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The *Railways and Transport Safety Bill*

Bill 40 of 2002-03

The *Railways and Transport Safety Bill* [Bill 40 of 2002-03] implements the recommendation of Lord Cullen's Inquiry into the Ladbroke Grove train crash to establish a Railway Accident Investigation Branch.

It replaces the rail regulator by a regulatory board, to be called the Office of Rail Regulation. It creates an independent police authority for the British Transport Police and transfers responsibility for the force from the Strategic Rail Authority to a new police authority.

The Bill also gives the police greater powers to tackle alcohol or drug abuse by maritime and aviation personnel. Finally the Bill contains a number of miscellaneous items including the incorporation into UK law of a modification to the International Convention concerning Carriage by Rail, a power to create a levy on the rail industry to meet the expenses of the Health and Safety Executive, in respect of rail, and minor amendments to the *Greater London Authority Act 1999* in respect of the transfer of London Underground to Transport for London.

The second reading debate is to be held on Tuesday 28 January 2003.

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Summary of main points

The Bill creates an independent body with responsibility for establishing the causes of accidents on the railways. This body, to be called the Rail Accident Investigation Branch, will be established on a similar model to that which already exists in the marine and aviation sectors. The establishment of this new body is in response to recommendations made in September 2001 by Part 2 of Lord Cullen's Report into the Ladbroke Grove rail crash.

The Bill provides for a regulatory board to replace the rail regulator, in line with standard practice for the regulation of utilities. When Railtrack was put into administration, the secretary of state, Stephen Byers announced that he planned to legislate to rationalise the regulatory structure. Proposals for reform were put forward for consultation in October 2002 but only one change was proposed and that was to establish a statutory regulatory board that would exercise all the powers currently exercised by the rail regulator.

The Bill gives the British Transport Police a wholly statutory, rather than part-statutory and part-contractual, jurisdiction over the railways. It also creates an independent police authority for the British Transport Police and transfer responsibility for the force from the Strategic Rail Authority to the new police authority.

The Bill introduces alcohol limits and related measures for crews on water-borne vessels, and for crew members and others with safety-critical functions in aviation. These limits will be enforced in a similar way to drink-drive limits on the roads, with the police given powers to test individuals if a reasonable suspicion exists that an offence is or has been committed.

The Bill also makes provision for other measures including:

- incorporation into UK law of modifications to the International Convention concerning carriage by rail;
- powers to create a levy on the rail industry to meet the expenses of the Health and Safety Executive;
- amendments to the Greater London Authority Act 1999 to remedy certain unintended consequences for the transfer of London Underground to Transport for London.

The Bill extends to the whole of the United Kingdom, with the following exceptions:

The following do not extend to Scotland:

- Part 1 (Investigation of Railway Accidents) as applied to tramways
- Part 3 (British Transport Police) in relation to tramways
- Part 4 (Shipping : Alcohol and Drugs) as applied to non-professional mariners
- Clause 103 (Road traffic: fixed penalty)

The following do not extend to Northern Ireland:

- Part 2 and clause 101 (Office of Rail Regulator)

- Part 3 (British Transport Police)
- Clause 102 (Railways safety levy)
- Clause 103 (Road traffic: fixed penalty)
- Clause 105 (Railways in London: transfers)

The Bill does not affect any of the National Assembly of Wales's powers.

Further reading can be found in Library Standard Notes *Railway Safety and Accidents* (SN/BT/605), *Railways: a bibliography* (SN/BT/253) and *Rail Safety Statistics* (SN/SG/630) available on the Parliamentary Intranet.

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I Investigation of Railway Accidents

Ultimate responsibility for safety on rail tracks and at stations rests with HM Railway Inspectorate (HMRI) and its responsibilities and statutory background remains as they were before the passing of the *Railways Act 1993*. Day to day responsibility for safety belongs to Network Rail, formerly Railtrack, and the train operating companies.

The *Railways Act 1993* brought all railway safety legislation within the framework created by the *Health and Safety at Work etc. Act 1974* (HSW Act 1974) and confirmed the Health and Safety Commission (HSC) as the principal provider of policy advice to Ministers on railway safety issues. A Memorandum of Understanding was signed by HSC and the then separate departments of transport and environment on 10 October 1996. This memorandum replaced the agency agreement which had existed between HSC and the secretary of state for transport, when HMRI was transferred from the department to the Health and Safety Executive (HSE) on 1 December 1990. The HSC is therefore the safety regulator but under the memorandum HSE, on its behalf, carries out certain functions for the secretary of state through HMRI.

The Chief Inspector of Railways, the head of HMRI, advises the secretary of state on behalf of HSC and HSE on matters concerned with functions such as the approval of new railway works and monitoring the effectiveness of the new safety regime following the privatisation of British Rail, but his responsibilities also include the provision of reports on the investigation of serious accidents and dangerous occurrences. In addition a separate Memorandum of Understanding exists between the HSE and the Office of the Rail Regulator. The purpose of this memorandum is to promote effective co-ordination of the regulatory roles of each body and co-operation between them.

Under the Memorandum of Understanding HMRI is required to produce an annual report on the safety record of Britain's railways focusing on the work of the Inspectorate and highlighting issues of concern.[1]

All accidents on railways and tramways, notifiable under the regulations, must be reported to HMRI under the *Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995*(RIDDOR).[2] These regulations replaced the *Railways (Notice of Accidents) Order 1986,*[3] and the *RIDDOR Regulations 1985,*[4] on 1 April 1996. These reporting arrangements include statutory reporting on wrong side signalling failures, signals passed at danger and incidents of severe congestion, which were previously reported under administrative arrangements.

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1 Available on the HSE website at http://www.hse.gov.uk/railway/railsafety
2 SI 1995/3163
3 SI 1986/2187
4 SI 1985/2023

A. Law on accident investigation

1. Investigations under the HSW Act 1974

The type of investigation to be made into a railway accident is decided by the HSC, usually within a few days of an accident.

Section 14

Investigations with a full report are carried out under section 14(2)(a) of the HSW Act 1974. A public inquiry into a railway accident is carried out under section 14(2)(b) of the 1974 Act under procedure laid down by regulations under the Act, the *Health and Safety Inquiries (Procedure) Regulations 1975.*[5] Recent accidents which have been investigated under section 14(2)(a) are those at Rickerscote, Watford and Hatfield. Public inquiries were conducted into the accident at Southall and the accident at Ladbroke Grove under section 14(2)(b). These provisions are reproduced below:

> **Power of the Commission to direct investigations and inquiries**
>
> 14.—(1) This section applies to the following matters, that is to say any accident, occurrence, or other matter whatsoever which the Commission think it necessary or expedient to investigate for any of the general purposes of this part or with a view to the making of regulations for whose purposes; and for the purposes of this subsection it is immaterial whether the Executive is or is not responsible for securing the enforcement of such (if any) of the relevant statutory provisions as relate to the matter in question.
> (2) The Commission may at any time—
> (a) direct the Executive or authorise any other person to investigate and make a special report on any matter to which this section applies; or
> (b) with the consent of the Secretary of State direct an inquiry to be held into any such matter.

Previous public railway enquiries such as the Hidden Inquiry into the Clapham Rail crash in 1988 were held under the *Regulation of Railways Act 1871,* repealed in May 1997.

Section 20

Less serious investigations are carried out under section 20 of the HSW Act 1974, which sets out the general powers of an inspector. In outline these are:

- to enter premises
- to take a constable with him

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[5] SI 1975/335

- to take another person authorised by the enforcing authority and relevant equipment and materials with him
- to examine and investigate and to this end require premises to be left undisturbed, take measurements, photographs and recordings and require information from any person
- to take samples
- to dismantle or test any dangerous article or substance and take possession of it for the purposes of examination or use in legal proceedings
- to require the production of books and documents and necessary facilities and assistance
- and any other necessary powers.

Apart from discovering the cause of an accident the HSE must decide whether there will be a need to prosecute under the HSW Act 1974 for any breaches of safety regulations: for example whether there were any contraventions of regulations concerned with the carriage of dangerous goods by rail.

Under section 20 an inspector can require the production of a report being carried out by another party into an accident, for example a report by the train operating company or Railtrack. However section 28 of the HSW Act 1974 prohibits the release of this information to a third party.

The British Transport Police (BTP) will investigate an accident if there are fatalities but they can bring a charge for endangering life on the railway so may investigate even where there are no deaths.

2. Industry inquiries

Accidents and incidents may also be the subject of a formal inquiry or formal investigation under Railway Group Standard GO/RT 3434/3. Currently about 90 inquiries and 150 investigations are carried out per annum.

Formal inquiries and formal investigations have as their objectives to:[6]

> Establish the full facts; determine the immediate and root cause(s); assess compliance with Railway Group Standards; question whether methods of working are safe; determine whether specific actions are necessary to avoid recurrence; determining (sic) whether changes are necessary to training, supervision, instructions, maintenance schedules, equipment used, etc; question whether there are underlying weaknesses, e.g. in the organisation, safety management systems and associated controls; enable prevention of recurrence.

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[6] HSE, *The Ladbroke Grove Rail Inquiry: Part 2 Report*, 2001

Formal inquiry
According to the Group Standard, a formal inquiry denotes a formally structured inquiry generally implemented in the case of high potential or major accidents. It is to be held in cases of accidental death; in circumstances involving accidental or multiple injuries resulting from a serious train accident, or other accidents "where a public inquiry or HMRI inquiry is likely"; or where the circumstances are such that it is considered to be necessary to ensure the facts are fully investigated. The inquiry is carried out by a panel representing the organisations involved in the accident.

Formal investigation
A formal investigation is held when considered necessary and a formal inquiry is not being held. A formal investigation is carried out by a person or team selected by the lead organisation involved in the accident.

3. The role of HMRI

The 1996/97 annual report of HMRI contained a useful summary of the Railway Inspectorate's role in major railway accidents and the tensions which can arise between the different types of investigation.[7]

> *Major incidents – the HMRI role*
>
> 61. One of the greatest challenges faced by HMRI's field force arises when a major accident occurs. With between 19 and 28 Inspectors notionally available in any one week, and spread across Great Britain, it is not practicable to maintain an organised 'on-call' service. However, even though it is not possible to maintain 24-hour cover for 'emergencies', which are thankfully relatively rare, Inspectors are, in practice, able to attend the most serious incidents reasonably quickly. For example, the first Inspector attended the scene of the Rickerscote (Staffordshire) collision at 03.00, just over three hours after HMRI in London was notified; and an Inspector was on site after the Watford collision just an hour after the incident. Nevertheless, at night, and weekends, the Inspectorate is dependent on the goodwill and commitment of Inspectors.
>
> 62. While it is desirable for HMRI to attend the site of a major incident as soon as practicable, Inspectors will always be on site after the police and, usually, railway officials. HMRI has agreed arrangements with BTP and is generally content with the railways' own rules for handling incidents. The first priority is for rescue and to save life. However important, investigations come second. Provided it does not get in the way of the emergency services, or after they have done all they can to protect life, the next priority is to preserve any perishable evidence – not least recording the scene of the accident before clearance of the site begins.

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[7] HSE, *Railway Safety: HM Chief Inspector of Railways Annual Report on the safety record of the railways in Great Britain during 1996/97,* November 1997

63. There will always be a tension between those who need to investigate an incident and those who need to re-establish a railway service. It is a difficult, and important, judgement as to when enough recording has been done, enough evidence has been secured and at what point the site clearance can begin. It is especially important for HMRI and BTP to exercise their professional judgement in co-operation, especially as there are complementary enforcement roles and 'evidence' from the site must be taken and protected in such a way that it will stand up to examination in the courts, should that be necessary.

64. All HSE's Inspectors have the powers to require accident sites to be left undisturbed and this may be important on those occasions when it is not possible to attend site immediately. There seems to be a growing problem arising from the increased number of parties who now operate on the railways. For example, at the Bexley derailment (February 1997) HMRI and BTP had to act to exclude insurance loss adjusters from site, each of whom wished to examine (or take) evidence on the ground before the statutory enforcement bodies had concluded their work.

65. HMRI will always seek to investigate fully all major incidents and needs to be assured that causes (both immediate and underlying) have been identified and that any action found to be immediately necessary is taken. This involves a considerable amount of follow-up work to seek evidence to complement that collected at the site and the results of any forensic work on items taken for further examination. As well as its investigation role, HMRI is also a public prosecution body in its own right and decisions always have to be made about whether to bring cases to court.

