DATA PROTECTION AND DIGITAL INFORMATION BILL

Memorandum from the Department for Science, Innovation and Technology to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Science, Innovation and Technology ("DSIT") to assist with its scrutiny of the Data Protection and Digital Information Bill ("the Bill").

2. The Bill was introduced in the House of Commons on 8 March 2023 and carried over into the 4th Parliamentary Session. This revised memorandum reflects the changes made to the Bill at Report Stage in the House of Commons.

3. This memorandum identifies the provisions of the Bill that confer new or amended powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

4. The Bill makes provision for a variety of measures relating to personal data and other information, including digital information.

5. Part 1 of the Bill makes various changes to the UK's data protection framework, as set out in the UK GDPR[1] and the Data Protection Act 2018 ("DPA 2018"), which regulates the processing of personal data. The existing data protection legislation provides for data protection principles, the grounds on which personal data may be processed, particular restrictions on processing sensitive personal data, rights of data subjects, obligations of data controllers and processors, and enforcement matters. The legislation provides for a regulator, the Information Commissioner, and sets out matters relating to its governance. The existing legislative framework comprises three data protection regimes:

    a. for general processing of personal data ("the general processing regime");

    b. for processing by "competent authorities" (e.g. the police) for law enforcement purposes ("the law enforcement regime"); and

    c. for processing by the intelligence services ("the intelligence services regime").

6. Part 1 makes changes to each of these regimes.

7. Changes to the general processing regime include changes in relation to processing for research purposes, the lawful grounds for processing personal data, data subject access rights, automated decision-making ("ADM"), compliance obligations and international data transfers.

[1] Prior to the Retained EU Law (Revocation and Reform) Act 2023 (the "REUL" Act), the UK GDPR was retained direct principal EU legislation, as defined in the European Union (Withdrawal) Act 2018 (the "EUWA 2018"). Changes made by the REUL Act mean that, with effect from the end of 2023, the UK GDPR will be assimilated direct principal legislation. It is amendable, where applicable, by powers in primary legislation in accordance with new paragraph 11B of schedule 8 to the EUWA 2018.

8. Changes to the law enforcement regime include changes in relation to conditions to consent for processing, data subject requests, exemptions for legal professional privilege and national security, automated decision-making, compliance obligations, codes of conduct, and international data transfers.

9. Changes to the intelligence services regime include changes in relation to data subject requests, automated decision-making, and provision enabling processing by "competent authorities" to take place under the intelligence services regime, instead of the law enforcement regime, in certain circumstances.

10. This part of the Bill also provides the Information Commissioner with additional enforcement powers.

11. Part 2 of the Bill establishes a regulatory framework for the provision of digital verification services in the UK and enables public authorities to disclose information relating to an individual to trusted organisations providing such verification services. It also amends existing powers to make subordinate legislation in the field of immigration law which will enable the Secretary of State to require employers and landlords who choose to carry out certain digital checks to use the services of organisations registered as complying with designated supplementary rules concerning the provision of those services.

12. Part 3 of the Bill provides powers to enable the establishment of "smart data" schemes. These schemes will enable the secure sharing of customer data, upon the customer's request, with authorised third-party providers, which can use the customer's data to provide services for the customer or business as well as sharing or publication of contextual business data.

13. Part 4 of the Bill makes changes to the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("the PEC Regulations"). These regulations include special rules which supplement the data protection legislation in relation to the processing of personal data through the use of cookies and for direct marketing purposes, including nuisance calls. The Bill makes some changes to these provisions, and also applies the DPA 2018 enforcement regime to the regulations, which are currently subject to the enforcement regime under the Data Protection Act 1998.

14. Part 4 also extends an existing power in the Digital Economy Act 2017, which allows for data sharing that benefits households and individuals, to additionally allow data sharing to deliver public services that benefit businesses and other forms of undertaking.

15. Part 4 also provides a power for the Secretary of State to make regulations in relation to the implementation of international data sharing agreements.

16. Part 4 also makes amendments to the Online Safety Act 2023 requiring Ofcom to issue information notices requiring retention of data in certain circumstances.

17. Part 4 also makes amendments to the regime under which certain biometric data (fingerprints and DNA profiles) can be retained by law enforcement authorities for the purposes of national security.

18. Part 4 and Schedule 13 also make a number of amendments to the New Roads and Street Works Act 1991 in order to provide a legislative framework for the National Underground Asset Register.

19. Part 4 also removes the requirement for paper registers of births and deaths and enables them to be registered electronically.

20. Schedule 14 concerns standards relating to the processing of information ("information standards") in relation to the health and adult social care sector enabling such information standards to be applied to providers of IT and related services. It does this by making clear

that information standards published under section 250 of the Health and Social Care Act 2012 include standards relating to IT or IT services, and extending the persons to whom information standards may apply to persons who make available IT, IT services or information processing services using IT, in connection with the provision in, or in relation to, England, of health or adult social care.

