These notes refer to the Local Democracy, Economic Development and Construction Act 2009 (c.20) which received Royal Assent on 12 November 2009

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009

EXPLANATORY NOTES

COMMENTARY

Part 1: Democracy and Involvement

Background

12. In December 2007, the report of the Councillors Commission *Representing the future*[1] was published. The report was an independent review of the incentives and barriers to serving on councils. In July 2008, the Government provided a response to the report in *The Government Response to the Councillors Commission*[2] which was published alongside the White Paper *Communities in control: real people, real power*[3] which set out the Government's proposals for empowering local communities. Chapters 1, 2, 3 and 5 of Part 1 follow on from those papers.

13. The creation of a National Tenant Voice was one of Martin Cave's recommendations in his review of social housing regulation (*Every Tenant Matters* (June 2007))[4]. Martin Cave recognised that whilst social landlords have well-established organisations in place to represent them at national level (not least in discussions with Government and the TSA), tenants lack such representation.

Chapter 1: General Duty of Local Authorities

Summary

14. This Chapter imposes duties on local authorities to promote understanding among local people of the opportunities that exist for members of the public to get involved in, and influence, the decisions made by local authorities and other local public bodies.

15. The duties apply to both England and Wales.

Commentary on Sections

Section 1 - Democratic arrangements of principal local authorities

16. *Subsection (1)* places a duty on principal local authorities to promote understanding of their functions and their democratic arrangements. "Democratic arrangements" are defined under *subsection (3)*. The subsection also requires those authorities to promote

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1 http://www.communities.gov.uk/councillorscommission/publications/representingthefuture/
2 http://www.communities.gov.uk/publications/communities/councillorscommissionresponse
3 http://www.communities.gov.uk/publications/communities/communitiesincontrol
4 http://www.communities.gov.uk/publications/housing/everytenantmatters

understanding of how members of the public can take part in those arrangements and what taking part is likely to involve.

17. *Subsection (2)* expands on *subsection (1)(c)* to require principal local authorities to promote understanding of the role of councillors, how to become one, and the support that is available to councillors to assist them in their role.

18. *Subsection (3)* defines the principal local authorities on whom the duty is placed. This covers all county and district councils in England (including unitary authorities), London borough councils and the Common Council of the City of London, and county and county borough councils in Wales.

19. *Subsection (3)* also defines "democratic arrangements" to mean the arrangements for people to participate in or influence the making of decisions including where those decisions are made by the local authority in partnership or conjunction with any other person. This would include opportunities for people to participate in or influence decision-making such as by:

- standing and serving as a councillor;
- voting to elect representatives;
- making representations to councillors and other directly elected representatives including by submitting petitions;
- taking part in consultations, formal forums, panels and public meetings, including attending the public parts of council meetings;
- taking on a civic role such as school governor or independent custody visitor.

Section 2 - Democratic arrangements of connected authorities

20. *Subsection (1)* places a duty on principal local authorities to promote understanding among local people of public bodies (referred to as 'connected authorities') which relate to the authority's area. It requires principal local authorities to promote understanding of what these bodies do and their democratic arrangements, as defined in *section 1(3).* It also requires them to promote understanding of how members of the public can take part in those arrangements and what taking part is likely to involve.

21. *Subsections (2)* and *(3)* specify what the connected authorities are in England. These are public bodies or persons that have a strong local presence, making decisions that are directly relevant to local people in the principal local authority's area and include:

- health bodies;
- police bodies;
- fire and rescue authorities;
- waste bodies;
- schools and Further Education colleges;
- National Park and Broads authorities;
- transport authorities;
- economic prosperity boards and combined authorities;
- probation services;
- parish councils and meetings;
- for a county council in a two-tier area, a district council;

- for a district council in a two-tier area, a county council;
- for London boroughs and the Common Council of the City of London, the Greater London Authority and Transport for London.

22. The inclusion of the chief officer of police as a "connected authority" means that the principal local authority is expected to promote understanding about the work of the police force itself, and not just the work of the police authority. This includes "neighbourhood policing" in which every area has a neighbourhood policing team and "the policing pledge" which sets out both locally and nationally the standards the public can expect from the police.

23. *Subsections (4)* and *(5)* specify what the connected authorities are in Wales. *Subsection (4)* largely replicates, in relation to Wales, the provisions of *subsection (2)*, save that the connected authorities do not include Further Education colleges nor those bodies which operate only in England but include equivalent Welsh bodies where appropriate.

24. *Subsection (6)* enables the "appropriate national authority" (the Secretary of State for England and the Welsh Ministers for Wales) by order to:

- add any person or body who has functions of a public nature to the list of connected authorities;
- remove a connected authority from the list of connected authorities;
- add or remove functions of the Secretary of State on the list of connected authorities.

Section 3 - Monitoring boards, courts boards and youth offending teams

25. This section places a duty on principal local authorities to promote understanding among local people of courts boards, independent monitoring boards for prisons and immigration removal centres and Youth Offending Teams ("YOTs").

- Courts boards give advice and make recommendations to achieve effective and efficient administration of the courts. This advisory role extends across the civil, family and criminal jurisdictions.
- Independent monitoring boards are appointed for every prison and immigration removal centre. They monitor conditions in the local prison or removal centre and ensure that proper standards of care and decency are maintained.
- YOTs are established for every local authority in England and Wales and are responsible for co-ordinating the work of the youth justice services. YOTs identify the needs of each young offender and then identify suitable programmes to address those needs with the intention of preventing further offending.

26. Principal local authorities are required to provide information about what these bodies do, how members of the public can take part in their work and what this is likely to involve.

Section 4 - Lay justices

27. This section places a duty on principal local authorities to promote understanding among local people of lay justices. Lay justices are unsalaried magistrates, as opposed to "District Judges (Magistrates' Courts)" (previously known as stipendiary magistrates) who are full-time salaried members of the judiciary. Principal local authorities are required to provide information about what lay justices do, how a member of the public can become a lay justice and what the role involves.

Section 5 - Provision of information

28. *Subsections (1)* and *(2)* provide that the duties in sections 2 to 4 do not apply to principal local authorities if information has not been provided by the connected authorities, monitoring boards, courts boards, youth offending teams and (in the case of lay justices) the Lord Chancellor, respectively, after it has been requested of them.

29. *Subsections (3)* and *(4)* provide the appropriate national authority with the power to make an order which would require one or more connected authorities or the bodies listed under *section 3(2)* to provide information to the principal local authorities. It is intended that this power will only be used if the intention of the duty is significantly frustrated by the failure of one or more authorities to provide the necessary information to the principal local authorities.

30. *Subsection (5)* provides that *subsections (1)* to *(3)* do not apply to a district council in a two-tier area, because alternative arrangements for those principal local authorities are covered in *subsection (6)*.

31. *Subsection (6)* establishes how the duties in sections 2 to 4 operate in two-tier areas. Districts in two-tier areas are required to promote understanding of the matters in sections 1 to 4. However, county councils are responsible for requesting the information, at least once a year, from persons listed under sections 2, 3 and 4 on behalf of the district councils. The county council must then pass on information it receives to the district councils. Where a county has been informed of material changes to information previously disseminated to its district councils, it is required to inform them accordingly. District councils in two-tier areas will not have failed to meet their duties under sections 2, 3 and 4 if the necessary information has not been passed to them by the county council.

Section 6 – Guidance

32. This section provides that the appropriate national authority may produce guidance for principal local authorities on how to fulfil their duties under Chapter 1. Before guidance is given, it must be consulted upon with the relevant principal local authorities. This guidance may be given generally, or tailored to the needs of different councils if appropriate, and must be published. Principal local authorities must have regard to any statutory guidance which applies to them.

Section 7 - Isles of Scilly

33. This section provides the Secretary of State with the power to apply the duties in this Chapter, with or without modifications, to the Scilly Isles.

Section 8 - Orders under this Chapter

34. This section specifies that any order made under this Chapter is to be made by statutory instrument and is to be subject to negative resolution procedure.

Chapter 2: Petitions to Local Authorities

Summary and Background

35. Section 10 places duties on principal local authorities in England and Wales in relation to electronic petitions signed by those who live, work or study in the local area. Section 11 requires principal authorities to make, publicise and comply with a scheme for handling both paper and electronic petitions. The intention of this Chapter is to make local decision-making in relation to petitions made to principal local authorities more transparent, by requiring them to respond to petitions which meet certain criteria, and making the response to petitions publicly available.

Section 10 – Electronic petitions

36. Section 10 requires principal local authorities to provide a facility for people to make petitions electronically. Principal local authorities are defined in *subsection (3).*

Section 11 – Petition scheme

37. Section 11 requires principal local authorities to make, publicise and comply with a scheme for handling both paper and electronic petitions. *Subsection (7)* makes it clear that existing powers and duties relating to petitions continue unaffected by the provisions in this Chapter.

Section 12 – Petitions to which a scheme must apply

38. Section 12 makes provision about the petitions to which a petition scheme must apply. These are petitions which:

- request the authority to take action or cease taking action;
- are signed by at least the number of people specified in the petition scheme;
- are not made under any other enactment. Petitions made successfully under other statutory provisions – for example, a petition requiring a local authority to hold a referendum on executive arrangements, pursuant to regulations made under section 34 of the Local Government Act 2000 do not come within the petition scheme; and
- if made in electronic form, are made using the principal local authority's e-petitions facility.

What amounts to "signature" for the purposes of an e-petition is a matter to be specified by authorities in their schemes. It may be, for example, that an authority will specify that entering an email address will constitute "signature" for this purpose.

Section 13 – Requirement to acknowledge petitions

39. Section 13 requires petition schemes to ensure that petitions are acknowledged in writing within a time specified in the scheme. The acknowledgement must say what the authority intends to do in response to the petition. For example, if an authority proposes to do whatever it is called on to do by the petition, it may be that a single letter confirming this will be sufficient.

Section 14 – Requirement to take steps

40. Section 14 requires principal local authorities to take one or more steps in response to petitions which meet the criteria set out in *subsections (1) and (2)* and are therefore "active" petitions. Authorities in England and Wales must take one or more substantive steps in response to a petition which relates to the authority's functions. In England, principal authorities other than non-unitary district councils must also take steps in response to petitions relating to an improvement in the local economic, social or environmental well-being to which any of the partner authorities could contribute.

41. There is no duty to take any substantive step in relation to petitions which are vexatious, abusive or otherwise inappropriate to be dealt with. The appropriate national authority has power to make an order to provide that certain principal local authority functions are excluded, so that petitions on these subjects would not be "active".

42. *Subsection (6)* sets out some examples of what the substantive steps might be and requires principal authorities to ensure that their petitions schemes include as a minimum all the listed examples as possibilities. *Subsection (7)* ensures that the petition organiser is told what steps will be taken, and that this information must be

publicly available online unless it is inappropriate because, for example, it would breach someone's right to privacy.

Section 15 – Requirement to debate

43. Section 15 gives an automatic right for the matter raised in a petition to be debated by the full council if more than a specified number of people have signed it. The trigger number must be specified in the petition scheme. The appropriate national authority has the power to issue guidance as to the threshold figure which is appropriate, to specify by order a threshold figure applicable to all principal authorities, or to direct a principal authority to amend its petitions scheme, including the threshold specified in it.

Section 16 – Requirement to call officer to account

44. Section 16 provides that certain senior officers of a principal local authority can be called to account at a public meeting. It is up to principal authorities to determine which of their officers are liable to be called to give evidence at a public meeting of the authority's overview and scrutiny committee, but their petition schemes must ensure that as a minimum the head of paid service, often known as the chief executive of the authority and the most senior officers responsible for the delivery of services can be required to attend such a meeting when requested to do so by a petition with a number of signatures above the threshold in the authority's scheme. The reasons for the request must relate to the officer's job functions.

45. Authorities operating executive arrangements are required by section 21 of the Local Government Act 2000 to have overview and scrutiny committees. The functions in this section are performed by the overview and scrutiny committee in the case of such authorities. Authorities which do not operate executive arrangements are currently required by regulations made under section 32 of the Local Government Act 2000 to have committees which carry out essentially the same functions as overview and scrutiny committees – and this section has the effect of conferring the public meeting function on such committees.

Section 17 – Review of steps

46. Section 17 gives the petition organiser (see section 22) the power to ask an overview and scrutiny committee (or its equivalent in authorities not operating executive arrangements) to review the principal local authority's response to their petition, if the organiser is not satisfied with the steps taken by the authority under section 14. The overview and scrutiny committee may arrange for the full council to carry out this function – that is to say the response of the authority to the petition could be discussed at a meeting of the full council. The principal local authority must inform the petition organiser of the outcome of this review.

Section 18 – Supplementary scheme provision

47. Section 18 sets out other issues which principal local authorities' schemes may include.

Section 19 – Powers of appropriate national authority

48. Section 19 sets out the powers of the appropriate national authority (the Secretary of State in relation to principal authorities in England and the Welsh Ministers in relation to principal authorities in Wales) to issue guidance in relation to the discharge of the petition function by principal authorities. This power includes a power to create a model petitions scheme which authorities will be able to adopt. The appropriate national authority has power to direct an individual principal authority to amend its petition scheme, for example, if an authority set an inappropriately high threshold for the number of signatures required to mean a petition is "active" within the meaning of section 14, the appropriate national authority could require an authority to set a lower

threshold. There is also a power to make orders applicable to all principal authorities to require them to make particular provision in their petition schemes.

Section 20 – Handling of petitions by other bodies

49. Section 20 enables the appropriate national authority to apply the petitions obligations of this chapter to different categories of local authority specified in section 20(2). The power permits the petitions obligations to be applied with modifications to take account of differences in the way such local authorities operate.

