or amend it by order but the power cannot be used to increase the number or length of occasions in any period on which it would be permissible to provide this entertainment under the exemption as presently drafted. In other words, the power cannot be used to widen the exemption to allow more relevant entertainment, such as lap dancing events, to be held at premises without the need for a sex establishment licence.
20. The power is intended to allow the Secretary of State to narrow the exemption should this be necessary once the new regime comes into force following concerns raised both by Parliamentarians and others that the exemption is too wide or should not exist at all. The power will enable the Secretary of State to deal with any concerns that this exemption will be exploited should they arise in practice.
21. 21. Although the power is fairly limited, given that it is a Henry VIII power, the Department believes that the affirmative procedure provides the appropriate level of Parliamentary scrutiny.

**Clause 50 (power to retain seized property: England and Wales): power to add to the list of seizure powers in relation to which a restraint order may authorise the retention of seized property**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

22. In the context of confiscation, section 41 of the Proceeds of Crime Act 2002 (“POCA”) provides for restraint orders to be made prohibiting any specified person from dealing with any realisable property held by him. Clause 50 of the Bill inserts a new section 41A to provide that a restraint order may authorise the retention of property that has been or may be seized under a specified power. The specified powers are those that are most relevant in the context of criminal investigations and proceedings likely to lead to the making of a confiscation order. The order-making power at new section 41A(5) provides for the list to be amended, and is therefore a Henry VIII power.

23. An order under new section 41A(5) would be subject to the affirmative resolution procedure. The Department considers that this would provide an appropriate level of Parliamentary scrutiny.
24. The definition of “relevant seizure power” in new section 41A(4) also has effect for the purpose of new section 67A of POCA, inserted by clause 56. New section 67A provides that property that has been seized under a relevant seizure power may be sold to satisfy a confiscation order. A magistrates’ court order is required, and certain conditions must be met.
25. Clause 52 makes a substantively identical provision for Northern Ireland. The definition of “relevant seizure power” in new section 190A(4) also has effect for the purpose of new section 215A of POCA, inserted by clause 58.

**Clause 53 (search and seizure of property: England and Wales): power to make a Code of Practice in connection with the exercise of the new search and seizure powers**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

26. This clause inserts new sections 47A-47R into POCA, creating new powers of search and seizure and detention for property that may be liable to be sold to satisfy a confiscation order. New section 47R provides that a Code of Practice must be made in connection with the exercise of the new powers. The Secretary of State must publish the Code in draft and consider any representations on the draft. A draft of the Code must be laid before Parliament and following this the Secretary of State may bring it into operation by order (new section 47R(4)). The same procedure applies to revisions to the Code. The Code will contain lengthy detailed provisions that are more suited to secondary legislation than primary legislation.
27. The order-making power is subject to the affirmative procedure, which the Department believes is the appropriate level of scrutiny.
28. Clause 55 makes a substantively identical provision for Northern Ireland. The power to make an order bringing the Code into operation is contained in new section 195R(4) of POCA, as inserted by clause 55(2).

**Clause 63 (forfeiture of detained cash): power to make regulations about how a forfeiture notice is to be given**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

29. This clause inserts new section 297A into chapter 3 of Part 5 of POCA, concerning the civil recovery of cash. The new section creates a procedure for the administrative forfeiture of cash in uncontested proceedings. New section 297A(3) requires the Secretary of State to make regulations about how a forfeiture notice must be given. Subsection (4) specifies that the regulations may provide for matters including to whom and how a notice is given, how a notice may be published, and the

circumstances in which a notice is to be treated as having been given. Subsection (5) specifies that the regulations must ensure that where a notice is given it is, if possible, given to every person to whom an order detaining the cash has been given.

30. Regulations under new section 297A(3) would be subject to the negative resolution procedure. The Department considers that this would provide an appropriate level of Parliamentary scrutiny, given the essentially technical and procedural nature of the subject matter of the regulations.