21. Part 5 and Schedule 15 establishes a statutory corporation, with a new governance structure, to replace the office of the Information Commissioner.

22. Part 5 also changes the oversight framework for the police use of biometrics and police and local authority use of surveillance cameras, abolishing the offices of the Commissioner for the Retention and Use of Biometric Material and the Surveillance Camera Commissioner and transferring some functions to the Investigatory Powers Commissioner. It also updates the scope of the police National DNA Database Board and provides the Secretary of State with a power to amend the scope of the Board.

23. To support its policy objectives, the Bill includes a number of delegated powers. Many of these build on or have precedents in existing powers and frameworks in current legislation, as described in further detail in Section C. In the majority of cases regulation-making powers are subject to consultation requirements. In general terms, powers in relation to data protection and privacy laws and for information standards for health and adult social care build on existing frameworks. Powers in Part 2 of the Bill support the creation of a new framework and where appropriate precedents for these have been identified. Powers in Part 3 of the Bill replace an existing statutory framework with a new, enhanced one.

C. DELEGATED POWERS

24. The Bill includes the following delegated powers.

Clause 5(4): Power to amend new lawful ground for processing

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

25. Clause 5 amends Article 6(1) of the UK GDPR to add a new lawful ground for processing personal data (new Article 6(1)(ea): processing necessary for the purposes of a recognised legitimate interest). It also inserts a new Annex 1 into the UK GDPR to set out the detailed conditions relating to the new lawful ground. These include important public interest grounds such as safeguarding vulnerable adults and children, safeguarding national security, public security and defence or where a public authority requests information that may include personal data. Under current law non-public authority data controllers would need to conduct a balancing of interests test to determine whether personal data should be processed for these purposes (Article 6(1)(f) UK GDPR). Some responses to the consultation, *Data: A New Direction*, indicated that the need to carry out a balancing exercise when relying on the legitimate interests lawful ground (Article 6(1)(f)) can cause risk aversion. If a data controller is not sure whether its interests outweigh the rights of the individual, it might decide to delay or stop the processing data due to worries about liability. The government considers that these areas are sufficiently important to dispense with the need for the balancing of interests test and that the burden should not be on data controllers in these circumstances. New Article 6(6) UK GDPR, inserted by clause 5(4), introduces a regulation-making power to amend Annex 1 by adding to or varying the conditions or omitting conditions added by regulations.

Justification for taking the power

26. The government is proceeding with the limited list of conditions set out in new Annex 1 on the basis that this is a departure from long-standing and well-understood lawful grounds for processing and will need to assess the extent to which they are relied on. However, the government is concerned that difficulties applying the balancing test in Article 6 (1)(f) for other processing activities may come to light in the future, interfering with important processing, particularly in light of wider changes made to the lawful ground for processing in the Bill. The grounds might alternatively need to be varied, for example to add additional safeguards if they were being relied on inappropriately by data controllers, or new grounds added by Regulations might need to be omitted for similar reasons. The ability for the government to act swiftly in these circumstances justifies the need for a regulation-making power in order to account for these situations.

27. The power allows direct amendment of Annex 1 in order to ensure legislative coherence and clarity for the reader. Data controllers and data subjects are used to being able to consult Article 6(1) UK GDPR to identify lawful grounds and will now need to consult Annex 1 also. The government would like to keep these additions to the lawful processing grounds in one place given their fundamental importance to the data protection framework. This approach of making direct amendments to the DPA 2018 is consistent with existing regulation-making powers in the DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights and section 10(6) power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data). There are limitations on the power: no provisions that were added to Annex 1 by primary legislation can be omitted. Also, the Secretary of State must take into account the interests and fundamental rights and freedoms of data subjects and the need to provide special protection of children before making any regulations. This requirement reflects the factors that are required to be taken into account under the existing balancing test in Article 6(1)(f) UK GDPR.

28. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 46 of this Bill).

Justification for the procedure

29. By virtue of new Article 6(8) UK GDPR (as inserted by clause 5(4)), the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations permit changes to fundamental lawful processing grounds. Given that the effect of clause 5 is to introduce new lawful grounds that are exempt from the balancing of interests test, the procedure is consistent with existing regulation-making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights - and section 10(6) - power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data).