Section 22 – Interpretation

50. Section 22 contains interpretation provisions. In relation to e-petitions it provides that such petitions are "made" to the authority – and thus potentially trigger the obligations specified in sections 14, 15 and 16 – on a date specified by the e-petition organiser, rather than on the date the organiser asks the authority to host the e-petition, or the date when it is first opened for signature. If an e-petition organiser does not specify a date, it is for the principal local authority to specify in its petition scheme when the e-petition is deemed to be "made".

Chapter 3: Duties of Public Authorities

Section 23 - Duty of public authorities to secure involvement

51. *Subsection (1)* places a duty on those authorities listed in *subsection (2)* to involve representatives of interested persons in the exercise of their functions, where they consider that it is appropriate to do so. It sets out that those authorities will need to consider each of three ways of securing such involvement, namely informing the representatives, consulting them and involving them in other ways.

52. *Subsection (2)* lists the affected authorities and *subsection (3)* explains that, with the exception of the Secretary of State, the relevant functions of the authorities listed are all functions they exercise in respect of or in relation to England. In respect of the Secretary of State, *subsection (3)(b)* provides that the relevant functions are limited to those specified (arrangements with respect to obtaining employment or employees and for the provision of probation services), in so far as they are exercisable in relation to England. *Subsection (8)* makes the Secretary of State's functions under *subsection (3)(b)(ii)* "probation provision" for the purposes of Part 1 of the Offender Management Act 2007 (see in particular section 3 of that Act (power to make arrangements for the provision of probation services by another person as provider of probation services)).

53. *Subsection (4)* provides that the duty to involve representatives of interested persons does not grant an authority any additional powers. Where there is a conflict between this duty and another duty, the latter takes precedence.

54. *Subsections (5) and (6)* enable the Secretary of State to provide exemptions from the duty by secondary legislation subject to the negative resolution procedure.

Section 24 - Duty of public authorities to secure involvement: guidance

55. *Section 24(1)* provides that the Secretary of State may issue guidance on the discharge of the duties under section 23. *Subsection (2)* sets out that the guidance may be general or for a particular authority, may be different for different authorities and must be published. *Subsection (3)* requires the Secretary of State to consult authorities to which the guidance relates before it is issued. *Subsection (4)* states that an authority must have regard to any such guidance that relates to it.

Chapter 4: Housing

Section 25 - Establishment and assistance of bodies representing tenants etc

56. Section 25 makes provision for the Secretary of State to establish and give financial or other support to a body that will represent the interests, at national level, of housing tenants in England.

57. *Subsection (1)* provides powers to the Secretary of State to create such a body, to provide funding to others to create such a body, or to fund an existing body (or a body newly created using other powers) capable of providing national representation of tenants.

58. *Subsections (2) to (4)* define the bodies in relation to which the Secretary of State may exercise powers in *subsection (1).* They outline the functions such a body must have: representing, or facilitating the representation of, the views and interests of tenants; conducting and commissioning research into issues affecting tenants, and promoting other bodies to represent tenants.

Section 26 – Consultation of bodies representing tenants etc

59. Section 26 amends the Housing and Regeneration Act 2008.

60. *Subsection (2)* inserts a new section 278A into the Act. The new section provides a power to the Secretary of State to nominate a body representing the interests of social housing tenants for the purposes of consultation in connection with certain functions carried out by the social housing regulator (established by Part 2 of the 2008 Act) and the Secretary of State and set out elsewhere in the Act (and which subsection (1) of the inserted section lists).

61. Subsection (2) of the inserted section requires the Secretary of State to notify the regulator of any such nomination and the withdrawal of any such nomination.

62. *Subsections (3) to (6)* amend those parts of the Act listed in subsection (1) of the inserted section by adding the nominated body to the list of those whom the regulator or Secretary of State must consult before exercising those functions. This means, specifically, the requirement on the regulator to consult on:

- the criteria for the registration of providers of social housing;
- the disposal of dwellings by registered providers of social housing;
- standards etc for registered providers of social housing;
- guidance to registered providers of social housing.

Chapter 5: Local Freedoms and Honorary Titles

Introduction and background

63. This Chapter makes amendments to provisions in the Local Government Act 1972 concerning freemen (local freedoms), and honorary aldermen and honorary freemen (honorary titles).

64. The status of “freeman”, derives from the historic traditions of certain towns and cities in England and Wales. Admission as a freeman is dependent on local rules often based on inheritance or apprenticeship, although a very few freedoms may be acquired through marriage. In some towns and cities the freemen, and certain persons related to or associated with them, have property or other rights.

65. Each guild of freemen has its own rules of admission, which may be contained in byelaws, Charters, local Acts or secondary legislation or enshrined in ancient custom and practice. While some guilds have found sufficient flexibility in their rules to enable

them to admit women or to make other amendments to their admissions practices, others have not been able to because the sources from which their rules derive have no simple process for amendment. These guilds now face difficulties in maintaining their numbers and in revising their rules to reflect changing times.

Section 27 – Local freedoms

66. Section 27 makes provision for a daughter of a freeman of a city or town to be admitted as a freeman where a son would have the right to be so admitted. It also makes provision for sons and daughters of freemen to be admitted as freemen irrespective of when and where they were born.

Section 28 – Power to amend law relating to local freedoms

67. Section 28, which amends section 248 of the Local Government Act 1972 and inserts a new Schedule 28A into that Act, allows the laws relating to the admission of freemen to be more easily amended.

68. New Schedule 28A makes provision for the laws relating to freedom of a city or town to be amended by, or pursuant to, a resolution of the freemen. Paragraph 2 contains powers to enable laws to be amended by, or pursuant to, a resolution of the freemen for certain, specified purposes. These are: firstly, to provide for the right for women to be admitted to the freedom of a city or town except where the effect of the amendment would be to deprive a man of the right to be admitted; secondly, to enable a woman admitted to freedom of a city or town to use the title freewoman; and, thirdly, to put a civil partner (or surviving civil partner) of a freeman in the same position as a spouse (for instance, if the relevant law confers on the surviving spouse of a freeman the right to an annual payment, the new provision allows that right to be extended to surviving civil partners).

69. Paragraph 2 goes on to provide that the freemen may amend any enactment (other than an Act of Parliament) or the law established by custom for any of the purposes set out above, simply by passing a "qualifying resolution". A qualifying resolution is a resolution passed in accordance with the procedure set out in paragraphs 7 to 10 of the Schedule. However, if the law which the freemen wish to amend for any of the purposes set out above is contained in an Act of Parliament then the Secretary of State or the Welsh Ministers, as the case may be, will need to make the amendments by Order once the freemen have proposed the amendment in a qualifying resolution. If the Act of Parliament concerned is a public general Act the Order will need to be made using the negative resolution procedure. No Parliamentary procedure is required if the Act of Parliament concerned is a local Act.

70. Paragraph 3 provides a power for any amendment (not just an amendment for one of the purposes set out in paragraph 2) to be made to the law relating to rights of admission where the law is contained in a royal charter. The amendment must first be proposed in a qualifying resolution and the amendment must be made by Order in Council.

71. Paragraph 4 provides a power for the freemen to amend, simply by passing a qualifying resolution, the law relating to rights of admission of freemen so far as that law is established by custom. However, where the amendment to customary law being made is for one of the purposes set out in paragraph 2, the amendment should be made under paragraph 2(3) and not paragraph 4.

72. Paragraphs 5 and 6 provide that the powers set out in paragraphs 2, 3 and 4 for the freemen to amend the law relating to rights of admission include a power to make consequential amendments using the relevant procedure. So, for example, where the principal amendment – the "admissions amendment" — is to a charter by Order in Council any consequential amendments will be made by Order in Council, even if the law amended is established by custom. This is subject, however, to paragraph 5(3) which provides that any consequential amendment which is made to an Act of Parliament must be made by an Order made by the Secretary of State or the Welsh

Ministers, as the case may be, once a qualifying resolution proposing the amendment has been passed by the freemen.

73. Paragraph 7 sets out the procedure to be followed by a freeman or freemen who propose an amendment to the law relating to rights of admission of freemen in their area. Under this paragraph a resolution to make an amendment is passed if it meets the conditions and procedural requirements set out in paragraphs 8 and 9.

Section 29 – Honorary titles

74. Section 29 amends section 249 of the Local Government Act 1972 in respect of both honorary freemen and honorary aldermen.

75. The title of "honorary freeman" is different from the status of freeman. As the name suggests, the status is purely honorary in nature, and confers no rights on the person so recognised.

76. Section 249 as originally enacted allows certain local authorities to confer the title 'honorary freeman' on persons of distinction and persons who have rendered eminent services to the local area. The local authorities who could exercise this power are the council of a London borough or a district having the status of a city, borough or royal borough or any parish or community having by grant under the royal prerogative the status of city and any parish or community entitled by such grant to be called and styled a royal town. The power is also exercisable by principal councils in Wales.

77. The amendments made to section 249 by section 29 extend the power to confer the title "honorary freeman" under section 249 to all principal councils, parish and community councils, and charter trustees in England. The amendments also allow councils to confer the title "honorary freewoman" where appropriate.

78. Section 249 also contains a power for principal councils to confer the title 'honorary alderman' on former members of the council who have rendered eminent services to that council. Section 29 amends section 249 to enable principal councils who are exercising that power to confer the title "honorary alderwoman" where appropriate.

Chapter 6: Politically Restricted Posts

Section 30 – Politically restricted posts

79. Certain local authority employees in positions of seniority or influence (for instance the chief executive of the authority) are restricted from undertaking certain political activities, such as standing for election or speaking publicly in support of a particular political party. As well as specific posts being politically restricted, employees with a salary of £36,730 or above are deemed to hold a politically restricted post. These political restrictions were introduced to address concerns about political impartiality and conflicts of interest. These so-called "Widdicombe rules" sought to ensure that authority members are confident that the advice they receive from their senior staff is impartial.

80. *Subsection (2)* removes the requirement imposed by section 2 of the Local Government and Housing Act 1989 for local authorities to prepare and maintain a list of posts that exceed a specified salary, and which as a consequence mean that the post-holder is subject to political restrictions. *Subsections (3) and (4)* make amendments consequential to this.

Part 2: Local Authorities — Governance and Audit

Chapter 1: Governance

Section 31 - Scrutiny officers

81. Each local authority operating executive arrangements is required by section 21 of the Local Government Act 2000 to have at least one overview and scrutiny committee to review or scrutinise decisions made, and to make reports and recommendations about matters whether or not they are the responsibility of the Executive; and to make reports or recommendations on matters which affect the authority's area. Section 31 inserts new a section into the Local Government Act 2000 requiring local authorities, with the exception of district councils in areas where there is a county council, to designate one of their officers as a scrutiny officer to support the work of the authority's overview and scrutiny committee(s).

82. *Subsection (2)* sets out the functions that a scrutiny officer may undertake. Typically, a scrutiny officer will promote the scrutiny function generally within the authority and local government partners more widely, and provide advice and support to members of the authority's committee(s) in undertaking their work. This may include the provision, or management, of committee secretariat services, research, analysis of data and report preparation for example.

83. *Subsections (3)* to *(5)* specify the title of the role, those officers who may not be designated by the authority as the scrutiny officer, and the types of authority who are not required to designate an officer in this manner.

Section 32 - Joint overview & scrutiny committees

84. Section 123 of the Local Government and Public Involvement in Health Act 2007 (the "2007 Act") as originally enacted, allows the Secretary of State to make regulations enabling a county council in a two tier area to establish a joint overview and scrutiny committee with one or more district councils in its area, for the purpose of making reports and recommendations relating to the attainment of "local improvement targets" as defined in Part 5 of that Act. Such regulations may also make provision for information relating to local improvement targets to be provided to joint overview and scrutiny committees by certain 'associated authorities'.

85. The purpose of section 32 is to broaden the scope of joint overview and scrutiny arrangements so that:

- joint overview and scrutiny committees may be set up by any two or more local authorities;
- such committees may make reports and recommendations on any matter (other than an excluded matter);
- associated authorities may be required to provide any information to joint overview and scrutiny committees (other than that relating to crime and disorder matters) and not just that relevant to local improvement targets.

86. Section 32 achieves this by replacing section 123 of the 2007 Act with a new section 123.

87. Subsection (1) of new section 123 allows the Secretary of State to make regulations enabling any two or more local authorities in England to appoint a joint overview and scrutiny committee.

88. Subsections (1)(b) and (2) mean that such joint overview and scrutiny committees may be given the power to make reports and recommendations on any matter, other than an excluded matter. Subsection (3) provides that certain crime and disorder matters

are "excluded matters". This is because Police and Justice Act 2006 makes separate provision for scrutiny of crime and disorder matters, and for the appointment of joint committees in relation to crime and disorder scrutiny functions.

89. Subsection (5) provides the detail as to what regulations made under the new section 123 may do, mainly by reference to the provisions of the Local Government Act 2000 that apply to normal (non-joint) overview and scrutiny committees. The provision that can be made is broadly the same as for those overview and scrutiny committees, with the exception that there is no power to make provision for councillors or officers of an authority to be required to attend before a joint overview and scrutiny committee to answer questions. Provision may also be made that is equivalent to or applies section 246 of, and schedule 17 to, the National Health Service Act 2006. These provisions are concerned with the exclusion of the public from meetings at which certain health related information is under consideration.

90. Subsection (5) also allows regulations to make provision as to the information which an "associated authority" of an appointing authority must provide or may not disclose to a joint committee. This is no longer limited to information relating to local improvement targets.