**Clause 77 (security planning for airports): power to specify aerodromes to which Part 2A of the Aviation Security Act 1982 applies**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

31. Part 2 of the Aviation Security Act 1982 (as amended) (“the 1982 Act”) contains general obligations that exist in relation to security at aerodromes. The Secretary of State can direct aerodromes to undertake certain functions if they are for the purpose of preventing unlawful acts of interference with civil aviation.
32. Clause 77 amends the 1982 Act by requiring (unless exempted) all aerodromes that are subject to the provisions of Part 2 to have in place an aerodrome security plan (“ASP”). In addition the Secretary of State can specify in an order that any other aerodrome not subject to Part 2 must also have an ASP. These provisions are going to be contained in a new Part 2A of the 1982 Act.
33. To produce an ASP the aerodrome manager must establish a risk advisory group (“the group”) made up of all relevant stakeholders (including the police) who provide services to the aerodrome. This group then produce a risk report which highlights any potential security risks that might exist at the aerodrome along with any necessary measures which in their opinion mitigate any identified risk. The necessary measures that need to be taken are divided between the members of the group in accordance with who is best suited to deliver the mitigating measures as regards a particular security threat.
34. The risk report is then submitted to a security executive group (“SEG”). It is their responsibility to consider the recommendations and decide the contents of an ASP, monitor the implementation of it by the members of the group, and keep under review the contents of the ASP.
35. In the event that there is a dispute over the contents or implementation of the ASP then any member of the SEG can refer the dispute to the Secretary of State. He must then allow any person with an interest in the dispute along with each member of the SEG to make representations about the matter in dispute. A declaration is then made which any of the parties can appeal to the High Court.
36. All aerodromes that are directed by the Secretary of State to implement security measures under Part 2 of the 1982 Act will be subject to the statutory security planning measures in Part 2A. In addition any aerodrome that is not so directed can also be made subject to the measures in Part 2A. Clause 60 inserts a new section 24AA(1)(b) into the 1982 Act, specifying that the Secretary of State can make an order specifying aerodromes to which Part 2A will apply.

37. The provision in new section 24AA(1)(a) is intended to be ambulatory in nature. It is intended that new section 24AA(1)(a) would *not* be construed as referring only to aerodromes in respect of which a direction is in force on commencement. It is intended to cover aerodromes in respect of which directions are given after commencement as well.
38. New section 24AT(4) (interpretation) expressly contemplates that an aerodrome could cease to be an aerodrome to which Part 2A applies and then become such an aerodrome again. There would be no need for an order to be made to bring an aerodrome back within the new provisions in Part 2A. If the Secretary of State does re-issue Part 2 directions to such an aerodrome then new section 24AA(1)(a) would automatically apply
39. The reason for new section 24AA(1)(b) is to allow for additional airports to be subject to the requirements. For example, if the threat to aviation were to change, it might warrant airports becoming subject to these security planning requirements that are not subject to directions under section 12, 13 or 14 of the 1982 Act, such as some general aviation airports.
40. Bearing this in mind in order to deliver effective and responsive security at UK aerodromes delegated legislative provision via the negative resolution procedure provides the necessary flexibility to respond to the changing threats as they affect different aerodromes at different times be they directed or otherwise.
41. The powers in question do not substantially affect the provisions of the 1982 Act. They potentially open up the applicability of existing and new aviation security provisions to a wider range of airports so as to address the current threat faced by civil aviation operations within the UK.
42. In this respect it is considered that the public interest is clearly served by these provisions and as such is not a situation where there is a need for such a high degree of Parliamentary scrutiny that the affirmative resolution procedure is needed.

**Clause 77 (security planning for airports): power to modify**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Negative resolution

43. This clause inserts a new section 24AS into the 1982 Act, enabling the Secretary of State to disapply or modify the application of this Part for those aerodromes that are subject to directions under Part 2 of the 1982 Act and therefore are subject to security planning procedures under Part 2A.
44. This power complements that set out in new section 24AA. It is intended to be used in circumstances where an aerodrome needs to be exempt from some or all of the security planning provisions in Part 2A. Again, an order under this provision would be intelligence-led such as to impose a proportionate security burden on an aerodrome in light of current security information and the circumstances of that individual airport. For example, there may be circumstances where a small airport does receive a very small number of public transport charter flights because of seasonal traffic and as such it is not necessary for all the provisions in Part 2A to apply which would require a disproportionate allocation of resources for what is a limited seasonal operation.