66. Once any inquest or legal proceedings are completed, it is likely that a comprehensive report on the major incident will be published. Following the repeal (in May 1997) of the *Regulation of Railways Act 1871*, it is likely that in future most reports of serious railway accidents will follow requests by HSC for a special investigation under section 14(2)(a) of the HSW Act (as in the case of the report into the Rickerscote, accident and, once legal action is concluded, the Watford accident)

67. The nature of the different kinds of investigation which occur after a railway accident often causes confusion, especially in the case of the railway's own 'formal inquiry'. Put simply, it is necessary for employers who conduct undertakings to learn the lessons of incidents which occur on their undertakings. This applies to all sectors but, in the newly fragmented railway industry, it is especially important for all parties involved to co-operate one with another to get at the root causes of any accident to identify improvements which can and should be made. This duty applies whether accidents are minor or serious. On the other hand, HMRI can only ever investigate a very small proportion of incidents which occur on the railway. It aspires to look at 3.5% of incidents generally and 20% of train accidents but even this fairly modest aim is not likely to be achieved. In short, HMRI must select which incidents to examine in detail and use a criteria-based approach which asks such questions as: Was this a particularly serious or unusual occurrence? Are clear breaches of the law apparent? Has the incident generated considerable public concern? Has there been an accidental death?

> Might one learn something of significance about accident prevention? and so on. It is also necessary for the Inspectorate to investigate a good range of accidents as a sample to check whether the railway companies' own investigation reports are robust.
>
> 68. Finally, where deaths are involved, the BTP will conduct its own inquiries (mostly in close contact with HMRI), for HM Coroner to see whether there have been breaches of more serious criminal law, such as manslaughter. Prosecution reports by BTP are considered by the Crown Prosecution Service (CPS) and HSE and CPS are actively working to improve co-ordination and co-operation between the two public prosecuting bodies.

B. Objections to current procedures

On 5 October 1999 at Ladbroke Grove Junction, about 2 miles west of Paddington station, 31 people were killed, including both drivers, and some 400 people were injured when a high speed passenger train collided head-on with a turbo diesel multiple unit train travelling in the opposite direction. The HSC, with the consent of the Deputy Prime Minister, directed that an inquiry be held under section 14(2)(b) of the HSW Act 1974 into the collision. Lord Cullen was appointed by the HSC as inquiry chairman. The Act required the inquiry to be held in public. The terms of reference were:

1. to inquire into, and draw lessons from, the accident near Paddington station on 5 October 1999, taking account of the findings of the HSE's investigations into immediate causes.

2. to consider general experience derived from relevant accidents on the railway since the Hidden Inquiry[8], with a view to drawing conclusions about:
   (a) factors which affect safety management
   (b) the appropriateness of the current regulatory regime.

3. in the light of the above, to make recommendations for improving safety on the future railway

Lord Cullen decided to divide the inquiry into two parts:[9]

> I decided shortly after I was appointed to hold the Inquiry in two parts, dealing respectively with paragraphs 1 and 2 of my terms of reference, along with, in each case, paragraph 3.

[8] Department of Transport, *Investigation into the Clapham Junction Railway Accident*, November 1989
[9] HSC, *The Ladbroke Grove Rail Inquiry: Part 1 Report*, March 2001, para 2.3

Part 1 was held first, and inquired into the crash. Part 2 inquired into the general question of how safety on the railways is managed and regulated, including the present system of accident investigation.

In his Part 2 report Lord Cullen made 74 recommendations of which 17 concerned accident investigation.[10] Some applied to industry investigations and inquiries.

1. HMRI investigations

In evidence to the Ladbroke Grove Inquiry (the Inquiry) a number of criticisms were expressed of the present system for accident investigation by HMRI under section 14 of the HSW Act 1974. The Joint Rail Unions were concerned about the relatively low number of investigations. Counsel for the bereaved and injured represented by the Southall and Ladbroke Grove Solicitors' Group criticised the HMRI investigations for a lack of transparency. They pointed out that reports of these investigations had not been published as a matter of course. The Collins Passengers' Group pointed out that there was no machinery for taking forward the recommendations of investigations or inquiries under section 14 of the HSW Act 1974.

2. Formal inquiries

Dr Walter, controller of safety management systems in Railtrack's Safety and Standards Directorate (S&SD), who gave evidence to the Inquiry, said that he had been commissioned in 1998 to ascertain what was needed in order to ensure that formal inquiries were re-focused to deal with major issues, determine underlying causes and deliver objective recommendations. He said that the process had identified certain weaknesses in investigation:[11]

- A perception of a lack on independence and objectivity
- A failure by the industry to respond effectively to the recommendations of inquiries
- A tension between criminal and industry investigations which affected the ability readily to reach conclusions on root or underlying causes
- A fear of prosecution hampering the free and open recognition of error and hence the learning of lessons
- The need to improve the standard of competence of investigation and the focus on recommendations.

Another witness, Ms A E Forster, operations and safety director for the train operator, First Great Western, was critical of the Group Standard requirement that the panel

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[10] HSC, *The Ladbroke Grove Rail Inquiry: Part 2 Report,* September 2001, available at http://www.hse.gov.uk/railway/paddrail/lgri2.pdf

[11] ibid para 11.6

conducting the formal inquiry should represent the organizations involved. Ms Forster also advocated a process for the challenging of a finding.

3. The position of HMRI

The principal criticism advanced to the Inquiry was that of structural conflict in the role of HMRI as both safety regulator and accident investigator: it was thought inappropriate for the safety regulator to carry out the function of investigation since it might be necessary for the investigation to examine the decisions and activities of the safety regulator itself.[12] The Rail Regulator made the following statement to the Inquiry:[13]

> …a safety investigator should be free, where necessary, to criticise the safety regulator if shortcomings on its part have contributed to the accident or its consequences. If the investigator and the regulator are one and the same, it may be difficult to convince the public that this aspect of the investigation will be pursued with the necessary vigour.

Railtrack, in evidence, emphasized that there were a number of benefits in separating enforcement from investigation:[14]

- The greater ability to focus on root causes and to identify the lessons without blame requiring to be apportioned;
- The development of enhanced investigatory skills and efficiency in process;
- An improvement in efficiency with which lessons were disseminated.

It was also pointed out to the Inquiry that the European Transport Safety Council (ETSC) recommended that the EU take steps to ensure that all railway accidents were investigated by independent bodies.[15]

Apparently several respondents to the DETR's consultation on transport safety shared Railtrack's view on this issue. It was stated that:[16]

> There is a view widely held amongst those concerned with aspects of transport safety that its regulation, and the investigation of transport accidents, should be kept separate. This was a view echoed in the response to the consultation, and

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[12] ibid para 9.22
[13] ibid
[14] ibid para 9.24
[15] para 9.25
[16] DETR, *Review of Transport Safety: Consultation Response and Consideration of Issues*, June 2000 para 3.17, Library Deposited Paper 00/988. The Transport Sub-Committee of the Environment, Transport and Regional Affairs Committee had recommended in two reports that transport safety regulation should be focused on a single independent authority, as a means of separating regulation from operational responsibility (1997-98, HC 286-I, 360-I). The government announced in its integrated white paper that it would carry out a review of transport safety, including accident investigation with a view to producing a substantive response to the Select Committee's reports in due course.

> underlined by very many of those with whom the Review Secretariat discussed the issues overseas. There was some acceptance that such a separation may mean a loss of synergy between the two activities, but this was not considered a decisive argument. The emphasis is laid on the accident investigator's freedom to conclude and to report that shortcomings in the regulatory regime contributed to the cause of an accident.

Lord Cullen recorded that the experience in countries with transport safety boards, which included the United States, Canada and New Zealand, had been positive: [17]

> Increasingly, it has become recognised that such boards must focus on the identification of systemic safety deficiencies, to the exclusion of placing blame for accidents. Achieving this requires the independence of the board, the ability to call on expertise as needed, and protection from court proceedings determining blame and punishment.

C. A rail accident investigation body

Lord Cullen recognized that there were some advantages in the present system but that the stronger arguments were in favour of change and he recommended that the responsibility for the investigation of accidents should be transferred to an independent body set up for the purpose. The body would be similar in constitution to the Air Accident Investigation Branch (AAIB) and the Marine Accident Investigation Branch (MAIB) and he referred to it as RAIB:[18]

> There is, on the other hand, a strong argument for an investigating body which enjoys real and perceived independence. The recognition of the strength of those arguments is demonstrated by well established arrangements in regard to aviation and transportation systems in other countries. There is also force in the added benefit which concentration on the learning and application of the lessons for accidents and incidents can bring. Against this I have to weigh the potential disadvantages, the most significant of which is the loss of direct connection between the investigator and the regular contact with the operation of safety systems. However, on balance I consider that the stronger arguments are in favour of change, and I accordingly recommend that the responsibility for the investigation of accidents should be entrusted to an independent body which is set up for the purpose. The body would be similar in constitution to the AAIB and the MAIB. For convenience I will refer to it as the RAIB.

Lord Cullen recommended that the RAIB be established within a year of publication of his report (i.e. by September 2002). His report envisaged the responsibility of the HSE for the investigation of rail accidents transferring to RAIB in 12 months, leaving HSE

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[17] ibid para 9.25 quoting from a report, National Economic Research Associates, *Safety Regulations and Standards for European Railways*, February 2000

[18] ibid para 9.29

with responsibilities for investigating possible breaches of health and safety law. The report also recommended that all investigations – including those which would fall to the industry to investigate – be brought under the control of RAIB within 3 years (i.e. by September 2004).

The establishment of an independent RAIB requires primary legislation with regulations made by statutory instrument setting out powers and procedures for its working. The government announced in the Queen's speech in June 2001 that it would publish during that Parliamentary session its proposals to take forward those of Lord Cullen's recommendations which required primary legislation, including the establishment of an independent accident investigator.[19] In July 2002 the Department for Transport (DfT) issued a consultation paper on establishing a rail accident investigation branch.[20] The consultation paper pointed out that because the Parliamentary timetable would not permit the transfer of accident investigation from the HSE to the RAIB by September 2002, as recommended by Lord Cullen, while legislation was in preparation and pending the appointment of a Chief Inspector of Rail Accidents, the HSE was establishing a small internal unit to look at the impact of the establishment of the RAIB on their existing arrangements. The investigation of any accidents which occur before the establishment of the RAIB would be undertaken using existing arrangements.

D. Consultation issues and the Bill

Part I of the Bill makes provision for the creation of an independent body of rail accident inspectors known as the Rail Accident Investigation Branch (RAIB).

Railway safety is a matter reserved to Westminster and this part of the Bill extends to the whole of the United Kingdom. There are two minor exceptions: in the application of this part of the Bill to Scotland any reference to a tramway shall be disregarded and in relation to Northern Ireland the maximum term of imprisonment for the purposes of sections 7(4)(a) and 10(4)(a) shall be 12 months **(clause 13)**, compared with 51 weeks in the rest of the UK.

1. Establishment of RAIB

Clause 3 establishes the RAIB on broadly the same model as that which exists for the Air Accidents Investigation Branch established in regulations made under section 75 of the *Civil Aviation Act 1982*, and the Marine Accident Investigation Branch, established under

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[19] The government had consulted on bringing accident investigation for all or some of the different transport modes in a single independent body (*Review of Transport Safety* June 2000 made available to the Cullen inquiry see footnote 16). Lord Cullen did not recommend this but pointed out that his recommendations would not conflict with a cross-modal body in the future.

[20] Department for Transport, *Establishing a Rail Accident Investigation Branch: Consultation Paper*, July 2002

section 267 of the *Merchant Shipping Act 1995*. The secretary of state will appoint a Chief Inspector of Rail Accidents and rail accident inspectors who will make up the RAIB. The government envisages that, although formally part of the DfT, the RAIB will operate as a fully independent body in the same way as the AAIB and the MAIB**.**

Clause 4 sets out its aims – to improve the safety of the railways and to prevent accidents.

2. Investigations

The DfT's consultation paper asked for comments on the proposed definitions of categories of RAIB investigations. Regulation 2 of the *Civil Aviation Act (Investigation of Air Accidents and Incidents) Regulations 1996* defines an accident as an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all persons have disembarked, in which: [21]

(a) a person suffers a fatal or serious injury in consequence of certain specified circumstances relative to the aircraft;
(b) the aircraft sustains damage or structural failure; or
(c) the aircraft is missing or completely inaccessible.

An incident is an occurrence, other than an accident, associated with the operation of an aircraft that affects or would affect the safety of operation. A serious incident is an incident involving circumstances indicating that an accident nearly occurred.