Section 33 - Powers of National Assembly for Wales

91. Section 33 amends the Government of Wales Act 2006 ("the 2006 Act"). The section extends the legislative competence of the National Assembly for Wales to make laws known as Measures of the National Assembly for Wales (referred to in the 2006 Act as "Assembly Measures"). The legislative competence conferred by the section is subject to general limitations on the exercise of that legislative competence, which apply by virtue of section 94 of, and Schedule 5 to, the 2006 Act.

92. *Subsection (1)* provides for amendments to Schedule 5 to the 2006 Act that introduce a number of matters into "*Field 12: local government*".

93. *Subsections (2)* and *(3)* insert matters 12.6 and 12.7 into *Field 12: local government"* in Part 1 of Schedule 5 to the 2006 Act.

94. Matter 12.6 is about decision-making structures of county and county borough councils, including executive arrangements. The matter does not include direct elections to executives of county or county borough councils or the creation of a form of executive requiring direct elections.

95. Matter 12.7 is about committees of county or county borough councils with functions of review or scrutiny or making reports or recommendations. Committees under section 19 of the Police and Justice Act 2006 (crime and disorder committees) are not included in this matter.

Chapter 2: Mutual Insurance

Introduction

96. On 9 June 2009 the Court of Appeal, in its consideration of Brent London Borough Council v Risk Management Partners Ltd [2009] EWCA Civ 490, ruled that the participation of councils in the London Authorities' Mutual Ltd was beyond their statutory powers. On 21 July 2009, the Department for Communities and Local Government published the consultation paper *Strengthening Local Democracy* which proposed specific new powers to enable councils to set up and participate in mutual insurance arrangements. This Chapter confers these powers on local authorities and other best value authorities in England and Wales and also permits insurance to be provided to other bodies specified by regulation. "Best value" authorities are defined in section 1 of the Local Government Act 1999.

Section 34 – Mutual insurance

97. Section 34 provides that a qualifying authority (listed in section 35(2)) may become a member of a body corporate whose objects must be those set out in subsection (2) and all of whose members are other qualifying authorities. In addition, it provides that a qualifying authority may do anything that is required by, or is conducive or incidental to, being a member of such a body corporate.

98. Subsection (3) provides that the power of a qualifying authority to do anything that is required of it as a member of the mutual insurance body corporate includes a power to pay premiums and other payments to the mutual insurance body, to agree to make any such payments and to assume financial obligations in relation to prescribed persons.

99. Subsection (4) provides that the Secretary of State, in relation to qualifying authorities in England, and Welsh Ministers, in relation to qualifying authorities in Wales, may by regulations impose restrictions or conditions on the use of the powers conferred on qualifying authorities.

100. Under subsection (5), qualifying authorities are required to have regard to any guidance issued by the Secretary of State or Welsh Ministers and to any guidance or document specified in regulations.

101. Subsection (6) provides that the Secretary of State and Welsh Ministers may, by regulation, amend the list of authorities that are qualifying authorities.

Section 35 – Mutual insurance: supplementary

102. Section 35(2) lists the qualifying authorities that are being provided with the power to become members of a mutual insurance body corporate.

103. The section defines the appropriate national authority, for the purpose of making regulations or issuing guidance, as the Secretary of State in relation to England and Welsh Ministers in relation to Wales.

104. The section provides that regulations under section 34 are to be made by statutory instrument and lays down the procedures to be followed. Regulations that (i) prescribe persons to whom mutual insurance bodies may provide insurance (ii) impose restrictions or conditions on the use of power by qualifying authorities or (iii) specify any guidance or document to which qualifying authorities must have regard are by negative resolution procedure in Parliament or the National Assembly for Wales, as appropriate. Regulations changing the authorities that are qualifying authorities are by affirmative resolution procedure in Parliament or the National Assembly for Wales, as appropriate.

Chapter 3: Audit of Entities Connected With Local Authorities

Introduction

105. This Chapter provides for an audit authority to appoint an auditor to an entity connected to one or more local authorities in England and Wales and for the auditor to issue a public interest report where it is in the public interest to do so. For the purposes of this Chapter an "audit authority" is the Audit Commission in England ("the Commission") and the Auditor General for Wales in Wales ("AGW"). An entity which has an auditor appointed in this way can appoint the same auditor, at no additional cost, to carry out the statutory audit which it is required to have carried out. The entity remains free, however, to appoint a different auditor to carry out the statutory audit – in which case the audit authority-appointed auditor will carry out an audit which is identical to the statutory audit.

106. This takes forward recommendations from Lord Sharman's independent review into the audit and accountability of public money *Holding to Account: The Review of Audit*

and Accountability for Central Government (2001).[5] Lord Sharman recommended that, among other things, the Comptroller and Auditor General (and Auditors General for Wales and Scotland and the Comptroller and Auditor General for Northern Ireland) should be appointed as the auditors of Non-Departmental Public Bodies (NDPBs) which are companies, and be eligible for appointment as auditors of those companies where Departments or NDPBs have a substantial stake or influence. This endorses one of the key principles of the Public Audit Forum on the independence of public sector auditors from the organisations being audited.

107. The Government accepted the principles of this recommendation and Parliament gave it statutory backing in the Companies Act 2006. Lord Sharman also recommended that similar arrangements should apply to local government entities. This Chapter implements that recommendation in relation to companies, limited liability partnerships and industrial and provident societies that are connected with local authorities.

Section 36 - Overview; Section 37 - Notification duties of local authorities; and Section 53 - Regulations

108. Section 36 provides that the relevant audit authority may appoint a person to carry out audit functions in relation to a local authority entity which meets certain qualifying criteria. An entity for the purposes of this Chapter is a company, a limited liability partnership ("LLP"), or an industrial and provident society ("I&PS"). The qualifying criteria are that the entity is connected with a local authority and that it meets other conditions specified in regulations made by the Secretary of State in England or by Welsh Ministers in Wales. A local authority is as defined in the Local Government Act 2003, and is required by accounting and auditing regulations to prepare statements of accounts. The smaller parish councils are excluded from the provisions for whilst they are covered by the 2003 Act definition, they are not required to prepare statements of accounts.

109. Section 37 provides that a local authority in England or Wales must notify the entity and the relevant audit authority if an entity meets, or ceases to meet, the qualifying conditions or ceases to be connected with the authority. Notification must be made within 21 days of the matter coming to the attention of the local authority.

Sections 38 - Power to appoint auditor; Section 39 - Power to appoint replacement auditor; and Section 40 - Exclusions

110. Section 38 provides that the audit authority may appoint a person to carry out an audit of a local authority entity where the entity appears to the audit authority to meet the qualifying criteria. The audit authority must consult the entity before making the appointment; and, after making the appointment, the audit authority must notify the relevant local authority. The appointment is made for a financial year of the entity and must be made before the start of that year. In the case of an appointment to a qualifying entity for its first financial year, an appointment may be made during the year.

111. Section 39 provides that where an appointed auditor dies, is dismissed, or is unable or unwilling to act, the audit authority may appoint a replacement auditor for that financial year. The audit authority must consult the entity before making a replacement appointment and after making the replacement appointment must notify the relevant local authority.

112. Section 40 provides that, unless the entity otherwise requests, the audit authority must not make an appointment if the entity appears to be exempt from statutory audit. A company, an LLP or an I&PS is to be exempt if it appears to the audit authority that the entity is, or will be, exempt from audit under Part 16 of the Companies Act 2006 (including as applied to LLPs) or under the Friendly and Industrial and Provident Societies Act 1968.

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5 http://www.hm-treasury.gov.uk/d/38.pdf

Sections 41 - Eligibility for appointment; and Section 42 - Terms of appointment

113. Section 41 specifies who is eligible for appointment as an auditor under this Chapter. The audit authority may appoint as an auditor under this Chapter: a member of the staff of the audit authority; an individual; or a firm. However, those individuals or firms which are not eligible for appointment as a statutory auditor under the Companies Act 2006 or who do not satisfy the test of independence in that legislation may not be appointed.

114. Section 42 sets out the terms of appointment for an auditor appointed under this Chapter. An appointment made under this Chapter begins on the first day of the financial year or, in the case of a replacement auditor, on the date of the appointment. Unless terminated earlier, the appointment ends when the auditor has discharged their functions. An audit authority may terminate the appointment of an auditor if it appears that the entity has ceased to be a qualifying entity. However, the appointed person may not be dismissed for any divergence of opinion on accounting treatments or audit procedures.

Section 43 - Right of entity to appoint auditor to conduct statutory audit; and Section 44 - Functions of auditor not appointed to conduct statutory audit

115. Section 43 provides that where an audit authority appoints an auditor to an entity, the entity may also appoint that same auditor as its statutory auditor under Part 16 of the Companies Act 2006 (including that Part as applied to LLPs) or section 4 of the Friendly and Industrial and Provident Societies Act 1968. This appointment, if made, will be on the standard terms and conditions (including fees) as published by the audit authority. However, some entities may require certain modifications to be made to the standard terms and conditions and these modifications may be agreed between the entity and the auditor. The intention is that where the entity wishes to appoint the audit authority's appointed auditor as its statutory auditor, that it is able to but not obliged to do so. This may be done for no additional fee beyond that agreed for the audit under this Chapter unless agreed with the auditor as part of the modification of the terms and conditions on appointment.

116. Before publishing any terms and conditions, the audit authority must consult the Secretary of State (in the case of the Commission) and Welsh Ministers (in case of the AGW) and such associations of local authorities and bodies of accountants as they consider appropriate. If the audit authority terminates the appointment of an auditor made under this Chapter, it does not terminate the appointment by the entity of their statutory auditor.

117. Section 44 applies when the entity does not wish to exercise the power in section 39(1) and instead chooses to appoint a different auditor as its statutory auditor, or where the entity exercises the power in section 39(1) but then terminates the appointment. In such a circumstance, the audit authority's appointed auditor has the same powers as in the Companies Act 2006 (including as applied to LLPs) or the Friendly and Industrial and Provident Societies Act 1968 to enable the auditor to make a report to the company, partnership or society on the annual accounts. The auditor must also send a copy of the report to the local authority with which the entity is connected and the relevant appointing audit authority.

Section 45 - Public interest reports; Section 46 - Codes of practice; Section 47- Access to information; Section 48 - Consideration of report by entity; Section 49- Consideration of report by local authority

118. Sections 45 to 49 provide the powers for an auditor appointed under this Chapter to make a report in the public interest. This adopts, for this Part, one of the principles of public audit endorsed in Lord Sharman's report, namely that public auditors should be able to make the results of their audits available to the public and to democratically elected representatives.

119. By virtue of section 45, an appointed auditor must make a report to the entity about any matter relating to the financial affairs or corporate governance of the entity which comes to their attention in discharging their functions under this Chapter and which they consider that it would be in the public interest to bring to the attention of the entity, the local authority with which it is connected, or the public. A copy of the report must be sent to the local authority with which the entity is connected and the relevant audit authority. The auditor may notify any person that a report has been made and supply a copy, or part of a copy to any person. Section 46 provides that the Audit Commission must prescribe the way in which the auditor carries out their functions in a code of practice made under section 4 of the Audit Commission Act 1998, and the Auditor General for Wales must prescribe such conditions in a code of practice made under section 16 of the Public Audit (Wales) Act 2004. In carrying out their public interest reporting functions, an auditor is required to comply with the provisions in the relevant code of practice.

120. Section 47 requires the entity to provide the auditor with every facility and all information which the auditor may reasonably require for the purpose of preparing a public interest report where the auditor intends to do so. Any person who, without reasonable excuse, obstructs the auditor, or fails to comply, is guilty of an offence. An appointed auditor has a right of access to documents of the entity for the purposes of making a public interest report.

121. Sections 48 and 49 set out the process for the entity and the local authority to consider a public interest report. Section 48 provides that where a public interest report is made, the report must be considered by the entity. In the case of a company this must be at a general meeting of the company, in the case of a LLP at a meeting of members of the partnership, and, in the case of an industrial and provident society in accordance with the rules of the society. The meeting must be held before the end of a period of one month, although the auditor may extend this period. At the meeting the entity must decide whether the report requires it to take any action and must notify the local authority of its decision. If the decision is to take no action then the reasons for this must be given in the notification. Section 49 provides that where a public interest report is made, the local authority must consider the report and the entity's decisions in relation to the report and decide whether the authority needs to take any action. The notice given of the meeting must include a copy of the report and of the entity's notification setting out the decision it has taken in relation to the report. The meeting must be held before the end of a period of one month although the auditor may extend this period. At the meeting the authority must decide whether the report requires it to take any action. Provision is made to cover admission to meetings, inspection and public access to agendas and reports.

Sections 50 - Fees; Section 51 - Power of audit authority to require information; and Section 52 - Subsidiaries of Passenger Transport Executives

122. Section 50 provides that a fee must be paid by the entity to the appointing audit authority when an auditor discharges any functions under section 44 (functions of auditor not appointed to conduct statutory audit) and sections 45 to 49 (public interest reports). The audit authority must prescribe a scale of fees for the purposes of audits undertaken in sections 45 to 49. This scale also determines the fees payable under the standard terms and conditions where the auditor is also appointed under Part 16 of the Companies Act (including that Part as applied to LLPs), or under the legislation applying to industrial and provident societies as provided for in section 43. If the amount of work involved in a particular case differs substantially a different fee may be charged. Before prescribing a scale of fees, the audit authority must consult such associations of local authorities, or such bodies of accountants, as it considers appropriate. There is a reserve power for the Secretary of State or Welsh Ministers, by regulations and following consultation, to prescribe a scale of fees in place of any scale prescribed by the Commission or AGW respectively.