**Clause 82 (monitoring: additional fees): power to prescribe a fee when an applicant under section 24 of the Safeguarding Vulnerable Groups Act 2006 undergoes a prescribed change of circumstances such that although a fee was not payable at the time of the application, a fee would be payable should the application be made in the current circumstances**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

45. Section 24 of the Safeguarding Vulnerable Groups Act 2006 (“the 2006 Act”) governs the making of an application to become subject to monitoring (in order to participate in regulated activity in relation to children or vulnerable adults). Section 24(1)(d) provides that a fee can be prescribed relating to that application by regulations made by the Secretary of State. These regulations will follow the guidance of the Criminal Records Bureau and provide that applicants who make the application in relation to an unpaid (i.e. voluntary) activity will not need to pay the otherwise prescribed fee. New section 24A provides that the Secretary of State can prescribe a change of circumstances as a result of which a volunteer who was not required to pay a fee will be liable to pay a fee when the volunteer moves into paid activity. The section also provides that in those circumstances the Secretary of State can prescribe the fee that will be payable, subject to the proviso that such a fee must not exceed the fee prescribed under section 24(1)(d) (for those applicants in paid activity). Without this clause, no fee could be required when a volunteer moves into paid activity.
46. The regulations for prescribing a fee under section 24(1)(d) are subject to the negative resolution procedure. Since new section 24A is being inserted in order to fill a gap left by section 24(1)(d) (namely, the situation where a volunteer registers without paying a fee and subsequently moves into paid activity), the Department considers that the same level of Parliamentary scrutiny for describing this change of circumstances and prescribing the fee to be paid is appropriate.

**Clause 83 (vetting information): Power to provide for an activity to be treated as, or not to be treated as, an activity carried out for financial gain**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

47. This clause inserts a new requirement for the declaration made by an applicant under section 30 of the 2006 Act to contain a statement stating whether vetting information is sought with a view to permitting or supplying an applicant subject to monitoring under section 24 to carry out paid activity. This additional requirement will alert the Secretary of State in cases where an application was originally made under section 24 relating to unpaid activity and then seeks to move into paid activity. This will trigger the requirement to pay a fee under section 24A.
48. The power to provide, in regulations, that an activity is to be treated as, or not to be treated as, an activity carried out for financial gain, allows the Secretary of State to avoid the situation where, due to the definition of “activity carried out for financial

gain”, an applicant may be unjustly required to pay, or not to pay, the prescribed fee. This power therefore allows the Secretary of State to clarify areas of doubt.

49. It is envisaged that this power will be used only to make detailed technical provision about whether particular activities are to be regarded as “paid” and its purpose is to avoid any potential unfairness in requiring applicants to pay a fee. The Department therefore considers that the negative resolution procedure provides adequate Parliamentary scrutiny for the exercise of this power.

**Clause 92 (certificates of criminal records etc: right to work information): Power to prescribe additional fee to be paid in prescribed manner**

*Power conferred on:* Secretary of State or Scottish Ministers

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

50. New section 113CD(1)(c) of the Police Act 1997 provides that the Secretary of State may prescribe an additional fee in relation to applications for criminal record certificates (including standard and enhanced disclosures) under sections 112, 113A or 113B of that Act when that application requests right to work information.
51. The provision of this information will require resources additional to those for applications which do not request the information. The Department considers that the negative resolution procedure provides adequate Parliamentary scrutiny for the prescription of the fee payable and the manner in which it is to be paid. Similar powers to prescribe fees under Part V of the Police Act 1997 are also subject to the negative resolution procedure.

**Clause 93 (criminal conviction certificates: verification of identity): power to prescribe other verification of the applicant’s identity**

*Power conferred on:* Secretary of State or Scottish Ministers

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

52. Section 118(2)(a) of the Police Act 1997 currently allows the Secretary of State to prescribe the manner and place at which a person’s fingerprints can be taken for the purposes of establishing their identity in connection with an application for a criminal conviction certificate. Clause 93 inserts a new subsection (2ZA) into that section to allow the Secretary of State to prescribe another method of verifying identity.
53. This is envisaged in particular for criminal conviction certificates under section 112 of the 1997 Act which do not require a registered person to be a counter-signatory. The taking of fingerprints is already provided for under section 118(2) and any method prescribed under the new power in section 118(2ZA) is likely to be less intrusive than requiring fingerprints. Such requirements might, for example, include requiring evidence of identity such as a passport, driving licence or utility bills. Accordingly the Department considers that the negative resolution procedure provides adequate Parliamentary scrutiny for such methods to be prescribed.