Regulation 2(1) of The *Merchant Shipping (Accident Reporting and Investigation Regulations) 1999*defines an accident broadly as an event where: [22]

(a) there is loss of life or major injury to any person on board, or
(b) any person is lost or falls overboard from a ship or ships boat; or
(c) where a ship is lost or damaged

Comments were invited on the proposal that the legislation should set out the categories of RAIB investigations along similar lines:[23]

> (3d) "accidents", defined as any unplanned, uncontrolled and unintended event on the railway involving train movement (or which might affect train movement) which results in the derailment of rolling stock or the loss of human life, multiple serious injuries or extensive damage to rolling stock, the railway infrastructure or the environment;

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[21] SI 1996/2798
[22] SI 1999/2567
[23] Department for Transport, *Establishing a Rail Accident Investigation Branch: Consultation Paper*, July 2002 para 3.22

> (3e) "incidents", which under different circumstances may have resulted in such an accident, or any series of unplanned or uncontrolled events which under different circumstances may have resulted in such an accident, including near misses and/or precursors which may have wider implications for safety on the railways; and
> (3f) such other unplanned, uncontrolled and unintended events on the railways as the Chief Inspector of Rail Accidents or the Secretary of State may determine.

Clause 6(1)(a) requires RAIB to investigate serious accidents. **Clause 6(1)(b)** provides RAIB with discretion to investigate no-serious accidents or any incident. **Clause 6(1)(c)** provides that the RAIB is also to investigate not-serious accidents or incidents, if required under regulations made by the secretary of state. No definitions are actually included in the Bill but can be included in regulations.

The consultation paper proposed that the jurisdiction of the RAIB should take as its starting point the definition of "railway" in section 81(2) of the *Railways Act 1993*. This covers a railway (network, rolling stock or track), a tramway, and a transport system which uses another mode of guided transport but which is not a trolley vehicle system. **Clause 6(2)** provides for the Chief Inspector of RAIB to exercise discretion when considering whether or not to investigate a serious accident on a tramway. This is because investigation of an accident affecting a road-running part of a tramway would fall to the police to investigate. It is expected that an accident affecting a rail-running part of a tramway would be investigated by the RAIB.

Comments were invited on the proposal that it is a statutory objective of the RAIB that its fundamental purpose should be to undertake investigations and inquiries which look for the root causes of accidents without apportioning blame or liability. Regulation 4 of the *Civil Aviation (Investigation of Air Accident and Incidents) Regulations 1996* provides that "the sole objective of the investigation shall be the prevention of accidents and incidents. It shall not be the purpose of such an investigation to apportion blame or liability". Under regulation 4 of the *Merchant Shipping (Accident Reports and Investigation Regulations) 1999*, "the fundamental purpose of investigating an accident under these regulations is to determine its circumstances and the causes with the aim of improving the safety of life at sea and the avoidance of accidents in the future. It is not the purpose to apportion liability nor, except so far as is necessary to achieve the fundamental purpose, to apportion blame." **Clause 6(3)&(5)** of the Bill when taken together provide that, although the RAIB is not to consider blame or liability, it is still able to make a report or a determination of the cause from which liability or blame may be inferred.

Clause 7 gives RAIB inspectors the powers necessary to conduct an investigation. These provisions are modeled on the powers available to AAIB and MAIB and the HSE and include the powers of entry and the power to collect evidence. **Clause 7(3)** creates new offences in connection with hindering an RAIB inspector in his investigations, such as providing the inspector with misleading information or obstructing the inspector in the course of his investigation. These offences are punishable on summary conviction by

imprisonment, a level 5 fine or both. **Clause 7(5)&(6)** gives the RAIB the lead in any investigation where more than one party is involved. The Chief Inspector of Accidents can decide whether any particular course of accident is desirable.

Clause 8(1) gives the secretary of state power to make regulations on the way in which the RAIB is to conduct its investigations. The government was concerned that the RAIB investigation should not be delayed or constrained by any criminal investigation or judicial process. It consulted on the following proposals and these could be included in regulations:[24]

> (4a) a duty be placed on any relevant person, including any contractor or agent, to preserve evidence;
> (4b) the RAIB have an unfettered right of access to accident sites but be under a duty to protect the chain of evidence;
> (4c) certain categories of information or data, such as medical or private information or opinions expressed in the analysis of information or data, may not be disclosed without the order of the court.
> (4d) no statement made by any witness in connection with an RAIB investigation or inquiry may be disclosed to the police or the HSE save by the order of a judge unless the witness concerned agrees, and that a judge would need to consider whether the wider public interest outweighed any impact that disclosure might have on the investigation;
> (4e) the RAIB release details of those who have given evidence in the course of an RAIB investigation or inquiry.

Clause 8(2) make provisions for the regulations to contain certain requirements about the publication of reports, including the timing of publication. Lord Cullen made clear in his report that he supported the approach taken by the AAIB with regard to the publication of reports:[25]

> On completion of an investigation the investigating inspector is required to prepare a report, a copy of which is submitted to the Secretary of State. It is required to contain, where appropriate relevant safety recommendations. The AAIB regulations state that a recommendation shall in no case create a presumption of blame or liability for an accident or incident. The report must protect the anonymity of the persons involved in the incident. It must be circulated to the parties likely to benefit from its findings in respect to safety. The reports have to be made public in the shortest possible time, if possible within 12 months of the date of the accident or incident, in such manner as the Chief Inspector thinks fit. If, in the opinion of the investigating officer, publication of a report is likely to adversely affect the reputation of any person (or a deceased person), notice must be given to that person (or to the representative of the deceased) by the investigating officer. The notice must include particulars of any

[24] ibid paras 4.5 & 4.8

[25] HSC, *The Ladbroke Grove Rail Inquiry Part 2 Report*, September 2001, para 11.17

> proposed analysis of facts and conclusions as to the cause or causes of the accident or incident, which may affect the person on whom the notice is served. In practice, the investigating officer sends the whole report to the person.
> The inspector is required to consider any representations made prior to publication of the report. In practice, where substantive representations are made to the person (or his representative) is invited to a meeting with the investigating officer at which matters are discussed

The government consulted on a proposal that reports should be made publicly available normally within 12 months of the date of the accident or incident. It also consulted on the proposal that reports should not be made public until any person or organization whose reputation may be adversely affected by the report is informed by notice and given the opportunity to make representation. **Clause 8(2)(e)** provides for the inclusion of these provisions in regulations.

The government consulted on the following proposal in respect of accident investigation:[26]

> (4f) a duty be placed on the Chief Rail Accident Inspector to ensure that infrastructure managers, railway undertakings, safety authority (HSE), bereaved and injured, emergency services, representatives of staff and users, owners of damaged property, and manufacturers are, as far as possible, kept informed about the progress of an investigation. In addition, when appropriate, arrangements should be made to provide a private briefing to those injured in a crash and to the next of kin and close family of fatalities before an RAIB Investigation report is published.

Clause 8(e)&(f) allow this to be provided for in regulations.

Lord Cullen had recommended that:[27]

> the investigation of rail accidents and incidents of whatever nature should be brought under the overall control of the RAIB.

Clause 9(1) provides the Chief Inspector of Rail Accidents with the power to direct that an industry investigation be carried out by the relevant party and **clause 9(3)** makes it an offence for the party to ignore that direction.

Clause 10 allows the secretary of state to make regulations which would allow requirements to be made for the reporting of both rail accidents and incidents to the RAIB. Currently all accidents are reported to the HSE and BTP when they occur and all incidents are reported to the HSE. The government proposed in the consultation

[26] ibid para 4.18
[27] Recommendation 58

document that the industry added another body, the RAIB, to the list of those who need to be reported to when an accident occurs. It did not propose the separate reporting of incidents to the RAIB and HSE but thought that the RAIB would have the right to obtain that information from the HSE as well as industry and HSE reports.

E. Regulatory impact assessment

The government's consultation paper contained detailed estimates of the costs of setting up the RAIB.[28]

Initial estimates prepared by Professor Andrew Evans in the course of a continuing DfT research project, suggest that the total annual cost of rail accidents is in the order of £105 million per annum.[29] Over a ten-year period this suggests the discounted present cost of rail accidents is about £800 million, assuming the same level of aggregate accident costs year to year.

The RAIB is expected to have a similar structure of professional posts to the AAIB and MAIB, although the number of principal inspector and inspector posts will be somewhat less.[30] The number of support staff is based on the average of the ratios of professional to support staff for the AAIB and MAIB. The RAIB is, therefore, assumed to have 10 professional staff and 8 support staff. The estimated annual running costs of RAIB are estimated at £1.4 million, staff costs at £1 million and running and other costs at £400,000. Over a ten- year period the discounted present cost would be some £11 million. The compliance cost to industry of the creation of the RAIB is to be similar to the existing costs of co-operating with the HSE, HMRI and BTP. The RIA estimates that the cost increase to industry would be approximately 10% of the cost of maintaining the RAIB, a present cost over 2003-2012 of £1 million.

If the RAIB improves rail safety and the number of accidents there could be net savings. The consultation document postulates a 2½% reduction in the aggregate costs of accidents over 2003-2012 which would yield a benefit of £19 million, a net saving of £7 million.

II Office of Rail Regulation

The Strategic Rail Authority (SRA), the rail regulator, and the Health and Safety Commission (HSC) are the three pillars of railway regulation in Great Britain. These three are expected to work together to ensure that the railways are run safely in the public

[28] Annex C

[29] Excluding the costs of trespasser fatalities which RAIB investigations will not directly help to prevent and this figure includes the costs of worker injuries and fatalities.

[30] The staffing structures of the AAIB and MAIB in 2000/01 is shown in table 1 of the consultation paper

interest, through effective and accountable regulation. The relative jurisdiction of the regulator and the SRA and the possibility of overlap have been an issue since the mid 1990s when the structure was set up by the *Railways Act 1993*. The *Transport Act 2000* made efforts to rationalise the roles, but the government was still not comfortable and when Railtrack was put into administration in October 2001, the then secretary of state, Stephen Byers announced that he planned to legislate, "when Parliamentary time allows" to rationalise the regulatory structure "to provide stronger strategic direction while reducing the burdens of day to day interference in the industry and a self-defeating system of penalties and compensation." This would deliver clearer accountability and end perverse incentives.[31]

Proposals for reform were put forward for consultation in October 2002 but were very limited.[32] Only one change was proposed and that was to establish a statutory regulatory board that would exercise all the powers currently exercised by the rail regulator. Part II and schedule 2 of the Bill provides for this regulatory board.

This part of the Bill extends to England, Wales and Scotland but not to Northern Ireland.

A. Background

1. Role of the Rail Regulator

Since the *Transport Act 2000*, the SRA and the regulator now have the same statutory objectives and purposes but have separate powers and responsibilities. The SRA is the planning and co-ordinating body. It should provide a clear strategic direction for rail transport in Britain; promote rail passenger and freight transport; and encourage private investment in the rail industry. It awards the passenger rail franchises and enforces consumer protection.[33] The role of the rail regulator is to act as the independent economic regulator of the railway in the public interest. He is independent of government.

The rail industry's activities are subject to a high degree of regulation under both the *Railways Act 1993* and the network and station licences awarded by the rail regulator. His functions and duties are set out in section 4 of the *Railways Act 1993*, as amended by the *Transport Act 2000*, the *Competition Act 1998* and, in relation to international regulation, the *Channel Tunnel Rail Link Act 1996* and the *Railways Regulations 1998*.[34] The regulator's existing responsibilities are defined in legislation as his alone; the proposed legislation will make them the responsibility of a board rather than an individual.

His functions include the following:

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31 DfT press notice 7 October 2001

32 DfT *Creating a regulatory board for the railways*, consultation document October 2002

33 Consumer protection was transferred to the SRA from the regulator with effect from 1 February 2001. More information about the SRA is given in Library Standard Note SN/BT/1344.

34 SI 1998/1340

- The powers allow him to set the contractual and financial framework within which Network Rail (formerly Railtrack) works to maintain, renew and expand the network. Network Rail is the monopoly owner and operator of the rail infrastructure (track, signalling, bridges, tunnels and stations) and operates under a network licence issued by the government but enforced by the regulator. The framework for its regulation is based on the provision of effective incentives so that the company is appropriately rewarded for doing a good job. If necessary, however, the regulator may enforce compliance with the network licence if Network Rail fails to fulfil its obligations and may impose monetary penalties.