123. Section 51 sets out the power of the audit authority to request information relating to the accounts audited by the auditor and any other document or information relating to the entity, which would have been available to the auditor under the powers that he had. This is to enable the audit authority to see what the auditors they have appointed have done, and allows them access to the information needed to maintain proper standards.

124. Section 52 provides that a company which is a subsidiary of a Passenger Transport Executive is to be regarded as connected with the Integrated Transport Authority for the area for which the executive is established. This allows for the relevant audit authority to appoint an auditor to a subsidiary of a Passenger Transport Executive and for that auditor to issue a public interest report where it is in the public interest to do so.

Section 54 - Interpretation

125. This section contains interpretation provisions relating to this Chapter. Section 54(2) provides that an entity "connected with" a local authority has the meaning provided in subsection 212(6) of the Local Government and Public Involvement in Health Act 2007, namely that an entity is connected with a local authority if financial information about the entity must be included in the local authority's statement of accounts. However, a local authority is not considered to be an entity itself in the 2007 Act.

Part 3: Local Government Boundary and Electoral Change

Introduction

126. The Electoral Commission was established under the provisions of the Political Parties, Elections and Referendums Act 2000 to oversee the workings of political parties in the UK. That Act also included provision to establish Boundary Committees for each country in the UK within the Electoral Commission and contained provisions to transfer to them the functions of the four Parliamentary Boundary Commissions for Scotland, England, Wales and Northern Ireland, together with those of the Local Government Commission for England and the Local Government Boundary Commissions for Scotland and Wales. These provisions were only ever commenced in relation to England and no Boundary Committees were established elsewhere.

127. Responsibility for local authority administrative and electoral boundaries in England was transferred to the Electoral Commission on 1st April 2002 to be carried out thereafter largely by the Boundary Committee for England.

128. Part 3 establishes a new body, the Local Government Boundary Commission for England, and transfers to it the functions of the Boundary Committee for England (subject to some modifications). In particular, sections 56 to 59 largely re-enact the provisions in Part 2 of the Local Government Act 1992, which make provision for changes to local authority electoral arrangements in England. A number of modifications have been made to reflect the removal of the role of the Electoral Commission from this process. The Local Government Boundary Commission for England will be able to initiate reviews of its own accord and Orders made by the Committee will now be subject to a Parliamentary procedure providing a line of accountability to Parliament. Section 60 transfers other functions from the Electoral Commission (see the note on section 60).

129. The sections that relate to the establishment of the Local Government Boundary Commission for England apply only to England. Section 61 applies to other parts of the United Kingdom (see the note on section 61).

Section 55 – Local Government Boundary Commission for England

130. Section 55 establishes the Local Government Boundary Commission for England as a separate corporate body. Schedule 1 contains the detailed provisions for the constitution and administration of the new body.

Section 56 – Review of electoral arrangements

131. *Subsection (1)* provides that the Local Government Boundary Commission for England must from time to time conduct a review of electoral arrangements of each principal council in England (the term "principal council" is defined in the section). *Subsection (2)* provides that the Local Government Boundary Commission may, at any time, conduct a review of all, or any part, of the area of a principal council. Following a review under *subsection (1) or (2)*, the new Commission may recommend whether a change should be made to electoral arrangements. The section re-enacts, with changes, the provision previously made by sections 13(3), 13(4), 13(8) and 14(4) of the Local Government Act 1992.

Section 57 – Requests for review of single-member electoral areas

132. This section provides a power for the Local Government Boundary Commission for England to conduct a review of the area of a principal council (as defined by section 52), at that council's request, with a view to making recommendations as to whether each electoral area in the area of the principal council should return only one member. It re-enacts, with changes, sections 14A and 14B of the Local Government Act 1992, which were inserted by the Local Government and Public Involvement in Health Act 2007. The main difference from those provisions is that the role of the Electoral Commission has been removed.

Section 58 – Review procedure

133. This section sets out the procedure which the Local Government Boundary Commission for England must follow when conducting electoral reviews under section 53. It provides, in particular, for a process of preparing and publishing draft recommendations, and for a period of time for interested persons to make representations about those draft recommendations (*subsection (2*)). At the end of its review, the Local Government Boundary Commission for England must publish a report stating its recommendations (*subsection 4(a)).* It re-enacts section 15 of the Local Government Act 1992 with some amendments to remove the role of the Electoral Commission.

Section 59 – Implementation of review recommendations

134. This section gives the Local Government Boundary Commission for England the power to make an order to give effect to all or any of the recommendations which it makes following a review of electoral arrangements for a local government area. It replaces section 17 of the Local Government Act 1992, removing the role of the Electoral Commission and making significant changes to the procedure for making an order to implement the Commission's recommendations.

135. *Subsection (2)* sets out the electoral changes that may be made by the Local Government Boundary Commission for England in an order. *Subsection (3)* provides that any electoral change may only be implemented at the next ordinary election for that council.

136. *Subsection (9)* provides that any order made by the Local Government Boundary Commission for England must be laid in draft before both Houses of Parliament before it can be made. Such an order is subject to the draft negative resolution procedure in accordance with section 6(1) of the Statutory Instruments Act 1946. The Local Government Boundary Commission is not able to make any order until a period of 40 days, beginning with the day on which a copy of the draft order is laid in Parliament, has passed. If during that 40 day period either House of Parliament resolves that the order be not made the Local Government Boundary Commission would not be able to make the Order. Under the Local Government Act 1992, recommendations from the Local Government Boundary Commission for England's electoral reviews were implemented by order by the Electoral Commission, and were not statutory instruments subject to Parliamentary procedure.

Section 60 – Transfer of functions relating to boundary change

137. This section transfers various functions from the Electoral Commission and the Boundary Committee for England to the new Local Government Boundary Commission for England. These functions are: the Boundary Committee for England's functions in providing advice to the Secretary of State on unitary local government (the replacement of a two tier system of county and district councils with a single tier of local government) and conducting boundary reviews under Part 1 of the Local Government and Public Involvement in Health Act 2007; the Electoral Commission's function of considering whether an electoral review is necessary following a structural or boundary change order being made; the Electoral Commission's functions for the review of constituencies of the Greater London Assembly under the Greater London Authority Act 1999, and its functions in relation to changes to local authorities' electoral arrangements and parish reorganisation under Parts 2 and 4 of the 2007 Act.

Section 61 – Removal of Electoral Commission boundary functions

138. This section abolishes the Electoral Commission's duty to establish a Boundary Committee for England and repeals section 14, so far as it relates to England, and section 15 of the Political Parties, Elections and Referendums Act 2000. Those provisions provided for the establishment of the Boundary Committee for England as a statutory committee of the Electoral Commission, and the appointment by the Electoral Commission of Deputy Commissioners to be members of the Boundary Committee.

139. Section 61 also repeals section 14, so far as it relates to Northern Ireland, Scotland and Wales, sections 16, 17, 19 and 20 and the related provisions within the schedules to the Political Parties, Elections and Referendums Act 2000. Insofar as these sections relate to Northern Ireland, Scotland and Wales they were never commenced. The repeal removes the Electoral Commission's duty to establish Boundary Committees for Northern Ireland, Scotland and Wales and the provisions for the transfer of the functions of the existing local government and parliamentary boundary commissions to these Boundary Committees.

Section 62 – Transfer schemes

140. This section places the Electoral Commission under a duty to produce one or more schemes for the transfer of property, rights and liabilities from the Electoral Commission to the Local Government Boundary Commission for England. The Electoral Commission is required to consult with the Secretary of State on this scheme and seek the consent of the existing Boundary Committee for England before making the scheme. This section requires the Electoral Commission to make such a scheme on or before 31 December 2009. If the Electoral Commission and existing Boundary Committee for England are unable to reach agreement on the provisions to be included in a scheme then the Secretary of State may by order specify such matters.

Section 63 – Continuity of functions

141. This section provides that anything done by the Boundary Committee for England (which is part of the Electoral Commission) or by the Electoral Commission, in relation to structural or boundary changes or electoral arrangements, may be treated as having been done by the new Local Government Boundary Commission for England.

Section 64 – Interim provision

142. Schedule 3 makes modifications to the Local Government Act 1992 to apply during an interim period starting on the day on which the Act is passed and ending on the date of the establishment of the Local Government Boundary Commission for England. *Subsection (2)* relates to recommendations made to the Electoral Commission by the Boundary Committee for England before the passing of this Act.

Section 65 – Electoral changes consequential on boundary change

143. This section makes amendments to sections 8, 10, 11 and 12 of the Local Government and Public Involvement in Health Act 2007. This section amends the process set out in sections 8 and 10 for the review by the Boundary Committee for England of the boundaries of local government areas, to enable the new Local Government Boundary Commission for England to consider whether consequential changes (including changes to constituencies of the Greater London Assembly) should be made to electoral arrangements as part of the same review. This enables, but does not require, both boundary and electoral matters to be considered in a single review rather than two separate reviews. Section 65 also makes consequential changes to the powers to implement boundary changes in sections 11 and 12 of the 2007 Act.

Section 66 – Repeal of redundant provisions

144. This section repeals provisions which relate to the defunct Local Government Commission for England. When the functions of that body were transferred to the Electoral Commission on 1st April 2002, the Local Government Commission for England was wound up.

Section 67 – Consequential and supplementary provision

145. This section gives effect to Schedule 4, which contains amendments consequential on provision made in Part 3 of the Act. It also gives the Secretary of State a power by order to amend, repeal or revoke enactments for the purposes of making further consequential provisions in relation to any provisions within Part 3.

Schedule 1 – The Local Government Boundary Commission for England

146. This Schedule provides the detailed arrangements for the creation of a new Local Government Boundary Commission for England, separate from the Electoral Commission. The Schedule replicates many of the arrangements which apply to the Electoral Commission.

147. It provides for the number of Committee members, which must be at least five and no more than 12, and requires a Chair and Deputy Chair to be appointed. The Schedule provides for appointments to be made by Her Majesty following, in relation to the Chair, an Address by the House of Commons, and for all other members, on the recommendation of the Secretary of State. The Schedule gives the Speaker's Committee the same role in the control and oversight of the funding of the Local Government Boundary Commission for England as it has for the Electoral Commission.

Schedule 2 –Electoral change in England: considerations on review

148. This Schedule sets out the criteria that the Local Government Boundary Commission for England must have regard to when conducting electoral reviews under section 56. It re-enacts and consolidates the provision previously made by Schedule 11 to the Local Government Act 1972 and sections 13(5), 13(5A) and 14(8) of the Local Government Act 1992. A number of drafting changes have been made to reflect other changes made in legislation.

Schedule 3 – Interim modifications of the Local Government Act 1992

149. This Schedule makes modifications to the Local Government Act 1992 to apply during the interim period starting on the day on which the Act is passed and ending with the establishment of the Local Government Boundary Commission for England. During that period, the procedure for implementing recommendations made by the existing Boundary Committee for England is modified so that it does not require the involvement of the Electoral Commission.

Schedule 4 – Local Government Boundary Commission for England: consequential and supplementary amendments

150. This Schedule makes amendments to the Local Government Act 1972, the Environment Act 1995, the Greater London Authority Act 1999 and the Local Government and Public Involvement in Health Act 2007 consequential upon Part 3 of the Act. These changes reflect the establishment of the Local Government Boundary Commission for England as an independent body, the transfer of local government boundary and electoral functions from the Electoral Commission to the new Commission, and the new electoral review procedures set out in Part 3 of this Act. In particular, paragraph 10 makes substantial amendments to arrangements for the review of Greater London Assembly constituency boundaries under the Greater London Authority Act 1999. Under these provisions, where the Secretary of State makes a boundary change order under section 10 of the 2007 Act which affects a London borough, the new Local Government Boundary Commission for England must consider whether or not to conduct a review of the Greater London Assembly constituencies. An order made by the Local Government Boundary Commission for England to implement any recommendation for changes to Assembly constituencies will be subject to the draft negative resolution procedure (see notes on section 59(9) above).

Part 4: Local Authority Economic Assessments

Background – Parts 4 to 7

151. The provisions in Parts 4, 5, 6 and 7 follow on from the *Review of Sub-National Economic Development and Regeneration*"[6] and the consultation document *Prosperous Places: Taking forward the Review of Sub National Economic Development and Regeneration*"[7].

Section 69 - Duty of responsible local authorities to prepare economic assessment

152. This section requires principal local authorities to prepare an assessment of the economic conditions of their area.

153. *Subsection (3)* defines "principal local authorities" as county councils, district councils other than a council for a district for which there is a county council (unitary authorities), the Council of the Isles of Scilly, London boroughs and the City of London Corporation. *Subsection (2)* enables a responsible authority to revise its assessment, or any part or aspect of it, at any time. *Subsection (4)* places a duty on a principal local authority to consult such persons it considers appropriate.

154. Where the responsible authority is a county council, *subsection (5)* requires it to consult and seek the participation of the district councils within its area in carrying out its assessment. The county council must also have regard to any material produced by district councils in the discharge of their responsibilities under section 13 of the Planning and Compulsory Purchase Act 2004, which requires them to keep under review matters which may be expected to affect the development of their area or the planning of its development. *Subsection (5)(c)* requires district councils to co-operate with the county council.

155. *Subsection (6)* requires principal local authorities to have regard to guidance issued by the Secretary of State setting out what an assessment should contain and how it should be prepared, when an assessment should be prepared and when it should be revised. Under *subsection (7)* the Secretary of State is required to consult representatives of local government and other such persons the Secretary of State considers appropriate before issuing guidance.