**Clause 94 (registered persons): power to prescribe the details of the circumstances in which a person became barred from regulated activity as information to which the Secretary of State may have regard when considering whether an individual is suitable to have access to any information**

*Power conferred on:* Secretary of State or Scottish Ministers

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

54. Section 120A of the Police Act 1997 provides that the Secretary of State may refuse to register a person to countersign and receive certain disclosures if registration would be likely to make it possible for information to become available to a person who is not suitable to have access to that information. Clause 94 amends that section to provide that in determining whether a person is suitable to have access to any information, the Secretary of State may have particular regard to, amongst other matters, whether the person is barred from regulated activity and, if so, prescribed details of the circumstances in which he became barred. The power to prescribe those details is contained in new subsection (3A)(b) of section 120A.
55. The Department considers that the negative resolution procedure provides adequate Parliamentary scrutiny for the use of this power. This is consistent with all comparable powers in Part V of the Police Act 1997, and it relates to a technical aspect of the detail of the registration process

**Clause 94 (registered persons): power to alter the information taken into account when considering suitability of registered person**

*Power conferred on:* Secretary of State or Scottish Ministers

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Negative resolution

56. Subsection (4) of clause 71 inserts new sections 120A(7) and (8) into the Police Act 1997. These provide that the Secretary of State may, by order, alter the information specified in section 120A(3A) to which the Secretary of State may have regard in considering the suitability of persons for registration. This includes information relating to whether the person is on the Independent Safeguarding Authority's barring list or is being considered for inclusion.
57. The Department considers that the negative resolution procedure provides adequate Parliamentary scrutiny for the use of this power, which relates to a technical aspect of the detail of the registration process.

**Clause 96 (retention and destruction of samples etc: England and Wales): power to make provision as to the retention, use and destruction of certain material**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

58. This clause would insert new sections 64B and 64C into the Police and Criminal Evidence Act 1984 (“PACE”) to allow the Secretary of State power to make regulations as to the retention, use and destruction of the following material: photographs, fingerprints, footwear impressions, DNA and other samples, and DNA profiles.
59. The regulations would be able to make different provision for different cases, and to make provision subject to exceptions. Any provisions or exception could be framed by reference to an approval or consent, and the regulations could confer functions on persons specified or described in the regulations.
60. The regulations could, in particular, confer on a person the functions of providing information about the operation of the regulations, keeping their operation under review, reporting to the Secretary of State with recommendations. The regulations could also establish a new body to discharge these functions.
61. The regulations could modify provisions of primary or secondary legislation (including provisions to make codes of practice etc), and could make supplementary, incidental, consequential, transitional, transitory or saving provision. Before laying a draft of the regulations, the Secretary of State must consult the statutory consultees set out in new section 64C(4) of PACE, which mirrors the list in section 67(4) of that Act of people who must be consulted before a code of practice or a revision of it is issued.
62. The reason why the Government is proposing to take these wide powers is to comply with the judgment of the European Court of Human Rights in the case of *S. and Marper v the United Kingdom* on 4th December 2008. The Court found that the existing policy under Part V of PACE was in breach of the right to respect for private life in ECHR Article 8. The blanket and indiscriminate nature of the powers to retain DNA samples and fingerprints of persons suspected but not found guilty failed to strike a fair balance between the competing public and private interests and therefore constituted a disproportionate interference with the Article 8 right.
63. The Government is committed to complying with the Strasbourg judgment. However, the judgment leaves open a number of possible ways this could be done. The judgment does not say that the DNA profiles and other information on unconvicted people can never be kept; rather it says that it is unlawful to keep all such data indefinitely. The judgment itself acknowledges a number of factors that might be relevant to the question of how long it is proportionate to retain data. These could include: what type of information is at issue (for example, a DNA sample or a fingerprint); the age of the individual in question; and the nature and severity of the offence of which he was suspected.
64. The Government has carefully considered whether this topic is so important that it can properly be dealt with only in primary legislation. But it has concluded that the approach of taking a power in the Policing and Crime Bill, enabling it to conduct a full consultation exercise before setting out the detail of the policy in regulations subject to the affirmative resolution procedure, has considerable advantages over the

two principal alternative approaches, namely setting out the detail of the policy in this Bill or waiting to do so in future primary legislation.