- The regulator ensures that Network Rail's income, a combination of private finance and public subsidy set by the regulator, is spent on the right things at the right times. He establishes and reviews the structure and levels of charges for the use of the infrastructure through the mechanisms of periodic and interim reviews. The track access charges approved by the regulator determine the main costs of the train operators and the major part of Railtrack's income. Decisions on outputs of the network (for example performance, capability and capacity) are principally for funders and train operators (and here there is a key role for the SRA and government). It is then up to the regulator to decide the price of these outputs, and to ensure that agreed outputs are delivered.

- He is responsible for the issue, modification and enforcement of licences to operate trains, networks, stations and light maintenance depots, most significantly Network Rail's network licence.

- He supervises the allocation of capacity of track, stations and maintenance facilities through the access regime. He approves agreements for access to railway facilities, i.e. track, stations and light maintenance depots, the direction of compulsory third party access and the mandatory enhancement of facilities. To run trains on the rail network, the train operators must reach agreement with Network Rail on their mutual rights and obligations. These agreements must be approved by the regulator. If a train operator cannot achieve a satisfactory result by negotiation, the regulator has the power to compel Network Rail to enter into contracts on terms which he, not Network Rail, determines. These powers ensure fair access to the national rail infrastructure. A similar regime applies to contracts for the upgrade of the network.

- If any railway company abuses its dominant position, or enters into an anti-competitive agreement, the regulator is able to use his powers under the *Competition Act 1998* to order the offending party to stop what it was doing, and he may impose penalties for such behaviour. The powers, exercised concurrently with the director general of fair trading, cover agreements, exemptions and notifications relating to anti-competitive behaviour.

When exercising his functions, the regulator must have regard to the duties placed upon him under section 4 of the 1993 Act. The duties are equal in importance and he must best judge how to balance them when exercising his functions. They include:

- to facilitate the furtherance by the SRA of any strategies which it has formulated with respect to its purposes;
- to protect the interests of users of railway services;
- to promote the use of the railway network in Great Britain for carriage of passengers and goods, and the development of that railway network, to the greatest extent that he considers economically practicable;
- to contribute to the development of an integrated system of transport of passengers and goods;
- to contribute to the achievement of sustainable development;
- to promote efficiency and economy on the part of persons providing railway services;
- to promote competition in the provision of railway services for the benefit of users of railway services;
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;
- to take into account the need to protect all persons from dangers arising from the operation of railways, in particular, taking account of any advice given him in that behalf by the HSE; and
- to have regard to the effect on the environment of activities connected with the provision of railway services.

He is also under a duty:

- to have regard to any general guidance given to him by the secretary of state about railway services or other matters relating to railways;
- to act in a manner that will not render it unduly difficult for holders of network licences to finance those activities for which the regulator has some authority;
- to have regard to the financial position of the SRA in discharging its functions; and
- to have regard to the ability of the mayor of London, London Regional Transport (LRT) and Transport for London (TfL) to carry out the functions conferred or imposed on them by or under any enactment.

Thus since the *Transport Act 2000*, the regulator has had to take account of the policy aims of the SRA as well as the SRA's assessment of the overall benefits of individual service proposals in implementing the legislation. These are set out by the SRA each January in its strategic plan. The *Transport Act 2000* also imposed a new duty on the regulator to have regard to "any general guidance from the secretary of state about railway services or other matters relating to railways." Guidance was issued on 26 September 2002 and emphasised the importance of working *with* Network Rail and the SRA in securing a firm and sustainable financial foundation for the provision of infrastructure services in the future.

The present regulator also holds the post of international rail regulator.

2. Better Regulation Task Force

The Better Regulation Task Force (BRTF) is an independent advisory group set up in 1997. Its terms of reference are "to advise the government on action which improves the effectiveness and credibility of government regulation. This is done by ensuring that regulation is necessary, fair, affordable and simple to understand, taking particular account of the needs of small businesses and ordinary people."

Members are unpaid and come from a variety of backgrounds, but all have experience of regulatory issues. They are drawn from large and small businesses, citizen and consumer groups, unions, the voluntary sector and those responsible for enforcing regulations. The task force carries out reviews of particular regulatory issues and has set five principles for good regulation:

- Transparency
- Accountability
- Proportionality
- Consistency
- Targeting

In July 2001 the BRTF published a report *Economic regulators*.[35] One of the questions it considered was what form of organisational structure was best suited to effective economic regulation. There was widespread agreement that regulators should be run by properly appointed boards rather than be individual regulators. The advantages of a board structure were felt to include:

- Ensuring a wide range of expertise within the decision making process. This is easier to achieve through a board (where individuals can bring different skills and perspectives) than through an individual postholder;
- Increasing continuity of decision making. Where a regulator is an individual appointment, a change in postholder can lead to a clear change in the approach to decision making. With a board, appointments can be staggered to ensure that change in personnel is more gradual and that new members can draw on the experience of others; and
- Greater transparency and accountability of decision making. Board decisions will be reached through open discussion, whereas an individual may internalise the process.

The government's response to the report was issued in February 2002. This agreed with the broad thrust of the recommendation made on the use of boards although there was no

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[35] http://www.brtf.gov.uk/taskforce/reports/BRTF%20Economic%20Regulation.pdf

specific mention of the rail regulator. The government's view is that individual regulators have been very effective in the past and a regulatory board is not necessarily any better, but that corporate governance is a more prominent issue than in the past. Boards are seen as the optimum arrangement and the "checks and balances in decision making by a suitable structured board can only reinforce the independence of regulation."[36] Rail is the only remaining utility regulator that is not a board or in the process of being made into a board.

B. Reform

On Sunday 7 October 2001, the secretary of state petitioned a high court judge to put Railtrack into "railway administration" under section 60 of the *Railways Act 1993*.[37] Following Mr Byers' statement it was thought possible that the role of the regulator would be merged with the SRA. It could be argued that the roles of the two organisations should be co-ordinated, not separated. Both bodies determine investment: the SRA through grants, franchise agreements and public/private partnerships and the Office of the Rail Regulator (ORR) by regulating Railtrack's charges. Both organisations determine service levels: the former through franchise agreements and subsidy and the latter through track access agreements.

However, the regulator, backed by the train operating companies (TOCs) argued that the absence of an independent regulator would leave Railtrack's successor too much power over the rest of the industry and also deter private finance. On the 15 October 2001 Stephen Byers made a statement in the House of Commons in which he appeared to recognise the need for at least some independent economic regulation:[38]

> A private company limited by guarantee would need far less intense regulation. We therefore intend to streamline the existing structure while still recognising that there will be a continued need for some form of independent economic regulation.

The House of Commons transport committee was considering passenger rail franchising at this time and, not surprisingly, felt it should also consider the future of Railtrack. In its report, the committee included its view on regulation:[39]

> 35. When Railtrack was taken into administration, the government announced its intention to legislate to change the regulatory regime for the railways. Although the details have yet to be revealed, the aim is to provide "stronger strategic direction while reducing the burdens of day-to-day interference in the industry

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36 DfT press notice *Creating a regulatory board for railways*, October 2002 para 29

37 DETR 7 October 2001 "Railtrack placed in administration"

38 HC Deb 15 October 2001 c956

39 Transport, local government and regions committee *Passenger rail franchising and the future of railway infrastructure*, first report 2001-02, 23 January 2002, HC 239 para 65-6

and a self-defeating system of penalties and compensation". "Transparent independent economic regulation" would be retained under the new regime. It is expected that a "more streamlined" regulatory system would help underpin the credit rating of the company limited by guarantee, although it was not clear precisely what changes would be made. The government will still be a major purchaser of the services of Railtrack's successor and that company is expected to be a monopoly supplier of those services. The rail regulator highlighted the fact that it was important to investors to maintain an independent regulatory body, separated from the government, to check the quality and price of those services. Moreover, the industry itself supports the retention of independent economic regulation.

36. **While the need for an independent economic regulator with clearly defined responsibilities, duties and objectives will continue, the respective roles of the regulator and the strategic rail authority should be reviewed.** There are, unhelpfully, some issues that fall within the jurisdiction of both organisations, for example, decisions about how track capacity should be shared among train operators, and the allocation of public funds to the railways. Sir Alastair Morton argued for the rail regulator's responsibilities for pricing, performance and access regulation to be transferred to the strategic rail authority, although he acknowledged the need for "an appellate body or tribunal" that is expert in railways. Such an arrangement was justified on the grounds that the strategic rail authority was responsible for funding the railways and "he who pays the piper should call the tune". The rail regulator, however, pointed to the importance of his role in determining the fair price for funding the long-term stewardship of the rail network There would be the question as to whether the strategic rail authority, as the dominant purchaser of railway services, should also determine the price and quality of those services. That would be likely to discourage the private sector from investing in the railway. Moreover, the long-term development of the railway could be undermined by changes in the strategic rail authority's budget in the same way that had happened under British Rail. Similarly, with regard to the allocation of track capacity, the regulator thinks that there are benefits from his office, as an independent body, balancing the needs of different operators. **While private sector companies remain involved in the railways, it is clear that the industry must have an independent regulator. However, if the strategic rail authority is to play a strategic role, it should be given sole responsibility for allocating funds and deciding how network track capacity be used and overall responsibility for rail infrastructure. Even though it may take some time before any legislative changes are in place, we further recommend that the government present its proposals for changing the regulatory regime before Railtrack's successor emerges from the process of administration**.

The new transport secretary, Alistair Darling, announced on 12 June 2002 that the powers of the regulator would remain as they were although the individual post of regulator would be abolished and replaced by a board. Thus the only change being made to the

regulatory regime is to provide statutory underpinning for a board structure at the ORR. It was hinted, however, that further reform could be needed if the board failed to establish a constructive relationship with Network Rail:[40]

> **Mr. Darling:** As the government announced in October 2001, they have been considering whether the railways regulatory framework continues to be fit for purpose given the changing circumstances faced by the UK rail industry. The government's considerations have been guided by a number of key overarching principles:
>
> - Providing sufficient comfort and protection to operators and lenders through independent economic regulation and in order to regulate monopoly/monopsony elements and to secure private investment in the railways at an efficient cost;
> - Ensuring that public expenditure on the railways delivers the government's objectives and achieves value for money;
> - Ensuring that the level of public expenditure on the railways respects and reflects the government's overall spending priorities, including the 10 year plan;
> - Keeping the burden of regulation to the minimum level necessary; and
> - Ensuring a stable, well led industry with clarity of roles.
>
> Having reviewed the current regulatory regime, the government propose to build on the existing board structure of the ORR by establishing a statutory regulatory board. This is in line with government policy on independent regulatory authorities, is consistent with the recommendations of the Better Regulation Task Force, and has been done in the case of the regulation of the gas and electricity industries (*Utilities Act 2000*) and postal services (*Postal Services Act 2000*) and is in the course of being done for the Office of Fair Trading (*Enterprise Act 2002*) and the telecommunications and broadcasting sectors (*Communications Bill*).
>
> The regulator's duties include requirements to have regard to the SRA's strategies and budget. In view of the importance the government attach to continued close working between the SRA and the regulator on these matters, I intend to issue directions to the SRA and guidance to the regulator on how I expect these requirements to be reflected in any future review of the network operator's revenue requirements.
>
> The government will need to continue to keep the effectiveness of the regime under review as the rail sector develops. The implementation of EU directives already requires the government to review the regulatory framework and adjust it in accordance with the directives as necessary (the implementation of the first railway package of directives is due by March 2003).

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[40] PQ HC Deb 12 June 2002 c1261w

> In making any further changes to the regulatory regime, the government will continue to have regard to all of the principles set out above, treating the first one on independent economic regulation as an essential continuing requirement. Should the government conclude that any change is required, they would consult key stakeholders on proposals in the normal way before bringing forward appropriate legislation.

Part of the problem was the adversarial relationship that the rail regulator has had with both the SRA and Railtrack. Under the new regimes major efforts have been made to overcome the problems. The SRA and the rail regulator recognise that they will tackle the problems facing the rail industry more effectively by working together. How the two organisations are to do this is set out in the *Concordat between the Strategic Rail Authority and the Office of the Rail Regulator*, which was signed by Richard Bowker, the chairman of the SRA and Tom Winsor, the rail regulator, on 25 February 2002. The establishment of Network Rail with new directors and mangers gave an opportunity for a more constructive relationship with the regulator.[41]

The changes could be interpreted as an effort to depersonalise the post. Or it could be seen to be extending best practice to the rail industry following the recommendations of the Better Regulation Task Force, which recommended that statutory boards were the preferred format for regulation. In October 2002 the government published a consultation paper on the creation of a regulatory board, the results of which are included in schedule 1 of the Bill.