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6 http://www.hm-treasury.gov.uk/d/subnational_econ_review170707.pdf
7 http://www.berr.gov.uk/files/file45468.pdf

Part 5: Regional Strategy

Section 70 - Regional Strategy

156. This section provides for a regional strategy in each region other than London. A regional strategy must set out policies in relation to sustainable economic growth, development and the use of land within the region and can include different policies for different areas within the region.

157. The regional strategy is to include policies to contribute to the mitigation of, and adaptation to, climate change.

158. The regional strategy replaces the regional spatial strategy for the region, which sets out the Secretary of State's policies in relation to the development and use of land within the region, and the regional economic strategy for the region, which is the strategy produced by the regional development agency for the region relating to its purposes. These include the furtherance of economic development and regeneration of the region, the promotion of employment, business efficiency and investment, and contribution to sustainable development.

159. On commencement of this section, the existing regional spatial strategy and the existing regional economic strategy for an area become the regional strategy.

Section 71 - Leaders' Boards

160. This section provides for participating authorities to set up "Leaders' Boards" for the purposes of this Part of the Act. The Leaders' Board is a means to enable local authorities to act collectively at regional level. District and county councils and (where relevant) National Park authorities and the Broads Authority must make and consult on a scheme for establishing and operating a Leaders' Board. The participating authorities must submit the scheme to the Secretary of State for approval before establishing the body in accordance with the approved scheme.

161. The section gives the Secretary of State the power to fund the Leaders' Board or a participating authority in respect of that Board. It also gives the Secretary of State power to withdraw approval for the Leaders' Board where this is not operating effectively. The section also requires the Secretary of State to make regulations covering access to information requirements in relation to Leaders' Boards.

Section 72 - Responsible regional authorities

162. This section provides that the regional development agency (RDA) and local authorities' Leaders' Board for the region, are, jointly, the "responsible regional authorities" referred to throughout the remainder of this part of the Act. If there is no Leaders' Board, the RDA will act alone.

Section 73 – Sustainable development

163. This section requires the bodies responsible for regional strategy to exercise their functions with the objective of contributing to the achievement of sustainable development and having regard to the desirability of achieving good design.

Section 74 – Review and revision by responsible regional authorities

164. This section gives the responsible regional authorities a duty to keep the regional strategy and relevant matters under review and explains when a draft revision is to be prepared either of part or the whole of the strategy.

Section 75 - Community involvement

165. This section requires the responsible regional authorities to prepare, publish and comply with a statement setting out their policies for involving interested persons when preparing a draft revision of a regional strategy.

Section 76 - Examination in public

166. The section provides for the responsible regional authorities to arrange for an examination in public into the draft revision to be held by a person appointed by the Secretary of State. If the responsible regional authorities decide not to arrange for such an examination, the Secretary of State has the power to do so and to appoint a person to hold it. There is no automatic right for a person to be heard at an examination in public. The person holding the examination in public must report to the responsible regional authorities and send a copy to the Secretary of State.

Section 77 - Matters to be taken into account in revision

167. This section sets out the matters the responsible regional authorities must take into account when preparing a revision. Along with the draft revision they must prepare, publish and submit a sustainability appraisal report of the draft revision.

Section 78 - Approval of revision by Secretary of State

168. Once the responsible regional authorities have prepared and published a draft revision of the regional strategy and the sustainability appraisal report, this section requires them to submit these to the Secretary of State. The Secretary of State can then choose, subject to consultation, either to approve the draft revision as it stands or to modify it before approving it. In deciding whether or not to make modifications, the Secretary of State must have regard to any examination in public report and any representations made either to the responsible regional authorities or to the Secretary of State. Once the strategy has been approved, the responsible regional authorities are required to publish it.

Section 79 - Reserve powers of Secretary of State

169. This section sets out the Secretary of State's reserve power to revise a regional strategy in whole or in part, where the responsible regional authorities fail to do so at the time specified in regulations or directions. It also sets out the Secretary of State's reserve power to revoke a regional strategy where the Secretary of State thinks it, necessary or, expedient to do so.

Section 80 - Revision: supplementary

170. Section 80 sets out the Secretary of State's power to make regulations for procedural matters in connection with revisions of regional strategies. It also makes a saving provision for any steps already carried out in relation to a revision of an existing regional spatial or economic strategy at the time that this Part of the Act is commenced.

Section 81- Implementation

171. This section imposes duties on the responsible regional authorities to implement and monitor the regional strategy. In particular, they must publish and keep up to date an implementation plan and must make an annual report.

Section 82 - Regional strategy as part of the development plan

172. The regional strategy is part of the statutory development plan for an area (and applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise - see section 38 of

the Planning and Compulsory Purchase Act 2004). Until the strategy is revised, this section provides that the statutory development plan for an area will only consist of the policies that were previously in the regional spatial strategy.

Section 83- Duties of regional development agencies

173. This section requires regional development agencies to have regard to the regional strategy in exercising their functions.

Section 84 - Guidance and directions

174. This section gives the Secretary of State power to give guidance and directions in relation to the exercise of functions under this Part of the Act.

Part 6: Economic Prosperity Boards and Combined Authorities

Section 88 –EPBs and their areas

175. *Subsection (1)* provides that the Secretary of State can make an order establishing an Economic Prosperity Board ("EPB") for an area. An EPB will have functions relating to the economic development and regeneration of its area.

176. *Subsections (2)* to *(6)* specify the conditions that need to be met for an area to be capable of designation as an EPB's area.

177. *Subsection (2)* specifies that the area must consist of the whole of two or more local government areas in England.

178. *Subsections (3) and (4)* stipulate that the area must be made up of local government areas that have contiguous boundaries. It is not possible for the area of an EPB to completely surround an area which does not form part of it, nor for any area which does form part of it to have no common boundaries with any part of the rest of the area.

179. *Subsection (5)* stipulates that it is not possible for any local government area to be part of more than one area of an EPB, or part of an EPB's area at the same time as being part of the area of a combined authority (see section 103).

180. *Subsection (6)* provides that each local government area that forms part of the area of an EPB must have been included in a scheme prepared and published under section 98.

181. *Subsection (7)* states that a local government area for this Part means the area of a county council or a district council. It does not therefore include Greater London or the Isles of Scilly.

182. *Subsection (8)* requires an order under this section to specify the name that the EPB will be known by.

Section 89 – Constitution

183. This section allows the Secretary of State to make an order about the constitutional arrangements of an EPB.

184. *Subsection (1)* sets out what those arrangements are. An order could cover the membership of an EPB, the voting powers of members of the EPB, and the executive arrangements of the EPB. (Executive arrangements are arrangements for an EPB to set up an executive to make specific decisions, especially the day to day decisions, on its behalf. An executive would be expected to be a smaller and more stream-lined body than the EPB itself. Local authorities are required to operate executive arrangements).

185. *Subsection (2)* allows the order to make provision about the number of members of the EPB and how they are to be appointed. It also permits details of the remuneration of, and pensions or allowances payable to, members of the EPB to be included in such an order.

186. *Subsection (3)* states that the provision which may be made about the voting powers of each member includes provision about the different weight to be given to the vote of each member.

187. *Subsection (4)* explains what is meant by "executive arrangements" for the EPB, for instance the establishment of an executive and the arrangements by which that executive can exercise the powers of the EPB.

188. *Subsection (5)* provides that an order cannot provide that anyone other than the EPB has responsibility for agreeing its budget, so this function cannot be delegated to an executive of the EPB.

Section 90 – Constitution: membership and voting

189. This section sets out the provision which must be included in an order made under section 89 that deals with the number and appointment of members of an EPB. The order must provide that a majority of the EPB's members are elected members of the local authorities for the EPB's area.

190. *Subsection (5)* requires that the order must state that EPB members who are not elected members of its constituent local authorities will be non-voting members.

191. *Subsection (6)* allows for voting members of an EPB to resolve that provision made in accordance with *subsection (5)* does not apply, so that the voting members can decide to allow the members who are not elected members of its constituent local authorities to vote.

Section 91 – Exercise of local authority functions

192. *Subsection (1)* allows the Secretary of State to make an order that provides for functions of a county council or district council to be exercisable by the EPB. The functions must be exercisable by the council in relation to an area within the EPB's area.

193. This power applies only if the Secretary of State thinks it appropriate for the EPB to exercise the functions in question.

194. *Subsection (3)* provides that an order may specify that the function be exercisable generally, or subject to conditions or limitations. *Subsection (4)* allows an order to make provision for functions to be exercisable by the EPB instead of the local authority, or concurrently with the local authority.

195. *Subsection (5)* provides that an EPB must perform functions that are exercisable by the EPB with a view to promoting economic development and regeneration in its area.

Section 92 – Funding

196. This section allows the Secretary of State to make an order that sets out how the EPB will be funded.

197. *Subsection (1)* enables the Secretary of State to make provision for the costs of an EPB to be met by its constituent councils and about the basis on which the amount payable by each constituent council is to be determined.

Section 93 – Accounts

198. This section requires that an EPB keeps a general fund whereby all receipts of the EPB shall be carried to that fund and all liabilities falling to be discharged by the EPB shall be discharged out of that fund. Accounts shall be kept of receipts carried to and payments made out of the general fund.

Section 94 – Change of name

199. This section provides that an existing EPB can pass a resolution to change its name. *Subsections (2), (3) and (4)* set out conditions which must be followed in passing that resolution. The EPB must notify the Secretary of State that it has changed its name and must publish notice of the change. The Secretary of State can direct the EPB as to the manner of publication.

Section 95 – Changes to boundaries of an EPB's area

200. This section allows the Secretary of State to make an order changing the boundary of an existing EPB's area. Such an order could either add to or take away the whole of the area administered by a county council or district council.

201. *Subsection (2)* reflects the conditions in *subsections (2), (3), (4) and (5)* in section 85, so that the revised area would have to meet the same conditions as have to be met for the initial designation of an area of an EPB.

202. An order changing the boundary of an EPB's area cannot be made unless each of the councils in *subsection (3)* have agreed to the boundary change.

Section 96 – Dissolution of an EPB's area

203. This section allows the Secretary of State to make an order to dissolve an EPB's area and abolish the EPB.

204. An order dissolving an EPB cannot be made unless a majority of the councils whose territory is comprised in that EPB's area have agreed to the dissolution. This applies to county councils and unitary district councils, but not district councils in a county council area.

Section 97 – Review by authorities: new EPB

205. *Subsection (1)* provides that any two or more authorities referred to in *subsection (2)* may review the effectiveness and efficiency of arrangements to promote economic development and regeneration within the geographical area covered by the review. Where a review is conducted by the county council, the review area must include the whole of any one or more of the districts within the county or, if there are no such areas, the whole area of the county council. Where it is conducted by the council for a district, the review area must include that district.

206. *Subsection (5)* enables a review area to include counties or districts the councils for which are not conducting the review. There is no compulsion on the councils of those areas included in the review under *subsection (5*) to then be part of a section 95 scheme, but if the conclusion of the review is to establish an EPB they can be included in the scheme if they agree to be included.

Section 98 – Preparation and publication of scheme: new EPB

207. This section stipulates that if two or more of the councils that have conducted a section 97 review conclude that the establishment of an EPB for an area would be likely to improve the exercise of statutory functions relating to economic development and regeneration and economic conditions within the area, then they have the power to prepare and publish a scheme for the establishment of an EPB for the area.

208. *Subsection (3)* provides that the area of the proposed EPB must consist of all or part of the area covered by the review, may include one or more other local government areas, and must meet the conditions in *subsections (2), (3), and (4)* in section 88.

209. *Subsection (4)* prevents a local government area from being included in a scheme unless each appropriate authority for that area (defined in *subsection (5*)) has either

participated in the preparation of the scheme or consented to the inclusion of the local government area in the scheme.

Section 99 – Requirements in connection with establishment of EPB

210. This section specifies that the Secretary of State may make an order establishing an EPB for an area if, having had regard to a scheme prepared and published under section 98, the Secretary of State considers that the establishment of an EPB for an area is likely to improve both the exercise of statutory functions relating to economic development and regeneration in the area and the economic conditions in the area.

211. *Subsection (2)* requires the Secretary of State to consult each of the local authorities for the area which is proposed to be included in the EPB's area and any other persons the Secretary of State considers appropriate before making the order.

212. *Subsection (4)* requires the Secretary of State to have regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government in making the order.

Section 100 – Review by authorities: existing arrangements

213. Section 100 allows one or more of the authorities under *subsection (2)* - an existing EPB, a county council whose area or part of whose area is within an existing or proposed area of an EPB, and a district council whose area is within an existing or proposed area of an EPB — to review an "EPB matter".

214. An EPB matter is, in relation to an existing EPB, any matter in respect of which the Secretary of State has power to make an order under sections 89, 91, 92, 95 and 96 (relating to the constitutional arrangements, functions, funding, boundaries and dissolution of the EPB) and also includes any matter concerning the EPB that the EPB itself can decide.

215. The review must relate to one or more existing areas or proposed areas of an EPB.

Section 101 – Preparation and publication of scheme: existing EPB

216. If one or more of the authorities who have conducted a section 100 review conclude that the exercise of economic development and regeneration functions, or economic conditions, in an existing or proposed area of an EPB would be likely to be improved by the making of an order under any one or more of sections 89, 91, 92, 95 and 96 (relating to the constitutional arrangements, functions, funding, boundaries and dissolution of the EPB), then those authorities have the power to prepare and publish a scheme proposing how this should be done.

Section 102 – Requirements in connection with changes to existing EPB arrangements

217. This section sets out the requirements applying to the Secretary of State's power to make orders under sections 89, 91, 92, 95 and 96 (relating to the constitutional arrangements, functions, funding, boundaries and dissolution of the EPB) in relation to an existing EPB.