65. The reason why the Government concludes it would be impractical for this Bill to set out the detail of the policy is that the judgment raises complex issues which need to be properly thought through. The Government considers that setting out the detail of the policy in this Bill would mean both the policy and the legislation would be fatally rushed – the Government had given no detailed consideration to legislating prior to the Strasbourg judgment in December 2008, as it was not expecting to lose the case, not least because the domestic courts at every level up to and including the House of Lords had upheld the existing arrangements. Moreover, such an approach would not allow for any public consultation. Consultation in this case plays a dual role: it both informs and improves the quality of policy-making, and also helps to confer legitimacy on the policy in human rights terms insofar as public views are relevant to what is necessary in a democratic society.
66. The Government has also concluded that the requirement to respond to the Strasbourg judgment within a reasonable timeframe militates against waiting until there is a later opportunity to do this in primary legislation. In reaching this view the Government is mindful of the following factors.
- The Government is not inviting Parliament to legislate against a background which is neutral as it normally is in relation to many areas of public policy; it is acting against the background that the UK has been held to have violated the European Convention on Human Rights, where it has an obligation in international law (specifically in Article 46 of the Convention) to implement that judgment. The Government notes in this context the viewpoint expressed by the House of Lords Constitution Committee at paragraph 197 of its Second Report of 2008-09 that:

“We believe that DNA profiles should only be retained on the National DNA Database (NDNAD) where it can be shown that such retention is justified or deserved. We expect the Government to comply fully, and as soon as possible, with the judgment of the European Court of Human Rights in the case of *S. and Marper v. the United Kingdom*, and to ensure that the DNA profiles of people arrested for, or charged with, a recordable offence but not subsequently convicted are not retained on the NDNAD for an unlimited period of time.”
  - Although in the meantime our domestic legislation still stands, we would be uneasy about it remaining in force, in breach of the Convention rights, until such time as we could address this in the normal timescale for primary legislation. Individuals, and police forces who hold DNA and other data relating to individuals, need clarity about what will happen to those data. While the legal position in England and Wales remains unchanged from the House of Lords judgment, the Government cannot exclude the possibility of there being a surge of pressure from individuals seeking deletion of their data from the relevant databases. Indeed, Ministers have already received correspondence and some legal challenges from individuals seeking the early destruction of their DNA samples.
  - As a matter of general principle, the Government needs to demonstrate to the Committee of Ministers what steps it is taking to implement the Strasbourg judgment. While it is thought that the Committee of

Ministers are likely to allow a reasonable period of time for reflection and legislative change, the Government needs to address the sorts of steps it is envisaging in reports to the Committee of Ministers.

- The Government is mindful that the decision in *S. & Marper* may not be the courts' last word on the lawfulness of arrangements for retaining DNA etc. The Government therefore considers it a virtue of the new regime that courts will in effect be able to require regulations to be amended if they fail to comply fully with the Convention. If the regime were set out in primary legislation, it would be more difficult to respond swiftly to court decisions on compliance with the Convention rights.
  - Under existing legislation the power of retention of samples lies with Chief Constables. It would be invidious to put Chief Constables in a position where they come under prolonged pressure to exercise their discretion to act in a particular way, and could eventually raise the risk of a Chief Constable seeking to take individual action which was inconsistent with the Government's overall objectives and planned policy framework on retention.
67. For the above reasons, the Government considers that there is real urgency in addressing implementation. This Bill therefore appears to provide a sensible opportunity to demonstrate that the Government is committed to implementing the judgment, consulting swiftly but thoroughly on the detail of the policy, and for the Government to give Parliament an opportunity to approve this human rights-enhancing measure through the affirmative resolution procedure.
68. As the Government is still consulting on its policy, it follows that the enabling power must be drawn sufficiently widely to ensure it is fit for its purpose. However, the Government's acceptance of its obligation to implement the decision in *S and Marper* effectively provides a limit on the exercise of these powers. On 7 May 2009, the Home Secretary published for public consultation proposals on a new, proportionate retention framework. These consultation proposals are available at <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database>. They propose a retention period for the DNA profiles of people arrested but not convicted of six years for all recordable offences except for those arrested for a violent, sexual or terrorist-related offence when a retention period of 12 years is being proposed. The profiles would be subject to automatic deletion unless the person has been subject to further arrest or to a conviction within the six or 12 year period. In those circumstances, a fresh period of six or 12 years would commence from the date of re-arrest or if convicted, profiles would be retained indefinitely in line with Government policy. This is based on research which supports a retention period of up to 15 years in order to facilitate detection of people who for that period following their arrest statistically remain more likely to offend than the population at large.
69. Subject to consultation, the Government considers that a period of six years for less serious offences, and 12 years for those associated with more serious offences, is a proportionate approach. This approach is designed to minimise public harm and help ensure that those who choose to commit criminal acts in the future may either be prevented from doing so or, if they do, would be liable to detection.
70. In some respects, the consultation paper sets out proposals which go significantly further than the judgment. Having noted the particular sensitivity identified by the Court surrounding the retention of biological samples, the Government is proposing the deletion of all DNA samples of individuals who have been arrested, whether or not they have been convicted. This would mean the deletion of around 4.5 million samples in England and Wales. Future samples would be destroyed as soon as a