The regulator's view on the consultation paper was set out in a speech on 8 October 2002.[42] He considers that the government is merely putting into statutory form a format that he has already introduced. He set up a board structure comprising four other executive directors and two non-executive directors. However, his board is only advisory as legally all responsibility for the functions and duties set out in legislation rest with the regulator alone.

C. The Bill

Part 2 and schedule 1 of the Bill establish a regulatory board for the railways in place of the rail regulator.

Clause 14 states that there "shall be a body corporate to be known as the office of rail regulation". This replaces the "officer known as the rail regulator" referred to in section 1 of the *Railways Act 1993* and retains the acronym ORR which, as the office of the rail

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41 Mercer Management Consulting *The GB rail industry: in its own words*, June 2002. This reported the perception of some consultees that the relationship between Railtrack and the regulator had become increasingly personalised. http://www.railways.dft.gov.uk/research/industry/pdf/report.pdf

42 Tom Winsor "Why rail regulation is now fit for purpose" Speech to conference on *Rail Regulation; getting it right,* 8 October 2002

regulator, is already well known. Clause 14 (2) introduces schedule 1 which gives details of the membership, staff and financial arrangements of the new ORR.

The main points of schedule 1 are:

- The ORR will consist of a chairman and at least four other members appointed by the secretary of state. The chairman and members may not be appointed for more than five years – though may be reappointed. No upper limit is set, but the consultation paper said:

  > 35. Size of board. We propose a minimum of five members, but not to set an upper limit in the legislation. The intention is to have a small board of up to nine members, but to maintain flexibility both to ensure that non-executives are in a majority and in case future circumstances call for a wider membership. This is not out of line with other regulatory boards, which vary considerably in size.
  >
  > 36. Non-executive representation. We propose to maintain a majority of non-executive members over executive members. It is an important aspect of corporate governance that the non-executive members have real power to hold the executive to account. We do not propose specifying the majority principle in the legislation because it could then be difficult to manage unforeseen temporary problems arising with recruitment or from resignation. This is general practice for other regulators.

  Members may be dismissed by the secretary of state on the grounds of unauthorised absence from board meetings for more than 3 consecutive months, a prejudicial interest likely to influence their performance, a bankruptcy restrictions order (in line with the *Enterprise Act 2002* it is not proposed to disqualify for bankruptcy unless the person has also been found to have acted culpably and is therefore subject to such an order) and for "misbehaviour".

- The ORR shall appoint a chief executive after consultation with the secretary of state and other employees after the approval of the Treasury as to numbers and the term and conditions. Staff will be considered civil servants (as they are now). The consultation paper explained the appointments:

  > 37. The chair, chief executive and other board members. The legislation should create a post of chair. The holder of that post would be appointed by the secretary of state, who would also appoint all other members of the board in consultation with the chair. The legislation should also provide for a chief executive, who would be appointed by the board with the secretary of state's agreement and then automatically be a member of the board. All appointments would be carried out through an open process conducted by the ORR for the chief executive and executive members and by the secretary of state for the chair and non-executive members. We do not propose creating the role of deputy chair since the size of the ORR does not warrant this.

> 38. The creation of separate statutory posts of chair and chief executive does not in practice prevent the same person being appointed to both posts. We propose leaving this option open to allow for decisions to be taken later in the circumstances at the time. Considerations would include whether there are then advantages in a single figure to represent the organisation and attracting the best candidate(s). (…)
>
> 40. Existing members of the advisory board of ORR. The intention is that all existing executive members should be appointed to the board by the secretary of state, providing that the overall size of the board – ensuring that non-executives are the majority – does not become excessive. This should help maintain continuity, particularly in senior appointments. Non-executive members should be considered for reappointment through the general process of recruitment for members. This is to ensure that the whole process for the recruitment of non-executive members is conducted from the outset under the office of the commissioner for public appointments (OCPA) rules that provide for a fully open and transparent recruitment procedure.

It is not intended to introduce the changes until the term of the present rail regulator has expired in June 2004. In part this is because he is working on an interim review of charges for Network Rail and there is no wish to interrupt that work. This review was announced in September 2002, an interim report was published in November and it is intended to publish the final report in December 2003.

- The ORR may establish committees and delegate its functions to these committees. This enables the office to include outside expertise on the committees. They may be advisory, deal with specific tasks or have continuing functions.

- The ORR should make arrangements to manage potential or perceived conflicts of interest. As the consultation paper said:

> 41. Independence. All appointments should be based on expertise and merit alone and reinforce the independence of the economic regulatory function by not having representative members for any interest, sector, region or country. It is for the SRA and the infrastructure manager to take account of these interests in formulating their strategies. The regulatory function is to facilitate their furtherance by the SRA, not to second guess them through sectional representation on the board.

Clause 15 transfers the functions of the rail regulator to the ORR and abolishes the office of rail regulator. It introduces schedule 2, which makes consequential amendments to existing legislation as the result of the transfer and schedule 3, which provides for the actions of the regulator prior to commencement to continue to be valid.

There will be costs for the appointment of additional non-executives to the regulatory board of the ORR. According to the regulatory appraisal:

> This would be recovered at least in part from the regulated industry, to some extent offset indirectly by increases in public subsidy. The extra costs would probably be less than £200,000, which is less than a 1.5% increase in the costs of the regulator and compares with annual income of about £3.9 billion for Network Rail alone.

The conclusion was that the benefits from moving to a regulatory board would outweigh the small cost of extra board members.[43]

III British Transport Police

Part III of the Bill, clauses 17 to 74, provides for the creation of an independent police authority for the British Transport Police, as announced by the government in 1998.[44]

The British Transport Police (BTP) is the national police force for the railways throughout England, Scotland and Wales. The force is also responsible for policing the London Underground, the Docklands Light Railway, the Croydon Tramlink and the Midland Metro. Its main activities include law and order policing, maintaining the Queen's peace and protecting the staff and public on the railways. The force deals with all crimes, including murder, violence, sexual offences, robberies, thefts and fraud, and other incidents including accidents, fatalities and suicides.

On 31 July 1998, the government announced its intention to introduce legislation for the BTP with the following objectives:[45]

- to create an independent national police authority for the force;
- to place the jurisdiction of the BTP over the railways on a statutory basis;
- to give the BTP jurisdiction outside the railways in certain circumstances;
- to bring the BTP within the scope of certain police legislation which currently provides powers to other police forces but excludes the BTP.

A. Background

On 11 October 2001 the then Department of Transport, Local Government and the Regions (DTLR) published a consultation paper on the future of the BTP, which gave details of the history and powers of the BTP on which the next paragraphs draw.[46]

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43 *Regulatory Impact Assessment* January 2003 para 54

44 *British Transport Police to get independent control,* DETR press notice 31 July 1998

45 ibid

The history of the force can be traced back to 1825, to the start of the railways in Britain and the beginning of modern policing. As the railway network spread across the country in the 19th century and criminals discovered that offences could be committed on the move with rapid means of escape - in the same way that the modern motorway network has created similar opportunities - the need for a dedicated mobile police force, able to cross county boundaries, became evident. The network nature of the railway system also means that incidents affecting its operation in one location can reverberate down the system, creating knock-on effects for thousands of people many miles away. That is why the railway is thought to have special policing needs and why a national police force for the railways has been considered a cost-effective solution.

There are now 2,123 officers and 101 special constables serving in the BTP and 644 civilian employees working for the force.[47] In terms of size, that puts the force about middle ranking when compared with the 43 Home Office forces in England and Wales. The BTP dealt with a total of 73,872 crimes in 2001/02 and had an annual budget of £125.8 million.[48]

The force adopts Home Office police standards and procedures and it maintains close contact with local police forces. The selection process for BTP officers mirrors the requirements for all other police forces with some higher standards imposed in terms of eyesight due to the working environment. Chief officers are members of the Association of Chief Police Officers (ACPO). Training at all levels of the force, from recruits through specialist policing and the highest levels of management, is conducted alongside all other police forces. Because of the specialist environment, additional training has to be undertaken. That includes officer protection, track safety and management of major railway incidents.

Under the *Transport Act 1962* the British Railways Board (BRB) were required to prepare a scheme, for approval by the secretary of state, concerning the organisation, control and administration of the BTP. The *Railways Act 1993* transferred these powers direct to the secretary of state and they were used to amend the existing scheme in 1994. The scheme required that the BRB appoint a committee to secure an adequate and efficient police service for the railway network. The committee appoints the Chief Constable who is responsible for the administration of the force, but it is a duty of the committee to supervise this administration and to give the Chief Constable such directions as may be necessary for that purpose.

The SRA was formally established under the *Transport Act 2000* on 1 February 2001. It SRA inherited the functions of the BRB and the Office of Passenger Rail Franchising. The SRA also inherited from the BRB all the duties, functions and liabilities regarding

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[46] DTLR, *Modernising the British Transport Police: A consultation paper,* 11 October 2001
[47] BTP Annual Report 2001/02
[48] ibid

the BTP and operates in a very similar way. The government's consultation paper on the BTP stated that this was intended to be a short-term measure:[49]

> 1.2 We do not consider this to be an appropriate long-term arrangement because the Police Committee, while it performs many of the functions of a Home Office police authority, has neither their public accountability nor their independent status.

On 10 September 2002 transport minister, John Spellar, announced that a new independent police authority for the BTP would be set up when a suitable legislative opportunity arose.[50] He said that 70 organisations and individuals had responded to the consultation paper on the BTP and that overwhelming majority of responses were in favour of the proposals.

Two of the government's proposals for the BTP have already been introduced. The proposal to give BTP jurisdiction outside the railways was taken forward in section 100 of the *Anti-terrorism, Crime & Security Act 2001*.[51] Schedule 7 of that Act and sections 75 and 76 of the subsequent *Police Reform Act 2002* extended to the BTP additional police powers, such as the power to remove truants from public places, proposed in the consultation paper.[52] The remaining proposals, namely the establishment of a police authority for the BTP and giving the force a statutory jurisdiction over the railways, are included in this Bill.

B. The Authority

The new authority was described as follows in the consultation paper:[53]

> 1.6 Home Office police authorities, together with the Home Secretary and the Chief Constables, form the 'tripartite arrangement' for the governance of policing in England & Wales. A similar arrangement exists in Scotland. This tripartite partnership is crucial to the structure of local policing. Its statutory basis is the *Police Act 1996* (the Police Act), which consolidated existing legislation for Home Office police authorities in England and Wales outside Greater London. The *Greater London Authority Act 1999* established a police authority for the Metropolitan Police along the lines of the existing local police authorities. These Acts serve as a guideline for the BTP's Authority. The *Police Act 1997* established independent Service Authorities for the National Crime Squad (NCS) and the National Criminal Intelligence Service (NCIS). The BTP authority would be similar to these authorities to the extent that it would be a function-based authority with a national remit. This legislation also provides precedents, albeit

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[49] DTLR, *Modernising the British Transport Police: A consultation paper,* 11 October 2001 para 1.2
[50] DfT press release 10 September 2002, "Spellar to modernise British Transport Police"
[51] More detail is given in Library Research Paper 01/97, pp 21-30
[52] More detail is given in Library Research Paper 02/15, pp 67-77
[53] DTLR, *Modernising the British Transport Police: A consultation paper,* 11 October 2001 para 1.6

limited, for a BTP Authority since neither the NCS nor NCIS generally engages in direct public policing. They provide services to local forces and the make-up of their authorities reflects this.

1.7 The new Authority, the BTP Chief Constable, and the Secretary of State for Transport, Local Government and the Regions (the Secretary of State) would be the three relevant parties for the BTP to replicate the tripartite arrangement. As the Home Secretary has primary responsibility for general police policy and law and order, the Secretary of State would undertake his duties alongside the Home Secretary. In undertaking their duties and powers proposed within this document, the Secretary of State, the BTP's Chief Constable and the Authority would have regard for the Home Secretary's primary role in policing matters.

1.8 The BTP Authority would be unlike local Home Office police authorities in a number of ways. The composition of Home Office police authorities (with magistrate members appointed by the local magistrates' panel and council members appointed by local councils) provides local democratic accountability. It is based on a local community so this option, or a similar alternative, would not work for a national force. A BTP Authority will need to reflect the BTP's unique circumstances of being a national force funded by the railways industry in which both the Secretary of State and the Home Secretary have an interest.

A table in paragraph 49 of the Explanatory Notes to the Bill lists each clause in the Bill against the section in the *Police Act 1996* (1996 Act) on which it is based.[54] Generally where the clauses do not mirror the 1996 Act provisions, this is only so as to meet the specific circumstances of the BTP as a national police force for the railways, as opposed to a county or metropolitan force.