218. Specifically, an order can be made in relation to an area if the Secretary of State considers that it is likely to improve statutory functions relating to economic development and regeneration in the area, or the economic conditions in that area. Before making the order the Secretary of State must consult such of the bodies specified in section 100(2) and such other persons as the Secretary of State considers appropriate. The Secretary of State must also have regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government.

Section 103 – Combined authorities and their areas

219. This section provides that the Secretary of State can make an order establishing a combined authority for an area which meets conditions specified in *subsections (2) to (6)*. A combined authority will have functions relating to economic development and regeneration and transport.

220. *Subsection (2)* specifies that a combined authority's area must consist of the whole of two or more local government areas in England.

221. *Subsections (3) and (4)* stipulate that a combined authority's area must be made up of local government areas that have contiguous boundaries. It is not possible for a combined authority's area to completely surround an area which does not form part of it, nor for any area which does form part of it to have no common boundaries with any part of the rest of the area.

222. *Subsection (5)* stipulates that no part of the area may form part of another combined authority's area, the area of an EPB or an integrated transport area.

223. *Subsection (6)* provides that each local government area that forms part of the combined authority's area must have been included in a scheme prepared and published under section 109.

224. *Subsection (7)* requires an order under this section to specify the name that the combined authority will be known by.

Section 104 - Constitution and functions: transport

225. The section allows the Secretary of State to make an order about the constitutional arrangements and functions of an individual combined authority.

226. The section enables the order to include any of the specified provisions in the Local Transport Act 2008 that may be made for an Integrated Transport Authority (ITA) in relation to constitutional arrangements (including provision about membership), delegation of local authority and Secretary of State functions, and a conferral of a power to direct.

227. *Subsection (4)* provides that the provision in the Local Transport Act 2008 relating to a change in name applies to a combined authority in the same way as it applies to an ITA.

228. *Subsections (5)* and *(6)* enable the Secretary of State by order to transfer any function of an ITA to a combined authority.

229. *Subsection (7)* enables the Secretary of State by order to provide for Public Transport Executive (PTE) functions to be exercisable by a combined authority, or the executive body of a combined authority.

230. *Subsection (8)* enables an order under *subsection (7)* to include any functions that have been conferred on an ITA by any enactment and relate to the functions of a PTE.

Section 105 – Constitution and functions: economic development and regeneration

231. *Subsection (1)* enables the Secretary of State to make in relation to a combined authority any provision that may be made in relation to an EPB under section 91.

232. *Subsection (2)* provides that section 91(5), the duty to perform functions with a view to promoting economic development and regeneration, applies to the exercise of functions by a combined authority that are conferred on it by virtue of section 105(1).

233. *Subsections (3) and (4)* allow the Secretary of State by order to make in relation to a combined authority any provision that may be made in relation to an EPB with regards to funding. The order may only make provision in relation to the costs of a combined

authority that are reasonably attributable to the exercise of its functions relating to economic development and regeneration.

Section 106 – Changes to boundaries of a combined authority's area

234. This section allows the Secretary of State to make an order changing the boundary of the area of an existing combined authority. Such an order could either add or take away from a combined authority's area the whole of the area administered by a county council or district council.

235. *Subsection (2)* provides that an order may be made if the new area meets the conditions in *subsections (2), (3), (4) and (5)* in section 103 and if each local authority specified under *subsection* (3) consents to the making of the order.

236. *Subsections (4) to (7)* require the order to designate one or more authorities as local transport authorities, to take over the transport functions for any areas removed from the combined authority's area. The requirement does not apply to those areas that become part of an integrated transport area of an Integrated Transport Authority.

Section 107 – Dissolution of a combined authority's area

237. This section allows the Secretary of State to make an order to dissolve a combined authority's area and abolish its combined authority.

238. An order dissolving a combined authority's area cannot be made unless a majority of the councils whose territory is partly or wholly within the combined authority's area have agreed to the dissolution. This applies to county councils and unitary district councils, but not district councils in a county council area.

239. *Subsections (4) to (7)* require the order to designate one or more authorities as local transport authorities to take over the transport functions for the former area of the combined authority. The requirement does not apply to those areas that become part of an integrated transport area of an Integrated Transport Authority.

Section 108 – Review by authorities: new combined authority

240. This section provides that any two or more authorities of the types referred to in *subsection (2)* may review the effectiveness and efficiency of transport, and of the arrangements to promote economic development and regeneration, within the geographical area covered by the review. Where a review is conducted by a county council the review area must include the areas of one or more of the districts within the county or, where the county is a unitary authority, the area of the county council. Where it is conducted by a district council the review area must cover the area of the district council. The review can also be undertaken by an EPB or ITA but must include one or more local government areas within their existing area.

241. *Subsection (7)* enables a review area to include counties or districts the councils for which are not conducting the review. There is no compulsion on the councils of those areas included in the review area by virtue of *subsection (7)* to be part of a section 109 scheme but, if the conclusion of the review is to establish a combined authority and they agree to be included, they can be included in the scheme.

Section 109 – Preparation and publication of scheme: new combined authority

242. If two or more of the authorities who have conducted a section 108 review conclude that the establishment of a combined authority for an area would be likely to improve the exercise of statutory functions relating to transport and economic development and regeneration, the effectiveness and efficiency of transport in the area, and the economic conditions in the area, the authorities may prepare and publish a scheme for the establishment of a combined authority for the scheme area.

243. *Subsection (3)* provides that the scheme area must consist of or include the whole or any part of the review area, may include one or more other local government areas and must meet conditions set out in section 103(2) to (4).

244. *Subsection (4)* ensures that the scheme area will only include the local government areas of authorities which participate in the preparation of the scheme or consent to their inclusion in the scheme area.

245. *Subsection (5)* identifies the authorities who must participate in, or consent to the inclusion of their area in, the scheme.

Section 110 – Requirements in connection with establishment of combined authority

246. This section specifies that the Secretary of State may make an order establishing a combined authority for an area if, having regard to the prepared and published scheme, the Secretary of State considers that the establishment of a combined authority is likely to improve the exercise of statutory functions relating to transport and the effectiveness and efficiency of transport in the area as well as the exercise of statutory economic development and regeneration functions in the area and the economic conditions in the area.

247. *Subsections (2) and (3)* require the Secretary of State to consult each of the local authorities, any Integrated Transport Authority and any EPB for an area which, or part of which, is included within the area of the proposed combined authority, and any other persons the Secretary of State considers appropriate before making the order.

248. *Subsection (4)* requires the Secretary of State to have regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government in making the order.

Section 111 – Review by authorities: existing combined authority

249. Section 111 allows one or more of the authorities under *subsection (2)* — an existing combined authority, a county council whose area or part of whose area is within an existing or proposed area of a combined authority, a district council whose area is within an existing or proposed area of a combined authority — to review a "combined matter".

250. A combined matter is, in relation to an existing combined authority, any matter in respect of which the Secretary of State has power to make an order under sections 104, 105, 106 and 107 (relating to the constitutional arrangements, functions, funding, boundaries and dissolution of the combined authority) and also includes any matter concerning the combined authority that the combined authority itself can decide.

251. The review must relate to one or more existing areas or proposed areas of a combined authority.

Section 112 – Preparation and publication of scheme: existing combined authority

252. Section 112 enables authorities to prepare a scheme if one or more of the authorities who have conducted a section 111 review conclude that the exercise of statutory transport or economic development and regeneration functions, the effectiveness and efficiency of transport, or the economic conditions in an existing or proposed area of a combined authority would be likely to be improved by the making of an order under any one or more of sections 104, 105, 106 and 107 (relating to the constitutional arrangements, functions, funding, boundaries and dissolution of the combined authority).

Section 113 – Requirements in connection with changes to existing combined arrangements

253. This section sets out the requirements applying to the Secretary of State's power to make orders under sections 104, 105, 106 and 107 (relating to the constitutional arrangements, functions, funding, boundaries and dissolution of the combined authority) in relation to an existing combined authority.

254. The Secretary of State may make an order if the Secretary of State considers that the making of the order is likely to improve the exercise of statutory functions relating to transport or economic development and regeneration, the effectiveness and efficiency of transport or the economic conditions in the combined authority's area. Before making the order the Secretary of State must consult such of the bodies specified in section 111(2) and such other persons as the Secretary of State considers appropriate.

255. The Secretary of State must also have regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government.

Section 114 – Incidental etc provision

256. This section provides that the Secretary of State may make incidental, consequential, transitional or supplementary provision in support of an order made under this Part.

257. *Subsection (2*) allows the Secretary of State to make orders making amendments, repeals or revocations to, or applying or disapplying, primary and subordinate legislation in consequence of making an order, for instance to reflect the fact that a new EPB or combined authority has been established.

Section 115 – Transfer of property, rights and liabilities

258. This section specifies that the Secretary of State may make provision by order for the transfer of property, rights and liabilities for the purpose of, or in consequence of, an order under this Part. This includes the transfer of rights and liabilities under a contract of employment, to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply.

Section 116 – Consequential amendments

259. Section 116 allows the Secretary of State, by order, to make provision in consequence of any provision made by this Part. This includes a power to amend, repeal or revoke provision contained in an enactment passed or made before the day on which the Act was passed.

Section 117 – Orders

260. This section sets out the procedure for making orders under the Part.

261. *Subsection (1)* requires an order under the Part to be made by statutory instrument.

262. *Subsections (2) and (3)* provide that an order under the Part is subject to the affirmative resolution procedure unless it is an order under section 116 alone and only amends legislation subject to the negative resolution procedure.

263. *Subsection (4)* enables the draft of an order to proceed as if it was not a hybrid instrument. This avoids the need for special procedures which apply to instruments which have a differential effect on people or places to be applied to these orders.

Section 118 – Guidance

264. *Subsection (1)* provides that the Secretary of State can issue guidance about anything which could be done under or by virtue of Part 6 by an authority referred to in *subsection (5).*

265. The authority must have regard to any guidance given in exercising any function conferred or imposed by virtue of this Part.

266. *Subsections (3)* and *(4)* specify that the guidance must be given in writing and may be varied or revoked by further guidance in writing and that the guidance may make different provision for different cases.

Section 119 – Amendments relating to EPBs and combined authorities

267. This section introduces Schedule 6 which makes a number of amendments to apply provisions of local government and transport law to EPBs and combined authorities.

Section 120 – Interpretation

268. This section provides definitions for Part 6.

Part 7: Multi-Area Agreements

Introduction

269. This Part makes certain arrangements for multi-area agreements ("MAAs") which are agreements between two or more local authorities and certain partner authorities, approved by the Secretary of State. It gives the Secretary of State the power to direct a nominated local authority (the "responsible authority") to prepare an MAA in consultation with partner authorities and others specified in guidance (which might include persons from the voluntary and community sector and local businesses). The local authority and partner authorities are placed under a duty to co-operate with each other in determining local improvement targets for the area to be included in the MAA, and a duty to have regard to the targets.

Section 121 - Multi-area agreements

270. This section defines a multi-area agreement.

271. *Subsection (2)* explains that a multi-area agreement is a document specifying improvement targets for a geographic area for which there are two or more local authorities. *Subsection (3)* provides that this area can be non-contiguous so that it may, for example, cover the area of two local authorities which are separated by the area of a third local authority which is not to be part of the multi-area agreement.

272. *Subsection (4)* defines an improvement target as a target for improvement in the economic, social or environmental well-being of the area or part of the area covered by the multi-area agreement. For example, an improvement target might specify an improvement to be achieved in the whole of the area covered by the agreement, or it might apply only to specific ward(s) in the area. The target must also 'relate' to a local authority for the area, a partner authority, or another person acting, or having functions exercisable, in the area.

273. *Subsection (5)* provides that for an improvement target to relate to an individual or body, that individual or body must be able to contribute to the target being achieved through its actions and they must have agreed that the target should apply to them. Where an individual or body can have no impact on the achievement of a target through its actions and/or has not agreed to the target it will not relate to them and they will not be required to have regard to it.

274. *Subsection (6)* stipulates that an individual or body is taken to have consented to a target applying to it if it has agreed to the target (or any subsequent change to it) being specified in the multi-area agreement. The authority preparing the multi-area agreement ("the responsible authority") will therefore have consented to all targets as in drawing up the agreement it will have agreed to the inclusion of those targets.

Section 122 - Local authorities

275. This section defines "local authority" for the purpose of this Part.

Section 123 - Partner authorities

276. This section sets out a list of public bodies and persons that will be "partner authorities" for the purpose of a multi-area agreement. This largely follows the list of bodies named for the purpose of agreeing a Local Area Agreement as set out in section 104 of the Local Government and Public Involvement in Health Act 2007. The Government intends that the list of named partner authorities for the purposes of multi-area agreements and local area agreements should be consistent unless there is a good reason for there to be a difference.

277. The English Sports Council (referred to in subsection (4)(b)) is the official name of Sports England. The Historic Buildings and Monuments Commission (which is referred to in subsection (4)(e)) is the official name of English Heritage. The Secretary of State, in relation to the Secretary of State's functions under section 2 of the Employment and Training Act 1973 (referred to in paragraph)4)(j)(i) is a reference to functions are exercised by Jobcentre Plus. The functions described in *subsection (4)(j)(ii) and (iii)* are exercised by the Highways Agency.

278. *Subsection (5)* allows the Secretary of State to amend the list of partner authorities, by order, by adding any person with functions of a public nature, deleting any person, or by adding or deleting references to the Secretary of State's functions. The Secretary of State cannot exercise this power without first consulting appropriately *(subsection (6)).*

Section 124 - Proposal for multi-area agreement

279. This section provides that any group of two or more local authorities may approach the Secretary of State and request that the Secretary of State direct a multi-area agreement to be prepared for their area and submitted to the Secretary of State. It is the Secretary of State's agreement to such a request (section 125) that is the trigger for duties being applied to local and partner authorities, as set out in section 126.