relevant profile had been placed on the database with the proviso that no sample may be retained longer than six months for that purpose. The Government expects most samples would be destroyed well before that deadline.

71. The Government is also proposing that the profiles (and samples and fingerprints) of people under the age of 18 (but over 10) years old, who are arrested but not convicted will be deleted after six years or on their reaching their 18<sup>th</sup> birthday (whichever is the sooner). This will be the case providing that the arrest is not in relation to a violent, sexual or terrorism-related offence, and that they have not been subject to a subsequent arrest or conviction before reaching 18 years old. The Home Secretary has already requested that all records relating to people aged under 10 should be deleted from the National DNA Database. This has been done.
72. The Government considers that the affirmative resolution procedure is the appropriate form of Parliamentary scrutiny, given the importance of the subject matter and the breadth of the enabling powers.

**Clause 97 (retention and destruction of samples etc: service offences): power to make provision as to the retention, use and destruction of certain material**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

73. This clause would amend section 113 of PACE to allow regulations, which will be equivalent to those provided for in clause 96 to be made in respect of material obtained by the Service police in each of the Armed Forces. Section 113 of PACE allows the Secretary of State to make provision equivalent to that made by any provision of Part 5 of that Act, subject to such modifications as the Secretary of State considers appropriate to apply those provisions to the Armed Forces. Part 5 of PACE is already applied to the Armed Forces by means of a statutory instrument made under section 113. Section 113 needs to be amended to allow regulations to be made for the Armed Forces which will be closely based on the regulations provided for in clause 95. Biometric data obtained by the Service police in each of the Armed Forces will therefore be treated in the same way as biometric data obtained by civilian police forces subject to the different circumstances in which the Service police conduct investigations. This will ensure that the UK's response to the *S. and Marper* judgment is comprehensive.

**Clause 98 (retention and destruction of samples etc: Northern Ireland): power to make provision as to the retention, use and destruction of certain material**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by Statutory Rule of Northern Ireland

*Parliamentary procedure:* Negative resolution

74. This clause makes provision for Northern Ireland equivalent to that made by clause 96. The negative resolution procedure is used because that is the procedure used for all Northern Ireland comparable provisions in this field.

**Clause 100: Powers in relation to cash**

*Power conferred on:* *The Treasury*

*Power exercisable by:* *Regulations made by statutory instrument*

*Parliamentary procedure:* *Negative resolution*

75. This clause inserts new section 164A into the Customs and Excise Management Act 1979 (“CEMA”). The new section makes clear that in relation to certain detection powers within CEMA a reference to goods includes a reference to cash. This will allow officers to ask questions about, and to search for, cash that is recoverable property or is intended by any person for use in unlawful conduct (as defined at section 289(6) and (7) of the Proceeds of Crime Act 2002). The new section further ensures compliance with the Cash Control Regulation on controls of cash entering or leaving the Community (Regulation (EC) No.1889/2005 of the European Parliament and of the Council).
76. The new section specifies those CEMA detection powers which may be used for the purpose of searching for cash. By virtue of new subsection 164A(4) the Treasury may by regulations provide for any other provision of CEMA, or any other enactment, to apply for the purposes of searching for cash.
77. Such regulations would be subject to the negative resolution procedure. The Department considers that this would provide an appropriate level of Parliamentary scrutiny, given that any such regulations would not create new search powers but would merely extend the existing powers to search for prohibited and restricted goods to cash as described above. Such regulations would not amend or repeal primary legislation.