The proposals for membership of the BTP authority were outlined in chapter 2 of the consultation paper:[55]

The British Transport Police Authority
2.6 The BTP is a national force, and therefore has no local council or magistrates panel on which to base the membership of the Authority. Unlike Home Office forces, who are funded directly by a mixture of local and central government funds, the BTP is wholly financed by the railways industry. The BTP Authority must therefore effectively represent and balance the interests of the travelling public, the railways industry, and the community at large.

Proposals
2.7 We propose that the Authority should normally have thirteen members, all appointed by the Secretary of State in accordance with standard appointment procedures. To avoid problems in the case of the Authority having a shortfall in

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[54] not reproduced here but available at http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/040/en/03040x--.htm
[55] ibid

> membership for any reason, we propose to include in the Bill a range of 11-15. The Secretary of State would have the power, by Order, to increase or lower the range.
>
> 2.8 All members would be under a statutory duty to act in the interests of the efficient policing of the railways. They would not be appointed in order to act in the interests of any particular lobby. However, members would typically be appointed because of their ability to represent the interests of:
>
> - passengers;
> - the railways industry;
> - Scotland, Wales and the English regions;
> - judicial, policing and social issues.
>
> 2.9 It would not be appropriate for any organisation to be allocated representation on the Authority as of right, and there would be no strict proportions defined in the legislation for each grouping. Nor should any organisation be able to come to consider that it had such a right through custom and practice. However the legislation would prescribe that the Authority should have a minimum of 4 representatives of passenger interests and a minimum of 4 representatives of the railway industry.

Clause 17 gives effect to **Schedule 4** to the bill. This schedule gives details of membership and proceedings for the BTP authority, as well as details about financial and pension arrangements for the Authority.

Clauses 19 to 28 provide for the setting up of the BTP. In particular **clauses 20-25** make provision for the BTP to have the same ranks as the Home Office police forces under the *Police Act 1996* and that the officers' functions, appointments and other associated matters are based on the provisions of the 1996 Act.

The existing staff of the BTP (both constables and administrative staff) will be transferred to the new Authority under the provisions of the Bill. Staff terms of employment, including pension benefits, will not be affected by the transfer to the Authority.

C. Jurisdiction

The BTP's main duties consist of public policing, exactly like a Home Office police force. However, unlike a Home Office force, almost all of the BTP's duties, and in particular its patrols, occur on private property, albeit private property to which the public has access. The BTP's existing jurisdiction on this private property flows from a combination of a 1949 private Act of Parliament[56] and numerous private agreements between the SRA and the railway companies. Most operators of railway vehicles and certain railway assets are

[56] *British Transport Commission Act 1949,* section 53

required under the licensing regime in the *Railways Act 1993* to have a licence. It is a condition of those licences that the operator must enter into a police services agreement with the SRA to engage the services of the BTP on its property. Police service agreements (PSAs) are contracts between the SRA and individual railway companies for the services of the BTP. The PSA has two primary function: it acts as a financial agreement between the SRA and the railway company and it also allows the BTP to provide police services to the railway company on its property. Existing statutory provisions ensure that any railway operator on the national network must enter a PSA with the SRA for the provision of the BTP's services.

It is these agreements, combined with the 1949 Act, that give the BTP the right to police most railway property. The consultation paper pointed out the deficiencies in these arrangements and made proposals for change:[57]

> 4.2…..The Government believes both that this is inappropriate in principle and that it is also a poor way to define the extent of the BTP's jurisdiction. In some areas PSAs extend the BTP's jurisdiction too far (such as company premises which are not part of the railway network), in others they overlap and there are parts of the network which are not covered. This causes confusion within the industry, the BTP and for the public. The challenge is to establish a statutory basis for the BTP's jurisdiction and their ability to publicly police the railways on what is essentially private property.
>
> **Proposed basis of the BTP's jurisdiction over the railways**
>
> *BTP's General Jurisdiction*
>
> 4.3 The Government accordingly proposes that the BTP should be given a statutory jurisdiction based on the model set out in the *Police Act 1996* which provides Home Office constables with jurisdiction throughout England and Wales, but extended in the case of the BTP to the whole of Great Britain. Apart from specific situations[58] described in Chapter 5, the jurisdiction would be limited to railway property, the vicinity of the railways and elsewhere on railway matters.
>
> 4.4 It is proposed that any place that is used for or in conjunction with the provision of railway services shall be within the jurisdiction of the BTP, as should any area in the vicinity of such a place. Railway services are services that carry passengers or goods by rail, certain types of rail-related maintenance work, the provision of stations and the provision of rail networks. These places could include, for example, rail freight terminals and light maintenance depots. On and in such places the BTP would have all the powers and privileges of a constable, and be subject to all the same restrictions as a Home Office constable.

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[57] DTLR, *Modernising the British Transport Police: A consultation paper,* 11 October 2001, paras 4.3-4.6

[58] emergencies and when called on for assistance by a member of a Home Office Police Force

4.5 As far as private property within this jurisdiction is concerned, the BTP officer would only have the same rights and privileges as a Home Office constable. This means that he could only enter private property in the following circumstances:

- by invitation of the lawful occupier of the property (this could include a relevant provision in a police service agreement);
- when executing a warrant (to enter and search the premises, to arrest a person or to commit a person);
- to enter and search premises under a statutory power for which no warrant is required, for example section 17 of the Police and Criminal Evidence Act 1984;
- to arrest a person for any offences for which an officer may arrest a person without a warrant (For example in accordance with section 2(4) of the Football Supporters Act 1989).

Right of entry

4.6 However BTP officers carry out many of their duties in 'public' areas of the railways, such as station concourses and trains, and these duties involve activities such as routine public patrols that do not fall into the categories listed above in paragraph 4.5. To allow the BTP to continue with their public policing duties it is proposed that there will be certain places where the BTP officer will have all the powers and privileges of a constable, but will also be able to patrol such places and be on that property, without needing any special permission or incident to have occurred before he or she may enter that property. This proposal would not give the BTP any power over or beyond that already available to a Home Office police force to enter any railway office. But it would enable BTP constables to patrol those parts of the railway to which the public normally have access, such as stations and trains, as well as areas such as the track, that the public access unlawfully and pose a threat to railway safety. These places would be defined in legislation as:

(a) on any railway track (any land or property comprising the permanent way of the railway, whether or not it is used for other purposes);
(b) on any railway (system of transport using parallel rails which support and guide vehicles on flanged wheels and form a track);
(c) on any form of guided transport (any vehicles guided by means external to the vehicles)
(d) on any railway network (any railway line and any installations associated with those lines);
(e) on and in any railway station (any land or other property which is used for, or in connection with, the purposes of a railway passenger station or terminal, whether or not it is used for other purposes);
(f) on and in any railway vehicle, locomotive or train on a network, whether it is being used for the purpose of carrying passengers or goods by railway or for any other purpose whatsoever;

(g) on and in any place owned or managed by the BTP or the BTP Authority in connection with the provision of the BTP's services (e.g. BTP Proposed basis of the BTP's jurisdiction over the railways

Clause 29(1) gives the BTP a wholly statutory railway jurisdiction throughout England, Scotland and Wales, and extends outside railway property in relation to railway matters.

Clause 29(2)&(3) allow the BTP to police railway property on a day-to-day basis. On property not listed in clause 29(3) the BTP constable is subject to the same restrictions as a Home Office constable.

D. Funding and police services agreements

A licence condition requires operators to use and pay for the services of the BTP through the SRA who employ the police. Policing costs are split between Network Rail, train operating companies, independent station operators and open access operators and London Underground. The BTP had an annual budget of £125.8 million in 2001/02.[59] This is entirely funded by the railway industry primarily by TOCs (£61.1 million), Railtrack (£35.0 million) and London Underground (£30.9 million).

The BTP will continue to be funded by the railway industry. Certain operators will be required to engage the police services of the BTP; other operators will have the choice. The government proposed in the consultation document that the main operators of the national railway network – Railtrack, the TOCs, and the freight operating companies – together with the main operators of railways and trams in London - London Underground, Croydon Tramlink and the DLR – would be required to enter into a PSA. Operators of international services in Great Britain, such as Eurostar, and any open access operator who wanted to operate services on the national rail network would also be required to enter into a PSA.

Clause 31 provides for a system of PSAs that will act as the means by which the financial arrangements between the Authority and railway operators are calculated and set out.

Clause 32 gives the secretary of state power to make orders requiring certain railway operators to enter into a PSA. Where an operator is required to enter into such an agreement and fails to do so it will commit an offence if it then provides railway services.

Clause 33 makes provision on disputes relating to PSAs.

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[59] British Transport Police Annual Report 2001/02

E. Regulations

The Home Secretary has powers under the *Police Act 1996* to make regulations by order regarding the government, administration and conditions of service of police forces. The regulations may make provisions for:

- ranks;
- qualifications for appointment and promotion;
- probation and voluntary retirement;
- conduct and efficiency including the maintenance of discipline;
- suspension;
- maintenance of personal records;
- duties which are and which are not to be performed by members of the force;
- hours of duty, leave, pay and allowances;
- design and performance requirements of equipment provided or used for police purposes;
- the issue, use and return of equipment.[60]

The Home Secretary also has powers to make regulations about the constitution and proceedings of the Police Federation of England and Wales and attendance at Federation meetings.

Regulations made by the Home Secretary, or others on his behalf, do not directly apply to the BTP. Instead the SRA, as employer of the force, applies similar provisions to the BTP through other devices, notably their conditions of employment and Force General Orders.[61] In most instances the Home Office regulations have to be modified to suit the specific needs of the BTP. In this way the SRA and the BTP have replicated the internal governance of a Home Office police force.

Four options were outlined in the consultation paper for improving the legislation:

> (i) Amending the Police Act so that the BTP is set alongside Home Office police forces for the purpose of that Act.
> (ii) DTLR adopting a parallel role to the Home Office and making regulations for the BTP by Order, based on the Home Office regulations.
> (iii) Including BTP regulations within the current 'BTP Scheme' process and amending the scheme when required.
> (iv) Enabling the Authority to make regulations regarding the BTP, which reflect the Home Office regulations.

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[60] In addition the Home Secretary has powers to make regulations for the government, administration and conditions of service of special constables and cadets.

Option (iv) described as follows has been chosen:[62]

> 3.7 This would broadly duplicate the existing position, substituting the Authority for the SRA, but it would be formalised within legislation. The switch from the SRA, as employer, applying regulations to the BTP through a variety of other means, to a police authority making the regulations for its police force would be a significant improvement in public accountability. The Authority would be the employer of the BTP and the legislation could include a requirement for the Authority to make regulations for the BTP that are consistent with Home Office regulations, except where no regulations already exist. This is attractive in terms of administration, as it would leave the Authority free to adapt Home Office regulations to the BTP as they are issued. Under this option it could be a requirement for any regulations made by the Authority to be confirmed by the Secretary of State before they came into effect. This would provide a safeguard against any risk that the Authority's process of adapting Home Office regulations might lead to a distortion in them.

Clauses 34-39 provide the BTP Authority with the power to make non-statutory regulations for the BTP similar to regulations under the 1996 Act. Any such non-statutory regulations would require the prior approval of the secretary of state. **Clauses 40-43** allow the secretary of state to make statutory regulations in relation to the BTP which mirror regulations in the *Police Act 1996* Act but he/she will be required to consult the Authority, the Chief Constable and staff associations before making such regulations. It is not envisaged that this power would be widely used.[63]

F. Other provisions

1. Planning

The Home Secretary currently has powers under the *Police Act 1996* to set policing priorities for England and Wales. These direct Authorities and police forces as to where they should concentrate their efforts. The Annual Policing Plan and Best Value Performance Plan that police authorities are required to publish should set out how these priorities are being tackled in their police area. Under current arrangements the secretary of state does not set separate priorities for the BTP. As proposed in the consultation document, **clauses 47-52** apply provisions of the *Police Act 1996* to the Authority in respect of policing objectives.

The *Local Government Act 1999* allows the Home Secretary to set Best Value Performance Indicators for police authorities.[64] The Home Secretary sets Performance Indicators after consultation with police authorities and forces. Currently these indicators cover the whole range of issues that the authorities face, ranging from their organisational

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[61] Force General Orders are guidelines defining the most important rules and regulations of the organisation from uniform specifications to how certain tasks should be handled.