280. *Subsections (2) and (3)* stipulate that all local authorities covered by the area of the proposed multi-area agreement, other than district councils in a county council area, must be party to any request for the Secretary of State to make a direction, whilst also expressly allowing such district councils to be part of the request if they want to join it.

281. *Subsections (4) and (5)* specify that a request under this section must be made in writing and set out the information the request must include together with the requirement that it should be prepared having regard to any guidance that the Secretary of State has issued. The request must name a local authority that will be responsible for preparing and submitting the draft multi-area agreement (the "responsible authority"). The area covered by the multi-area agreement does not have to include the whole area of a local authority that is party to the agreement – it may include part of a local authority area.

Section 125 - Direction to prepare and submit draft multi-area agreement

282. This section provides for the Secretary of State, in response to a request made under section 124, to direct the responsible authority to prepare and submit a draft multi-area agreement. The Secretary of State may specify the period of time within which the draft multi-area agreement must be prepared. The Secretary of State can vary or revoke a direction *(subsection (4)).*

283. *Subsections (2) and (3)* specify the information that the draft multi-area agreement must include: the period of time for which the agreement has effect and in respect of each improvement target, who it relates to (see section 121(5)) and the geographic area covered by it if it does not apply to the whole area of the multi-area agreement.

Section 126 - Preparation of draft multi-area agreement

284. This section places duties on the responsible authority and other local and partner authorities where a direction has been issued under section 125, following a request under section 124. Local and partner authorities will not be subject to duties under this section where they are developing a multi-area agreement without first obtaining a direction.

285. *Subsections (1) to (3*) place duties on the responsible authority to consult key stakeholders, to co-operate with local and partner authorities in determining the targets which are to relate to them and to have regard to guidance issued by the Secretary of State.

286. *Subsection (4)* places similar duties on local and partner authorities: a duty to co-operate with the responsible authority in determining the improvement targets that are to relate to them and a duty to have regard to guidance issued by the Secretary of State.

Section 127 - Approval of draft multi-area agreement

287. This section provides for the Secretary of State to approve, require modifications to or reject a draft multi-area agreement that is submitted in accordance with a direction issued under section 125. The approval brings the multi-area agreement into effect for the period specified in the agreement.

288. *Subsection (3)* provides that where the Secretary of State requires modifications to a draft multi-area agreement, this acts as a new direction under section 125 and therefore the duties on the responsible authority and local and partner authorities in connection with preparation of the agreement will continue to apply.

289. *Subsection (4)* stipulates that where the Secretary of State rejects a draft multi-area agreement then all directions and duties applicable to that agreement cease. If the local authorities concerned want to continue to pursue a multi-area agreement then they may do so without the benefit of a direction (and associated duties) or would need to submit a new request to the Secretary of State under section 124.

Section 128 - Submission of existing multi-area agreement

290. This section provides for a multi-area agreement that is prepared through procedures other than following a direction from the Secretary of State under section 125 to be submitted with a request that the Secretary of State approve it. This section allows local authorities to submit a multi-area agreement agreed prior to section 125 coming into force, or one that has been prepared without first seeking a direction.

291. *Subsection (3*) stipulates that all local authorities covered by the area of the multi-area agreement, other than district councils in a county council area, must be party to any request for the Secretary of State to approve the agreement whilst also expressly allowing district councils to be party to the request if they want to join it. This is consistent with who may request a direction to prepare and submit a multi-area agreement (see section 124).

292. *Subsection (4)* requires local authorities making the request to consult any other local authority, as well as partner authorities, for the area covered by the multi-area agreement, prior to making the request. *Subsection (7)(d)* requires the local authorities making the request to report the outcome of their consultation under this subsection.

293. *Subsections (5) to (7)* stipulate the information that must accompany the request. These information requirements are consistent with the requirements for a proposal for a direction under section 124 together with the requirements for a draft multi-area agreement in section 125.

Section 129 - Approval of an existing multi-area agreement

294. This section provides for the Secretary of State to be able to approve a multi-area agreement submitted under section 128. Once approved, the multi-area agreement takes effect in the same way as one prepared following a direction, and for the period specified in it.

Section 130 - Duty to have regard to improvement targets

295. This section places a duty on all local and partner authorities for the area covered by a multi-area agreement approved by the Secretary of State under section 127 or 129 to have regard, when exercising their functions, to each improvement target in the agreement that relates to them. This duty does not apply where the agreement concerned has not been approved in accordance with section 127 or 129. Signatories to a multi-area agreement agreed with Government prior to the commencement of these provisions will not, therefore, be subject to this duty unless that agreement has been subsequently approved by the Secretary of State under section 129.

Section 131 - Responsible authorities

296. This section defines who the responsible authority is and provides a mechanism for this to be changed by the local authorities to whom improvement targets in a multi-area agreement relate, with the agreement of the Secretary of State.

Section 132 - Revision proposals

297. This section provides a mechanism for a multi-area agreement that has been approved by the Secretary of State to be amended.

298. *Subsection (1)* provides that a proposal to modify an approved multi-area agreement can be prepared and submitted to the Secretary of State by the responsible authority at any time while the agreement is in force, but must be prepared and submitted if the Secretary of State directs the authority to do so. A direction under this subsection may stipulate the time period within which the revision proposal must be submitted and can be varied or revoked *(subsection (5))*.

299. *Subsection (2)* sets out the types of changes to an approved multi-area agreement that will require a revision proposal. Enlarging the area covered by the multi-area agreement may mean extending it to cover more of the area of a local authority that is already a signatory to the agreement, or, it may entail adding a local authority to the agreement whose area was previously outside the boundaries covered by the agreement. A revision proposal will not be required where a district council, in an area where there is also a county council, whose area was covered by the multi-area agreement but did not originally agree to it, subsequently decides that it does want to be party to the agreement.

300. *Subsections (3)* and *(4)* stipulate that where changes to an improvement target or the addition of an improvement target is proposed, the revision proposal must specify who it relates to (see section 121(5)) and the geographic area covered by it if it does not apply to the whole area of the multi-area agreement. This is consistent with the information requirement for a draft multi-area agreement set out in section 125.

Section 133 - Preparation of revision proposal

301. This section places equivalent duties on the responsible authority to consult and co-operate and have regard to guidance, and on other local and partner authorities to co-operate and have regard to guidance, when preparing a revision proposal as is placed on them when they are preparing a draft multi-area agreement by section 126.

302. Where the proposal is to enlarge the area covered by the agreement, the definition of the "agreement area" in *subsection (1)(a)* and the reference to the agreement area in *subsections (2)* and *(4)* make it clear that it is all local authorities in the enlarged area

that must be consulted and co-operated with by the responsible authority and who must, in turn, co-operate with the responsible authority.

Section 134 - Approval of the revision proposal

303. *Subsection (1)* provides that the Secretary of State may approve or reject a revision proposal that is submitted by the responsible authority. Where the revision proposal is submitted following a direction, the section provides that the Secretary of State will also be able to request that the proposal be modified.

304. *Subsection (2)* specifies that the changes will have effect in the multi-area agreement at the point the Secretary of State approves the revision proposal.

305. *Subsection (3)* provides that where the Secretary of State requires a modification to a revision proposal, this takes effect as a further direction to prepare a revision proposal, and so the duties on the responsible authority and local and partner authorities in relation to preparation of a revision proposal will still apply.

Section 135 - Duty to publish information about multi-area agreements

306. This section places a duty on the responsible authority to publish information about the multi-area agreement and any subsequent changes that are made to it through a revision proposal but leaves the decision as to what information is to be published and the manner of publication to the responsible authority.

Section 136 - Consultation on guidance

307. This section requires the Secretary of State to consult representatives of local government and, if appropriate, other people with an interest in multi-area agreements before issuing the guidance that responsible, local and partner authorities will have to have regard to in preparing agreements and revision proposals.

Part 8: Construction Contracts

Introduction

308. Part 2 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") concerns "construction contracts". Pursuant to section 104, these are agreements for the carrying out of "construction operations". Construction operations include the construction, alteration, repair, maintenance, extension, decoration and demolition of buildings; preparatory work such as site clearance, earth-moving and excavation; and the installation of fittings such as heating, lighting, drainage and sanitation systems (section 105). Contracts with householders are excluded, however. As originally enacted, Part 2 only applied to construction contracts which were "in writing".

309. Section 108 of the 1996 Act gives each party to a construction contract the right to refer a dispute to "adjudication" and requires the parties to include terms in their contract relating to adjudication. These include terms enabling either party to give notice to the other at any time of the intention to refer a dispute to adjudication; ones requiring the adjudicator to reach a decision within a certain time period; and terms providing (in the absence of contrary agreement) that an adjudicator's decision is binding in the interim. Section 109 of the 1996 Act provides that contractors (those performing the work) are entitled to periodic payments (unless the work is or is estimated to take less than 45 days). Section 110(1) stipulates that construction contracts are to contain an "adequate mechanism" for determining what and when payments become due under the contract and are to provide, in respect of each such payment, a final date by which settlement must be made – the "final date for payment". As originally enacted, section 110(2) required the payer to give the contractor/payee notice (in advance of each payment) of the sum which he proposed to pay.

310. If construction contracts do not contain provisions which are consistent with section 108(2) to (4) and section 110 (or, as regards section 109, the parties fail to agree upon the amounts or the frequency or circumstances of payments), the terms of the relevant Scheme for Construction Contracts apply – one Scheme in respect of contracts for construction operations carried out in England and Wales, and the other in respect of contracts for construction operations carried out in Scotland. Where either Scheme applies, such terms have effect as implied terms of the relevant contract – in effect supplying the missing contractual provision.

311. In addition, Part 2 of the 1996 Act allows a contractor to stop working where the payer owes the contractor money (section 112) and renders ineffective clauses in construction contracts which make payments conditional on the payer having been paid by a third party (section 113). As originally enacted, section 111 of the 1996 Act required the giving of an appropriate notice by the payer where the payer proposed to withhold moneys (which notice could, if various conditions were met, be the same notice as that given by the payer of the sum which he proposed to pay).

Summary

312. Part 8 of the Act amends Part 2 of the 1996 Act. It is comprised of eight sections, a brief description of which follows:

- Section 138 substitutes a new power allowing the Secretary of State and Scottish and Welsh Ministers to disapply any or all of the provisions of Part 2**.**
- Section 139 removes the original limitation of Part 2 to contracts which were in writing;
- Section 140 introduces a provision to facilitate the correction of clerical or typographical errors in an adjudicator's decision;
- Section 141 makes an agreement about the allocation of the costs of adjudication ineffective, unless certain conditions apply;
- Section 142 addresses the issue of making periodic payments under a construction contract conditional upon obligations under another contract, and the issue of making the date a payment becomes due dependent upon the giving of a notice by the payer of the sum the payer proposes to pay;
- Section 143 amends the original provisions relating to the notices which a payer gives of the sum which the payer proposes to pay and introduces provisions relating to the giving of notices by the payee;
- Section 144 introduces (in most cases) a statutory requirement to pay sums specified in these notices;
- Section 145 amends the original provisions relating to a contractor's right to stop working when the contractor has not been paid.

Commentary on sections

Section 138 - Application of construction contracts legislation

313. *Subsection (3)* of section 138 inserts new section 106A into the 1996 Act. New section 106A(1) allows the Secretary of State (as regards the law of England and Wales) to disapply, by order, any or all of the provisions of Part 2 in relation to descriptions of construction contract (not being ones for construction operations in Wales) specified in the relevant order. New section 106A(2) allows the Welsh Ministers (as regards the law of England and Wales) to disapply, by order, any or all of the provisions of Part 2 in relation to descriptions of construction contract (being ones for construction operations in Wales) specified in the relevant order. New section 106A(3) allows the Scottish

Ministers (as regards Scots law) to disapply, by order, any or all of the provisions of Part 2 as regards descriptions of construction contract specified in the relevant order. This new power replaces the power in Part 2 as it was originally enacted which allowed the disapplication of the whole of Part 2 (but which did not allow the disapplication of only parts of Part 2).

Section 139 - Requirement for construction contracts to be in writing

314. As originally enacted, section 107 of the 1996 Act provided that Part 2 of the 1996 Act only applied to contracts which were "in writing". This was interpreted restrictively by the courts such that all of the non-trivial terms of construction contracts had to be "in writing" for Part 2 to apply. Section 139 removes this general requirement, whilst prescribing that various matters must nonetheless be in writing.

315. *Subsection (1)* repeals section 107 in its entirety with the effect that Part 2 of the 1996 Act will apply to all construction contracts – those which are wholly in writing, partly in writing or wholly oral.

316. *Subsection (2)* provides that certain provisions of a construction contract, relating to adjudication, must be "in writing". These are various provisions relating to adjudication.

Section 140 - Adjudicator's power to make corrections

317. This section inserts new subsection (3A) into section 108 of the 1996 Act. New subsection (3A) has the effect of requiring the parties to a construction contract to provide in their contract that the adjudicator has the power to correct a clerical or typographical error in his decision arising by accident or omission. The provision concerned must be in writing. Such a requirement of their contract is in addition to the requirements which already apply.

Section 141 - Adjudication costs

318. Section 141 inserts new section 108A into the 1996 Act. New section 108A provides that any contractual provision by the parties to a construction contract concerning the allocation between them of costs relating to an adjudication is ineffective except in two cases. The first such case is where the contractual provision is in writing, is a provision of the parties' construction contract, and is one which allows the adjudicator to allocate his own fees and expenses between the parties. The second such case is where the contractual provision is in writing and is made after the giving of notice by one party to the other of the former's intention to refer a dispute to adjudication.