**Clause 103: Prohibition on importation of offensive weapons**

*Power conferred on:* *Secretary of State*

*Power exercisable by:* *Order made by statutory instrument*

*Parliamentary procedure:* *Affirmative resolution*

78. Section 141 of the Criminal Justice Act 1988 contains a power to specify offensive weapons. Where a weapon is specified, it is an offence to sell, hire or manufacture that weapon under section 141(1). The importation of the weapon is also prohibited (under section 141(4)). Section 141 contains a number of defences to the offence under section 141(1) and to offences of improper importation under the Customs and Excise Management Act 1979. It also contains a power to create further defences to these offences.
79. There is a lack of clarity in relation to the competence of the Scottish Ministers to make an order under section 141 as import is a reserved matter. This clause addresses this issue by separating out the importation consequences of specifying a weapon in an order under section 141 from the other activities which are the subject of section 141(1) – that is sale, hire etc.
80. This clause creates two new powers which replicate the regime existing under section 141 for the purposes of importation. The clause inserts a new section 141ZB which contains a power to specify offensive weapons, the importation of which is

then prohibited. The clause also inserts a new section 141ZC which contains a power to create further exceptions to this prohibition on importation.

81. The Department considers that it is appropriate for the affirmative resolution procedure to apply to both of these powers, as this reflects the existing level of Parliamentary scrutiny required under section 141 for the equivalent current powers.

**Clause 112 (minor and consequential amendments and repeals and revocations): power to make supplementary etc. provision for the purposes of this Act**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution (if the order amends or repeals primary legislation; otherwise negative resolution)

82. This clause confers power on the Secretary of State to make such supplementary, incidental or consequential provision as she considers appropriate for the purposes of the Bill. The power includes a power to amend or repeal any Act or subordinate legislation including the Bill (subsection (5)). The power includes power to make transitional, transitory or saving provision.
83. The powers conferred by this clause are wide. But there are various precedents for such provisions including section 333 of the Criminal Justice Act 2003, section 173 of the Serious Organised Crime and Police Act 2005, section 51 of the Police and Justice Act 2006 and section 148 of the Criminal Justice and Immigration Act 2008. There are far-reaching changes made by various provisions of this Bill and it is possible that not all of the consequences of them have been identified in the Bill's preparation. The Department considers that it therefore seems prudent for the Bill to contain a power to deal with these in secondary legislation. To the extent that an order under this clause amends or repeals primary legislation, it will be subject to the affirmative resolution procedure (see subsection (6)). Otherwise, the order will be subject to the negative resolution procedure (see subsections (7) and (8)). It is submitted that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

**Clause 113: Transitional, transitory and saving provision**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* None

84. This clause contains a power for the Secretary of State to make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill. As is usual in the case of commencement orders themselves, no Parliamentary scrutiny procedure is prescribed.

**Clause 116: Commencement**

*Power conferred on:* Secretary of State or Welsh Ministers

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* None

85. This clause contains a standard power for the Secretary of State (or, as the case may be, Welsh Ministers) to bring provisions of the Bill into force by commencement order.
86. By virtue of subsection (7), such orders can make different provision for different cases, and may make transitional or saving provision.
87. As is usual with commencement orders, they are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.

**Schedule 2 (closure orders): Power to specify premises in respect of which closure notices may not be issued**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative resolution

88. Clause 20 and Schedule 2 to the Bill insert a new Part 2A into the Sexual Offences Act 2003, granting the courts the power to close, on a temporary basis, premises being used for activities related to certain sexual offences. New section 136B(11), which falls within that Part, provides for the Secretary of State to make regulations specifying premises or descriptions of premises for which a closure notice cannot be made. This effectively allows the Secretary of State to exempt certain premises from the provisions in Part 2A of that Act. It mirrors similar powers taken under sections 1(10) and 11A(10) of the Anti-Social Behaviour Act 2003 relating respectively to the closure of premises connected with the use of Class A drugs and those associated with persistent disorder or nuisance.
89. Regulations under this section would be subject to the negative resolution procedure. The Department considers that this provides an appropriate level of Parliamentary scrutiny, given the limited nature of the power and the fact that such regulations would be used to prevent premises being subject to a closure notice or order, rather than to make additional categories of premises so subject.