[62] DTLR, *Modernising the British Transport Police: A consultation paper,* 11 October 2001

[63] DTLR, *Modernising the British Transport Police: A consultation paper*, para 3.11

[64] More detail about "best value" is given in Library Standard Note SN/HA/561

efficiency, make–up of their force in gender and ethnic terms to the level of crimes reported and detected in general and specific terms. While the majority of these indicators are appropriate for the proposed Authority and the BTP, not all are relevant or of significant importance to a specialist railway police force. They also do not cover specific railway matters. Under the current arrangements the secretary of state does not set separate Performance Indicators for the BTP, nor does he have the powers to do so. Instead the BTP committee voluntarily adopts the relevant performance indicators set by the Home Secretary and measures the BTP's results against these. **Clause 51** gives the secretary of state the power to direct the Authority to apply any requirement that he could make in respect of a "best value authority" under the 1999 Act.

2. Information

Clauses 53-57 apply the provisions of the *Police Act 1996* and the *Police Act 1997* to the Authority in respect of information, such as annual reports, which is required to be provided to the secretary of state.

3. Inspection

Her Majesty's Inspectorate of Constabulary (HMIC) inspects and reports to the Home Secretary on the efficiency and effectiveness of all Home Office police forces under the *Police Act 1996*. The BTP, being a non Home Office police force, fall outside the regular reports and inspections of HMIC. Instead the BTP committee currently invites HMIC to inspect the BTP every three years. This inspection is akin to a primary inspection of a Home Office force, which involves a detailed assessment of operational performance and organisational issues. A similar position exists in Scotland, where the BTP Committee invites HMIC for Scotland to inspect the BTP Scottish Area every three years. In each case the same standards applied to Home Office forces are applied to the BTP. **Clause 60** places a statutory duty on HMIC to inspect the BTP and report to the secretary of state. **Clauses 61-63,** modelled on similar provisions in the *Police Act 1996*, enable the secretary of state to direct the BTP Authority to take actions to remedy any BTP deficiencies. The BTP Authority will continue to fund the costs of HMIC inspections.

4. Pensions

The pension scheme arrangements for the BTP are materially different from those of the Home Office police forces. The BTP scheme is a funded, trust based scheme under which substantial powers vest in independent trustees, whereas the scheme for the main police forces is an unfunded public service scheme subject to traditional scheme regulation by the Home Office. Due to these differences the consultation document stated that it would not be appropriate for the Authority or the secretary of state to make regulations regarding emerging benefit entitlements under the pension scheme trust deed and rules (e.g. on ill-health retirement, where the discretion on awards rests with the scheme trustees). Different circumstances apply for early severance terms, where any compensation costs fall to the Authority rather than the pension fund. **Clause 70** and **schedule 5** include

powers to make transitional provision to a relevant pension scheme to ensure continuity following the establishment of the Authority.

IV Shipping: alcohol and drugs

Part IV of the Bill provides for the creation of statutory alcohol limits for mariners and the creation of an alcohol testing regime to be administered by the police. It extends to any professional and (subject to any exceptions made by regulations) any non-professional mariner sailing in United Kingdom waters, as well as to mariners in United Kingdom registered ships elsewhere. It does not extend to non-professional mariners in Scotland.

A. Background

There is at present no specific legislation to regulate alcohol consumption in the maritime industry apart from a general provision in section 58 of the *Merchant Shipping Act 1995*. This makes it an offence for the master or a seaman employed in a UK-registered ship, or in a foreign ship in a UK port or in UK waters on its way to or from a UK port, to endanger his ship or other ships by reason of being under the influence of drink (or drugs). There is no maximum blood/alcohol limit specified and there are no powers to test. This is in contrast with other transport modes.

It is a statutory offence for drivers of motor vehicles to be above a limit of 80 milligrams of alcohol in 100 millilitres of blood under the *Road Traffic Act 1988*. The penalties are: disqualification from driving for at least 12 months (3 years on a second offence) and up to six months imprisonment and/or a fine of up to £5,000. The courts also have powers to confiscate a vehicle used in committing a drink-drive offence. If the driver is found guilty of causing death by careless driving with excess alcohol, or while unfit through drink or drugs, he may be imprisoned for up to ten years and face an unlimited fine.

The *Transport and Works Act 1992* provides the criminal offences of working on a railway, tramway or specified system of guided transport while unfit through drink or drugs, and exceeding a prescribed blood alcohol concentration limit (identical to that in the *Road Traffic Act 1988*). The maximum penalties are a £5,000 fine or 6 months imprisonment, or both. The people covered by this legislation are all those engaged in activities which affect directly the safety of the travelling public or employees, principally the drivers of vehicles, their guards (in the case of trains) or conductors (in the case of tramcars) and signalmen. People working in any other capacity in which they can control or affect the movement of a vehicle are also covered.

These comprehensive powers back up operators' strict policies on alcohol and drug abuse. It is a rule on Network Rail and on train operating companies (TOCs) that no-one should report for duty under the influence of, nor take while on duty, alcohol or any other substance which might impair their safety, efficiency or vigilance. The industry views

contraventions of this rule very seriously and regards dismissal as the normal result. Network Rail and TOCs have a policy of pre-employment testing for drugs of recruits to safety posts. The industry also has random in-service and post-incident testing for safety posts.

Following the Marine Accident Investigation Branch's inquiry into the Marchioness disaster in 1989, the government asked John Hayes to conduct a wider inquiry into river safety.[65] The Hayes Report, published in 1992, made 22 recommendations. Recommendation 18 says:

> The Department [of Transport], after appropriate consultation, should promote legislation to introduce a breath test similar to that applying to motor vehicle drivers which would apply to the skippers and crew of all vessels.

On 18 August 1999, the Deputy Prime Minister announced an inquiry to review all the arrangements to ensure safety on the Thames. Amongst other things, the inquiry chairman, Lord Justice Clarke, recommended that:[66]

> Alcohol legislation for vessels should be in the form of primary legislation and an offence similar to that of being in charge of a vehicle while under the influence of drugs should also be introduced for vessels.
>
> Subject to consultation:
>
> - Alcohol legislation should extend to all persons on duty whose duties extend to the navigation of the ship, the operation of her engines or navigational equipment and any member of the crew (including bar and catering staff) who might be called on to assist in the event of an emergency.
> - It should extend to private pleasure craft.
> - It should apply to all vessels in UK waters, irrespective of flag.
> - Breath testing should be carried out after an accident or if there is reason to suspect a breach of the law but there should not be random testing.

In December 1999 the government published a consultation document on proposed legislation to combat alcohol abuse at sea.[67] It consulted specifically on who should be covered by any legislation, what the alcohol limit should be and when and by whom tests should be carried out. The minister announced the government's conclusions in reply to a PQ from Maria Eagle MP on 12 March 2001

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[65] Department of Transport, *Report of the Enquiry into River Safety*, July 1992 Cm 1991
[66] http://www.shipping.dft.gov.uk/thamesaf/cm4558/index.htm
[67] DETR, *Consultation Paper on Possible Legislation to Combat Alcohol Abuse at Sea*, December 1999

B. The Bill

The provisions of **clauses 75-88** of the Bill largely mirror provisions for road users and safety critical staff on railways and related transport systems. This Bill also provides powers to extend this regime to include other intoxicating drugs.

The Bill seeks to ensure that an alcohol regime is put in place similar to that already existing in other transport modes. The provisions for alcohol testing in this Bill are modeled on those of the *Road Traffic Act 1988*, the *Road Traffic Offenders Act 1988* (RTAs) and the *Transport and Works Act 1992* (TWA). A table in the explanatory notes shows the clauses of the current Bill which are drawn from provisions in the RTAs and TWA, along with a brief description of their effects. The explanatory notes also set out any distinctions between the provisions in the current Bill and the legislation governing other modes.[68]

The additional public sector costs are expected to be low as the number of tests is expected to be low.

V Aviation: alcohol and drugs

Part V of the Bill introduces a statutory alcohol limit for aviation personnel engaged in safety-critical activities and introduces a similar breath testing regime to that being introduced for mariners. The rules cover flight and cabin crew, air traffic controllers and licensed aircraft maintenance engineers in the United Kingdom, as well as the crew of any aircraft registered in the United Kingdom wherever it may be in the world. Crew on standby are covered but not service personnel on military aircraft.

A. Background

Article 65(2) of the *Air Navigation Order 2000*[69] (ANO) makes it an offence for a person to act as a member of the crew of an aircraft while under the influence of drink or drugs to such an extent as to impair their capacity so to act. Article 13(8) makes a similar offence for maintenance engineers and article 96 for air traffic controllers. In addition, operations manuals established by aircraft operators in accordance with Article 31 of the ANO are required to give clear guidance on abstention from alcohol before duty periods. There is no provision for breath testing in the ANO.

Following an accident to a light aircraft in 1991 the Air Accidents Investigation Branch made a recommendation that the Civil Aviation Authority (CAA) initiate action to amend

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68 EN-40, 2002-03 pp 23-24 http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/040/en/03040x.htm

69 SI 2000/1562

what was then Article 57 of the *Air Navigation (No 2) Order 1995*[70] to require aircrew involved in an accident or suspected of an offence under the Article to provide a sample for testing. The CAA accepted this recommendation, but section 60 of the *Civil Aviation Act 1982* does not give it the power to include such a provision in the ANO. The department stated in its consultation paper on proposed legislation on combating alcohol at sea that it had agreed to consider amending section 60 of the Act when a suitable legislative opportunity arose.[71]

The department consulted on proposals to introduce "with cause" alcohol testing for safety critical civil aviation personnel in 1996 which had a positive response.[72]

The Joint Aviation Authority (JAA) is an associate body of the European Civil Aviation Conference and has been developing harmonized aviation safety standards, known as joint aviation requirements (JARs) since 1970. It now has 32 member states including all EU member states and other European countries. The Joint Aviation Requirement on Commercial Air Transportation (JAR-OPS) adopted by the JAA in April 1995 contains provisions on alcohol and drug abuse. Section 1.085(b) states that:

> a crew member shall not:
> (1) consume alcohol less than eight hours prior to the specified reporting time for flight duty or the commencement of standby;
> (2) commence a flight duty period with a blood alcohol level in excess of 0.2 promille [ie 20mg/100ml], or
> (3) consume alcohol during the flight duty period or whilst on standby.

JAR-OPS do not have the force of EU law but there is a European Commission proposal (COM 2000/121) to make them part of EU law.

B. The Bill

The provisions covering aviation personnel are similar to those being introduced for mariners and largely mirror those in road traffic legislation and the TWA 1992. **Clause 89** introduces provisions similar to those in the ANO but they are now supported in **clause 90** by a prescribed limit of 20 milligrams of alcohol in 100 millilitres of blood for air crew and air traffic controllers. The levels for maintenance engineers are the same as in the road traffic acts.

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Clause 91(2),(3)&(4) apply the offences of being over the limit or unfit to a category specific to aviation that of crews on standby.

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70 SI 1995/1970

71 DETR, *Consultation Paper on Possible Legislation to Combat Alcohol Abuse at Sea*, December 1999, annex A

72 HC Deb 19 March 2001 c 26W

Clause 92 sets out penalties at the same level as those currently applying to aircrew and air traffic controllers under Article 122 of the ANO. That is on conviction on indictment to imprisonment for a maximum of two years, to a fine or both; or on summary conviction to a fine up to the statutory maximum.

Clause 93 allows the police to take breath tests or blood samples.

Supplementary regulations may be made under **clause 96** subject to the affirmative procedure.

VI Miscellaneous and General

1. Convention on international travel by rail

Clause 100 provides the secretary of state with the power to make regulations to give effect to the revised Convention concerning the International Carriage by Rail (COTIF). The United Kingdom is a signatory to the Protocol of Vilnius 1999 signed on 3 June 1999. This revised and updated the COTIF signed in 1980. The Protocol of Vilnius needs to be ratified by the UK, but before that can happen the UK must have the necessary legislation in place to introduce the new COTIF when it comes into force. Clause 100 does this.

Such regulations must be approved by both Houses of Parliament. This section extends to the whole of the United Kingdom.

Schedule 6 details the provision that may be made by regulations made under clause 100. There is already some railways legislation made at EU level on matters addressed in the new COTIF. In those areas, the European Community has the right to act in place of the individual EU member states. In recognition that some aspects of the new COTIF are the responsibility of the UK, and others are the responsibility of the EU, the regulations made under clause 100 will be partly made under powers in this Bill and partly made under section 2 of the *European Communities Act 1972*.

a. COTIF

COTIF is a long standing intergovernmental agreement between forty countries, which provides a system of international law for the carriage of goods, passengers and luggage by rail on international journeys. It avoids the need for large numbers of bilateral agreements between rail service operators in Europe, the Middle east and North Africa. Uniform systems of law have been in operation for many years: the first international convention concerning the carriage of goods was signed in 1893.