Section 142 - Determination of payments due

319. Section 142 inserts new subsections into section 110 of the 1996 Act. Subsection (1) of section 110 stipulates that every construction contract is to provide an "adequate mechanism" for determining what and when payments become due under the contract, and, in interpreting subsection (1), the courts have held that an "adequate mechanism" can include a certificate issued by a third party (for example, an architect or quantity surveyor) under a superior contract. This has caused difficulties – a sub-contractor may not be aware that a certificate has been issued in a superior contract and, where such a certificate covers work undertaken by other sub-contractors, payment to the sub-contractor is often delayed until all of the other work has been completed.

320. New subsection (1A) secures that it is not an adequate mechanism for these purposes to make the determination of what payments are due, or when, dependent upon the performance of obligations in a different contract (for example, in a superior contract) or upon someone's decision as to whether obligations have been performed in a different contract.

321. New subsection (1B) has the effect of excluding, from this general prohibition at new subsection (1A), obligations (in a different contract) to make payments: section 113 of the 1996 Act already secures that "pay when paid" clauses in a construction contract (clauses whereby one party is not to be paid unless the other party has been paid) are (for the most part) ineffective.

322. New subsection (1C) creates a material exception to the general prohibition at new subsection (1A) to ensure, for instance, that payments in a superior contract can of course continue to depend upon the work carried out in a sub-contract. Thus, where a construction contract is an agreement between two parties (A and B) to the effect that a third party (C) is to carry out construction operations (a contract of the type referred to at section 104(1)(b) of the 1996 Act), it will be permissible for A and B to provide in their contract that payments in that contract may be dependent upon C carrying out those obligations (in the contract which B has with C).

323. As originally enacted, section 110(2) of the 1996 Act provided that the parties to a construction contract had to include terms in their contract to the effect that, in relation to each payment and at most five days after such payment became payable (or would have become payable), the payer was to give the contractor (the payee) a notice. The notice had to specify the amount (if any) which the payer proposed to pay (or had by that time paid) and the basis on which that sum had been arrived at. New section 110A (see below) amends the original legislation relating to "payment notices". New section 110(1D) provides that the giving of a "payment notice" to the contractor is not an "adequate mechanism" for determining *when* payments become due under the contract .New subsection (1D) therefore secures that a provision in the parties' contract whereby a payment will only fall due if a "payment notice" in respect of that payment is given to the contractor is ineffective.

Section 143 - Notices relating to payment

324. Section 143 amends the original legislation relating to "payment notices" and, in doing so, provides for the giving of similar notices by the contractor (the payee). Section 143 achieves this by repealing what was section 110(2) (*subsection (2)* of section 143) and inserting new sections 110A and 110B into Part 2 of the 1996 Act (*subsection (3)* of section 143).

325. New section 110A(1) provides that a construction contract is to contain either:

- a provision which, in relation to every payment, requires the payer (or a "specified person") to give the payee a "payment notice"; or
- a provision requiring the payee to give the payer (or a "specified person") a "payment notice";

and in either case, requires the notice is to be given at most five days after the payment in question becomes payable.

326. A "specified person" is defined at new section 110A(6) – such a person is one identified in the construction contract or one "determined in accordance with" terms in the contract (for instance, terms allowing the payer subsequently to notify the payee of the appointment and identity of such person). In practice, a "specified person" is generally an architect or engineer: someone qualified to value construction work.

327. New section 110A(2) prescribes the contents of a "payment notice" given by the payer (or a "specified person") to the payee. Such a notice is to identify the sum which the payer (or the "specified person") believes is payable (by the payer) on the date that the payment concerned becomes payable (or, where some or all of that amount has been paid before the notice is given, the sum that would have been payable on such date). Such a notice is also to explain how that sum has been arrived at - for instance, by identifying any relevant moneys paid before the payment concerned actually became payable, or by identifying any set-off or abatement applied by the payer.

328. New section 110A(3) prescribes the contents of a "payment notice" given by the payee to the payer (or to a "specified person"). Such a notice is to identify the sum which the payee believes is payable (to the payee) on the date that the payment concerned becomes payable (or, where some or all of that amount has been paid before the notice is given, the sum that would have been payable on such date). Such a notice is also to explain how that sum has been arrived at.

329. The effect of new section 110A(4) is to ensure that, even where, in relation to any payment, the payer or, as appropriate, the payee, considers that no sum is actually payable, a "payment notice" to that effect must still be given. Such a notice is also to explain (for instance, because of any set-off or abatement) why no sum is believed to be payable.

330. New section 110A(5) provides that where the parties to a construction contract fail to include terms in their contract for the giving of a "payment notice" pursuant to new section 110A(1), the appropriate provisions of the relevant Scheme for Construction Contracts will apply. (The consequence of this is that terms providing for the giving of a "payment notice" by the payer to the payee will take effect as implied terms of their contract.)

331. In addition to the definition of "specified person", new section 110A(6) defines what is meant by "payee", "payer" and "payment due date".

332. New section 110B applies in a case where the parties to a construction contract have said in their contract that the payer (or a "specified person") is to give the payee a "payment notice" (at most five days after payments become due) and, in relation to a particular payment, no notice is actually given (or, if given, is late). New section 110B also applies in a case where the parties have failed to make provision in their contract for the giving of "payment notices" (such that the relevant Scheme for Construction Contracts has implied a payer "payment notice" term into the contract), and, in relation to a particular payment, no notice is actually given (or, if given, is late). In other words, new section 110B addresses the situation of a payer failing to serve a payment notice as required either by an express or by an implied term of the contract.

333. The effect of subsection (2) of new section 110B is (generally speaking) to allow the payee to give the payer a "payment notice" instead (one which complies with the requirements (as to content) of a "payment notice" given by a payee in cases where parties to a construction contract have agreed in their contract that it is the payee who gives this notice). A notice like this given by a payee in default of a payer's (or "specified person's") "payment notice" may be given at any time after the date by which the payer (or "specified person") ought to have given the "payment notice".

334. New section 110B(3) is a provision to postpone the "final date for payment" of a relevant sum where, pursuant to new section 110B(2), the payee serves a notice in default of the payer (or "specified person") giving a "payment notice". The effect of this new provision is to postpone the final date for payment of the sum in question by the same number of days after the date by which the payer (or "specified person") ought to have given the "payment notice", as the number of days after that date that the default notice was given. If, for example, a sum becomes payable on the 2nd day of the month (such that the date by which the "payment notice" should have been given was the 7th day) and must be paid, at the latest, on the 17th day, the effect of a payee's notice in default served on the 14th day would be to postpone the date on which the relevant sum must finally be paid to the 24th day of the month (17 +7 = 24).

335. Subsection *(*4) of new section 110B provides that where the parties had agreed in their contract that the payee was to notify the payer (or a "specified person") of the sum that the payee believed was due in relation to a payment and of how that sum was arrived at (what in the construction sector is known as a payee's "application"), such a notification is deemed to be a notice given pursuant to new section 110B(2) and, indeed, the payee cannot give a notice pursuant to new section 110B(2) in such a case.

336. *Subsection (1)* of section 143 makes a consequential amendment to bring the wording of section 109(4) into line with that used in new sections 110A and 110B.

Section 144 - *Requirement to pay notified sum*

337. As originally enacted, section 111 of the 1996 Act provided that a party to a construction contract could not withhold payment after the "final date for payment" of a sum due under the contract unless that party had given a notice of the intention to do so. *Subsection (1)* of section 144 substitutes a new section 111 and, in doing so, replaces this provision in respect of "withholding notices" with (generally speaking) a requirement on the part of the payer to pay the sum set out in such a notice. New section 111 also makes provision for the sum in such a notice to, in effect, be challenged or revised by the giving of a type of counter-notice.

338. Subsection (1) of new section 111 provides that the payer must pay the "notified sum" — the sum set out in such notice — on or before the final date for payment of such sum, (to the extent that it is unpaid). Subsection (2) has the effect of explaining what is meant by "the notified sum". In relation to a payment, it is (as appropriate):

- the sum set out in a "payment notice" given by a payer (whether such notice is given pursuant to an express term or one implied into the contract pursuant to the relevant Scheme for Construction Contracts) or by a "specified person" (subsection (2)(a));
- the sum set out in a "payment notice" given by a payee (subsection (2)(b));
- the sum set out in a payee's "payment notice" in default of one given by the payer or "specified person" (subsection (2)(c));or
- the sum set out in a payee's "application", where such notification is deemed to be a notice given in default of one given by the payer (subsection (2)(c)).

339. This requirement to pay the notified sum is intended further to facilitate cash flow by determining what is provisionally payable. What is properly and ultimately payable as a matter of the parties' contract is unaffected (see the decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Limited v Jervis* [2003] EWCA Civ 1563) (a transcript of the judgement can be found at http://www.bailii.org./ew/cases/EWCA/Civ/2003/1563.html).

340. Subsection (3) of new section 111 provides that a payer (or a "specified person") may, in relation to a payment, give a notice to the payee of the payer's intention to pay less than the notified sum. Subsection (3) permits both the giving of such a counter-notice where the notice containing the "notified sum" was given by the payee and, also, the giving of such a counter-notice where the notice containing the "notified sum" was given by the payer – a payer may wish to revise the amount he proposes to pay because, for instance, he subsequently discovers that the work in question was unsound.

341. Subsection (4) prescribes the content of such a counter-notice. It must identify the sum which the payer believes is payable on the date that such notice is given and is to explain how that sum has been arrived at (for instance, by identifying any moneys already paid by the date of the notice or by identifying any set-off or abatement applied by the payer). Subsection (4) makes it clear that such counter-notice may be for a nil payment (for example, as a consequence of any such set-off or abatement).

342. Subsection (5), read in conjunction with subsection (7), prescribes the timing of such a counter-notice. It must be given no later than such number of days as the parties have agreed in their contract before the final date for payment or, where there is no contractual provision, such number of days before the final date for payment as the relevant Scheme for Construction Contracts provides. Subsection (5)(b) has the effect of prohibiting the giving of such a counter-notice before the payee has actually given his "payment notice" (whether in a case where the parties had agreed in their contract that

"payment notices" were to be given by the payee, or the payee is giving (or is deemed to have given) his "payment notice" in a default of the payer giving a "payment notice").

343. Subsection (6) has the effect that the amount set out in a counter-notice given under subsection (3) of new section 111 becomes the "notified sum" which the payer must pay pursuant to subsection (1).

344. Subsection (7) defines the "prescribed period". It is the period that has been agreed by the parties to the construction contract. Where there is no such agreement, the provisions of the relevant Scheme for Construction Contract will apply. The Schemes currently provide that this is seven days before payment is finally due.

345. Subsection (8) states that subsection (9) applies where the payment notice provisions have been complied with but there is a dispute about the amount owing and the adjudicator decides that more money is owed than that set out in the relevant notice.

346. In such a case, subsection (9) provides that any such additional amount must be paid by the date which is the later of seven days from the date of the adjudicator's decision or the date which, but for the notice, would have been the final date for payment.

347. Subsection (10) has reference to the decision of the House of Lords in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others* [2007] UKHL 18 (a transcript of which judgment can be found at http://www.bailii.org/uk/cases/UKHL/2007/18.html). In that case, the House of Lords decided that the payer could legitimately withhold moneys, notwithstanding that no "withholding notice" under current section 111 of the 1996 Act had been given, in a case where the parties' contract had provided that moneys need not be paid in the event of the payee's insolvency. The key to that decision was the fact that the insolvency occurred *after* the period for giving a "withholding notice" had expired i.e. it was not in the nature of things possible for the payer to have given such a notice beforehand.

348. Subsection (10) is intended to ensure that the *Melville Dundas* decision remains confined to insolvency situations alone (and is not interpreted to include other events which the parties may have specified in their contract). In the context of new section 111, it provides that the subsection (1) requirement to pay the "notified sum" does not apply where the contract allows the payer to withhold moneys upon the payee's insolvency and the payee becomes insolvent after the expiry of the period for giving a notice of intention to pay less than this sum (pursuant to subsection (3)).

349. Subsection (11) applies the existing definitions of "insolvent" in the 1996 Act (section 113) to subsection (10).

350. *Subsection (2)* of section 144 makes consequential amendments to section 112 of the 1996 Act such that, in effect, relevant references in that section are to the new subsection (1) requirement i.e. the requirement to pay the "notified sum".

Section 145 - *Suspension of performance for non-payment*

351. Section 112 of the 1996 Act permits a contractor to stop carrying out work under the contract in the event of non-payment by the other party.

352. *Subsection (2)* of section 145 amends subsection (1) of section 112 to put it beyond doubt that a contractor may stop carrying out some, and not simply all, of the work in such a case.

353. *Subsection (3)* of section 145 inserts a new subsection (3A) into section 112. The effect of this is to make the "party in default" (the party who has not paid) liable to pay to the contractor stopping work pursuant to section 112 a reasonable amount by way of the costs and expenses he incurs by stopping work (for instance, the payee's reasonable costs in redeploying staff or removing plant and equipment).

354. *Subsection (4)* of section 145 amends subsection (4) of section 112. Section 112(4) as originally enacted provided that any period during which the contractor stopped work in pursuance of this right to do so in a non-payment situation was to be disregarded in calculating any time period prescribed in the contract. The amendment extends this to any period in which the contractor stops work "in consequence of the exercise of" this right; with the effect that extra time is allowable – for instance, the time which the payee requires to remobilise staff or return plant and equipment to the relevant site.