**Schedule 2 (closure orders): Power to extend the power to authorise the issue of closure notices to persons other than police officers**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

90. New section 136Q(1) to be inserted into the Sexual Offences Act 2003 allows the Secretary of State to extend the power to authorise the issue of a closure notice to persons other than members of the police forces. One example of persons or bodies to whom this power might be extended is local authorities. Under section 11A of the Anti-Social Behaviour Act 2003 both local authorities and the police can authorise the issue of a closure notice and apply for a closure order in respect of premises associated with significant and persistent disorder or persistent serious nuisance. The Department considers that the power to issue closure notices in respect of premises being used for activities related to certain specified prostitution and pornography offences is most useful to the police. However, taking this power should allow the Secretary of State to make provision for others to issue closure notices should this prove necessary or desirable in light of practical experience once the provisions have been commenced.
91. An order made under this section would be subject to the affirmative resolution procedure. The Department considers it appropriate to provide for this level of scrutiny as exercise of this power would involve conferring a wide-ranging power on a new category of person, and as subsection (2) of new section 136Q expressly allows for consequential amendments to the primary legislation to be made should this power be exercised.

**Schedule 3 (lap dancing and other sex encounter venues): Power to make transitional provision**

*Power conferred on:* Secretary of State or Welsh Ministers

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* None

92. Schedule 3 makes transitional provision in connection with provisions in the Bill to regulate lap dancing and other establishments as sex encounter venues. Paragraph 3 of the Schedule gives the Secretary of State (or, in respect of Wales, the Welsh Ministers) a power by order to make transitional, transitory or saving provision in connection with the coming into force of that regulatory new regime. (That new regime will not be mandatory but can be adopted by a resolution of the local authority in question.)
93. This power might be exercised, for example, to grant a transitional exemption for existing establishments pending the completion by them of an application for a licence.
94. An order made under this power will not be subject to any Parliamentary procedure. In the same way as is usual with commencement orders, the order simply provides for the convenient bringing into force of legislative provisions that will already have been approved in principle by Parliament.

**Schedule 4 (mandatory licensing conditions related to alcohol): power to specify mandatory conditions**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

95. Paragraphs 2 and 5 of Schedule 4 to the Bill respectively insert new sections 19A (in relation to licensed premises) and 73B (in relation to club premises certificates) into the Licensing Act 2003. Subsection (1) of each new section allows the Secretary of State to specify conditions relating to the supply of alcohol. These powers allow the Secretary of State to apply new mandatory conditions to all premises licences and club premises certificates or those licences or certificates of a particular description. The number of such conditions is limited to nine. As this is a wide-ranging power that will potentially affect any person selling alcohol the Department considers that the appropriate procedure for such orders will be the affirmative resolution procedure to ensure proper Parliamentary scrutiny.

**Schedule 4 (general licensing conditions related to alcohol): power to provide for the procedure to be adopted in relation to the imposition of general conditions**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

96. Paragraphs 3 and 6 of Schedule 4 to the Bill respectively insert new sections 21A (in relation to licensed premises) and 74A (in relation to club premises certificates) into the Licensing Act 2003. Under those new sections a licensing authority may resolve to impose general conditions on two or more premises in its area where it is appropriate to mitigate or prevent nuisance or disorder. Subsection (4) of each new section allows the Secretary of State to make regulations making provision about the procedure, consultation and publication of resolutions by licensing authorities to impose such conditions, and about variations, reviews or appeals of such conditions. As the detail of these provisions will be important the Department again believes that the affirmative resolution procedure is again the most appropriate.

**Schedule 4 (general licensing conditions related to alcohol): Power to specify conditions relating to the supply of alcohol**

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* Affirmative resolution

97. Paragraphs 3 and 6 of Schedule 4 to the Bill respectively insert new sections 21A (in relation to licensed premises) and 74A (in relation to club premises certificates) into the Licensing Act 2003. Subsection (6) of each new section defines “permitted conditions” as those specified by order made by the Secretary of State. These permitted conditions are those that licensing authorities may impose on licensed

premises and clubs under section 21A(1) and 74A(1). As these conditions may be applied to a large number of premises, the Department considers that the affirmative resolution procedure is appropriate for this order.

Home Office

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