The 1980 COTIF has several sets of rules, known as "uniform rules" which make provision for:

- contracts for the international carriage of passengers (known as the CIV uniform rules); and
- contracts for the international carriage of goods (freight) (known as the CIM uniform rules) with annexes dealing with, amongst other things, the carriage of dangerous goods (known as the RID regulation).

COTIF 1980 is being modified primarily to reflect major changes in railway management and operations particularly following EU directive 91/440/EEC on the development of the community's railways. In particular, the changes reflect the developments in EU member states concerning the increasing separation of infrastructure management from train operators and the introduction of open access rights, opening up the possibility of more than one operator on any one network. The Protocol of Vilnius provides new CIV uniform rules, new CIM uniform rules and makes RID a free standing appendix. It introduces new uniform rules for contracts of use of vehicles in international rail traffic (CUV), contracts of use of infrastructure in international rail traffic (CUI), the validation of technical standards and prescriptions applicable to railway material intended to be used in international traffic (APTU) and the technical admission of railway material used in international traffic (ATMF).

The protocol and the resulting amended COTIF were presented to Parliament in October 2000.[73] The new COTIF will come into force three months after the protocol is ratified by two-thirds of signatories to the convention. This is unlikely to be before 2004.

Once this happens, the new COTIF will only have the force of law in UK when the relevant provisions of this Bill are brought into force and the corresponding domestic regulations are made. The *International Transport Conventions Act 1983*, which currently gives effect to the COTIF 1980 is not sufficiently flexible to deal with the new agreement. The clauses in this Bill, combined with the domestic implementing regulations are designed to provide the necessary flexibility to give effect to the new COTIF.

b. European Community

The new COTIF brings within its scope certain matters that are within the competence of the European Community. In particular, the new APTU and ATMF appendices address the same matters as the EU directives on the interoperability of the European rail network (directives 96/48/EC & 2001/16/EC). These two appendices were drafted with the objective of achieving compatibility with the developing EU legislation on these matters. In any event the new COTIF recognizes that for member states EU law prevails so far as the new COTIF is concerned. The European Community intends to accede to the new

[73] *Protocol for the modification of the convention concerning carriage of rail (COTIF) of 9 May 1980 (protocol 1999)*, 2000 Cm 4873

COTIF in due course so that it may exercise its competence where it has it. However, until the new COTIF is in force, there is no mechanism for it to join.

The government consulted last year on the community's ability to act for it in this matter. In May 2002 the government consulted on six documents - a communication and five legislative proposals - collectively referred to as "the second railway package", adopted by the European Commission on 23 January 2002.[74]

Clause 100 is only concerned with one of these legislative proposals (and that indirectly), that to clarify the role of the Community in COTIF.[75] The commission's recommendation reflected its view that a number of areas in the convention as amended by the Vilnius Protocol of 1999 are now the exclusive competence of the community. As a result, the commission believes that member states can no longer ratify the Vilnius Protocol on their own, outside the framework of the community institutions.

The government's initial view was given in the consultation as:

> 28. The COTIF convention is a long standing and useful multinational agreement between 40 countries. It facilitates the development of international rail traffic by providing a uniform system of international law for the carriage of goods, passengers and luggage by rail. We support in principle the proposal that the European Community should accede to the COTIF convention. We accept that competence in certain matters covered by the new Vilnius Protocol is now within the exclusive or shared competence of the community. In addition some matters remain within member states' competence. The detailed proposals in the draft mandate for the community's rights to declare competence therefore need further examination to ensure that the proposed extension of community competence is appropriate. The draft mandate is defective in that the community cannot become a signatory until after the 1999 Vilnius Protocol is in force, which requires ratification by two-thirds of the existing signatory states and therefore includes the EU member states. There are also some more detailed issues to pursue to ensure that the individual and collective influence of EU member states on COTIF's management and work programme is not undermined.

A summary of the responses was published by the department on 7 November 2002.[76] The consultation document posed no questions about this recommendation, and only a few respondents referred to it. Most expressed agreement to the proposal and the government's initial views.

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[74] DfT *Consultation on EC second railway package*, May 2002 http://www.railways.dft.gov.uk/consult/ecsecond/01.htm Considered in European Standing Committee A, 8 May 2002.

[75] Recommendation for a decision authorising the commission to negotiate the conditions for community accession to the convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, COM(2002)24 final

[76] http://www.railways.dft.gov.uk/consult/ecsecond/responses/index.htm

The transport minister wrote to the European Scrutiny Committee on the consultation process in November 2002 and reported that the basis on which the community can accede to the convention and how it expects to exercise its competence had been clarified to the satisfaction of all members.

2. ORR general duties

Clause 101 makes a minor amendment to section 4(5) of the *Railways Act 1993* by repealing the words shown in bold:

> The Office of Rail Regulation shall also be under a duty in exercising the functions assigned or transferred to it under this Part;
> (a) to have regard to the financial position of the [Strategic Rail] Authority in discharging its functions **under this Part**.

This ensures that the ORR has regard to the SRA's financial position in respect of all of its functions. It is a consequential amendment not picked up in the *Transport Act 2000* arising from the creation of the SRA in place of the franchising director. The authority's financial position, unlike that of the franchising director, is not limited to discharging its functions under the part of the 1993 Act referred to in the deleted words.

3. Railway safety levy

Clause 102(1) inserts clause 43A in the *Health and Safety at Work etc Act 1974*, giving the secretary of state power to make regulations introducing a compulsory railway safety levy on the railway industry. The HSC will be able to propose such regulations to the secretary of state after consultation.

This clause extends to England, Scotland and Wales.

Under the *Health and Safety at Work etc Act 1974,* the HSE is responsible for a range of regulatory work including inspection activities applied to the rail industry. Since October 1999, there has been a charge for this work, on an hourly basis. Such charges only cover part of the cost of HSE's work on railway safety; for example they do not cover work relating to policy-making or all operational activities. The HSE Annual Report on Railway Safety listed those activities for which charges were made:[77]

- Approval of specific proposals by operators and suppliers;
- Safety case acceptance which HMRI has a duty to accept;
- Safety case exemptions in certain circumstances; and
- Safety case acceptances arising from field operations

[77] HSE, *Railway Safety: HSE's Annual Report on the safety record of the railways in Great Britain during 2001/02,* 2002, page 8

Ministers agreed that the impact of charging would be reviewed after two years:[78]

> 1.31 Because of concerns about the introduction of charging in HMRI and other HSE directorates, Ministers invited HSC to review each new charging scheme after two years of operation. In June 2001 HSE commissioned independent consultants Deloitte and Touche to review each of the four charging schemes run by HSE in terms of administrative efficiency, the 'reasonableness of charge-out rates' and the effectiveness of the queries and disputes procedures. HMRI is currently evaluating Deloitte and Touche's report, which it received in the spring of 2002.

The outcome of the review was not made public but the explanatory notes to the Bill state that the review revealed that the existing charging regime was seen as bureaucratic, and stakeholders could not easily budget for the charges.[79] HSE held a consultation exercise with industry stakeholders on the principle of a railway safety levy between the end of November and 20 December 2002.

Regulations to require the payment of a levy need primary legislation, because levies cannot be imposed under regulations made under section 43(2) of the *Health and Safety at Work etc Act 1974* (which provides vires for the existing charging regime).

4. Road traffic: fixed penalty

Clause 103 is a drafting amendment to correct an error to ensure that section 76(2) of the *Road Traffic Offenders Act 1988* makes sense. It now reads:

> No proceedings shall be brought against any person for the offence to which the conditional offer relates until -
> a) in England and Wales, the person by or on whose behalf the conditional offer was sent receives notice in accordance with subsection (4) or (5) below

This clause does not extend to Scotland or Northern Ireland.

5. Shipping legislation

Clause 104 provides a new, extended power for the secretary of state to make an order so that any shipping provision may be applied, disapplied or modified in relation to things used on water. A shipping provision must expressly apply to ships, vessels or boats and is so defined so that it could include a provision made in or under this Bill, the *Merchant Shipping Act 1995*, or another Act. The order may provide for other legislation to take precedence, for example where there are relevant harbour byelaws in place.

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[78] ibid

[79] EN-40, 2002-03 pp 35 http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/040/en/03040x--.htm

The secretary of state may use the power to apply the provisions of the Bill relating to alcohol testing of mariners to users of personal watercraft (such as jetskis) or to those in charge of chain ferries. Current case law casts doubt on whether these things would otherwise be "ships". An order could also be made to apply the UK's merchant shipping regulations relating to the prevention of collisions to personal watercraft, even if they are not being used "at sea". Regulations relating to the survey of ships could be made to apply to chain ferries by means of such an order. And an order could be used to clarify the application of other legislation, where the enactment of new legislation might cast doubt - for example under various Acts relating to public health and regulation of activities near the seashore.

This clause extends throughout the United Kingdom.

6. Railways in London: transfers

These amendments to the *Greater London Authority Act 1999* (GLA Act) are designed solely to achieve Parliament’s original intentions as regards the Act, correcting some unforeseen consequences of how the Act and the London Underground Public Private Partnership (PPP) contracts – and also London Underground’s existing Private Finance Initiative contracts – would operate together.

The GLA Act envisaged the transfer of London Underground (LUL) from London Regional Transport (LRT) to Transport for London (TfL) after the PPP for the London Underground had come into effect. **Clauses 105(1)(2)&(3)** make certain amendments to the GLA Act to allow contracts to operate as intended on transfer from London Regional Transport to TfL and on any subsequent transfer between TfL’s subsidiaries.

These parts of the GLA Act may otherwise frustrate parts of contracts made by LRT/LUL or TfL such as change of control provisions, which are designed to operate when transfer schemes are made.

As the GLA Act did not contemplate the possibility of a significant delay between completion of a PPP agreement and transfer of the London Underground to TfL, there was no provision for ensuring the return of the assets of London Underground to the public sector in the event of a PPP company defaulting on a contract before London Underground transfers to TfL Nor was there provision for the insolvency provisions to come into effect if a PPP company became insolvent before the transfer of London Underground to TfL. **Clause 105(5)** enables provisions relating to the insolvency and winding up of a London Underground PPP company, and the return of its assets to the public sector, to come into effect before the transfer of London Underground to TfL. **Clause 105(6)** will allow the insolvency provisions in sections 220 to 224 of the *GLA Act* to come into force before the transfer of LUL to Transport for London.

7. Money

Clause 107 confirms that the money for new expenditures caused by the Bill will come from money provided by Parliament. The secretary of state will therefore be asking Parliament to pass the appropriate financial resolutions.

8. Commencement

Clause 108 says most of the Act will come into force in accordance with orders made by the secretary of state.

Under this clause, clauses 102 (rail safety levy) and 104 (shipping legislation) would come into force two months after the Act is passed. Clause 101 (ORR general duties) would come into effect on the passing of the Act.

Subsections (3)(a) and (3)(b) provide for transitional arrangements to be made if commencement of the ORR takes place before legislation in the *Enterprise Act 2002* establishing bankruptcy restrictions orders has come into place. Since the *Enterprise Act* does not extend to Scotland, subsection (3)(b) makes it possible to make transitional provisions equivalent to bankruptcy restriction orders until such time as equivalent Scottish legislation comes into force.

Appendix: Abbreviations

AAIB	Air Accidents Investigation Branch
ANO	Air Navigation Order
BRB	British Railways Board
BRTF	British Regulation Task Force
BTP	British Transport Police
CAA	Civil Aviation Authority
COTIF	Convention for the International Organisation for International Carriage by Rail
DfT	Department for Transport
DTLR	Department of Transport, Local Government and the Regions
ETSC	European Transport Safety Council
HMIC	Her Majesty's Inspectorate of Constabulary
HMRI	HM Railway Inspectorate
HSC	Health and Safety Commission
HSE	Health and Safety Executive
HSW Act	Health and Safety at Work Act 1974
JAA	Joint Aviation Authority
JAR-OPS	Joint Aviation Requirement on Commercial Air Transportation
LRT	London Regional Transport
LUL	London Underground
MAIB	Marine Accidents Investigation Branch
ORR	Office of Rail Regulation
ORR	Office of the Rail Regulator
PSA	Police Service Agreement
RAIB	Rail Accident Investigation Branch
RIDDOR	Reporting of injuries, diseases and dangerous occurrences regulations
S&SD	Safety and Standards Directorate
SRA	Strategic Rail Authority
TfL	Transport for London
TOC	Train Operating Company