Clause 6(5): Power to amend conditions in which processing is treated as compatible with the original purpose

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

30. Clause 6(6) inserts new Annex 2 into the UK GDPR. Annex 2 sets out a limited set of circumstances in which processing of personal data for a different purpose is treated as

compatible with the original purpose without a specific law being required. The context for these provisions is that the existing law as set out in the UK GDPR (carried over on EU exit from the EU GDPR) is confusing. The main provision in the text (Article 6(4) UK GDPR) is poorly drafted, and is supported by a recital (with non-legislative effect)- recital 50- which provides more detail but is also difficult to decipher. As such, controllers and data subjects have had difficulty accessing these important rules, which relate to a fundamental principle in the UK GDPR that processing in a manner incompatible with the original purpose is not permitted. New Article 8A(5) contains a regulation-making power to amend Annex 2 by adding to or varying the provisions in the Annex or omitting provisions added by regulations made under Article 8A(5). The power can only be exercised where the Secretary of State considers that processing in these cases is necessary to safeguard an objective listed in Article 23(1)(c) to (j) of the UK GDPR. New Article 8A(7) sets out some specific provisions that may be made under the power.

Justification for taking the power

31. The power is needed because new Article 8A is clarifying the rules on purpose limitation to make them easier for data controllers and data subjects to understand them. The rules affect data controllers across all sectors of the UK. There is a risk that in clarifying those rules for the first time, certain important public interest processing activities are inadvertently affected, given that the current rules allow for a degree of ambiguity in interpretation. Controllers may only realise that these problems arise when they come to apply the new rules to processing activities. It is important that the government is able to deal with any such situations swiftly and on a case by case basis in case the codification of these rules leads to the impediment of important processing for an important objective of public interest, for example. It is also important that where new exemptions are added but evidence arises that these are being relied on inappropriately, these are able to be removed or varied.

32. The power allows direct amendments of Annex 2 in order to ensure legislative coherence and clarity for the reader. Data controllers and data subjects will need to consult Annex 2 and provisions in the main body of the UK GDPR to understand the framework for processing personal data for a different purpose. The key aim of clause 6 is to provide clarity for data subjects and data controllers around an important data processing principle that has previously been lacking. Having a coherent and complete set of rules around processing for a different purpose in new Article 8A and Annex 2 will give controllers more confidence about using personal data correctly and data subjects a better understanding of their rights. This approach of making direct amendments to DPA 2018 is consistent with existing regulation-making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights - and section 10(6) - power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data). By way of limitation on the power, it does not permit conditions that were added by primary legislation to be omitted.

33. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

34. By virtue of new Article 8A(8), as inserted by this clause, the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the new cases that can be added by regulations amount to exemptions from one of the key data protection principles (the purpose limitation principle in Article 5(1)(b) UK GDPR). The procedure is consistent with existing regulation-making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b)- powers to exempt from data subject rights) and section 10(6)- power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data).

Clause 7: Power to amend conditions in which processing is treated as having a basis in relevant international law

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

35. Articles 6(1)(e) and 9(2)(g) of the UK GDPR provide that data controllers can process personal data and special category data (personal data which is more sensitive in nature) on public interest grounds if certain requirements are met, including that the basis for the processing is set out in 'domestic law'. They can also process personal data relating to criminal offences and convictions if, among other things, the processing is authorised by 'domestic law' (Article 10(1)). Controllers may also further process personal data if, among other things, that processing is authorised by an enactment or rule of law under Article 8A(3)(e) (inserted by Clause 6 of this Bill).

36. Clause 7 amends these Articles to make it clear that personal data can also be processed on these grounds if the processing has a basis in or is authorised by 'relevant international law'. This clause inserts s.9A into the DPA 2018, which sets out that processing will have a basis in 'relevant international law' if it meets a condition in new Schedule A1 to the DPA 2018. Conditions in Schedule A1 must relate to international treaties, ratified by the United Kingdom.

37. The clause inserts one condition in Schedule A1, relating to processing necessary to respond to requests under the Data Access Agreement between the UK and the United States (the DAA). The DAA permits telecommunications operators (TOs) in the UK to share information about serious crimes with law enforcement agencies in the US; and vice versa.

38. Disclosures made by UK TOs under the DAA are already lawful under the UK GDPR and the relevant domestic framework. However, some UK TOs feel that the domestic framework is not sufficiently clear in respect of the basis that can be relied on when responding to DAA requests under public interest grounds. In light of the importance of the DAA to enable law enforcement on both sides of the Atlantic to promptly and efficiently access data that is vital to helping keep people safe, the government considers it necessary to put it beyond any possible doubt that the DAA provides a basis / authorisation for disclosures under the above provisions of the UK GDPR through this amendment.

39. The clause also inserts a Henry VIII power to add further conditions to Schedule A1 by regulations. These conditions must relate to an international treaty ratified by the UK. The power also allows conditions to be varied or omitted, and for further safeguards to be specified.

Justification for taking the power

40. The power is needed to ensure that important processing under future international agreements that may face similar issues to the DAA should not be compromised. While no other conditions (i.e. relating to other international treaties) have been added alongside the DAA, given the wide range of international treaties the Government enters into, it cannot be precluded that similar issues may arise in different contexts. Therefore the Government considers it necessary to include the power to specify other international agreements. The Government considers that a power to specify further individual agreements is a proportionate way to ensure that this provision is capable of providing that clarification, where necessary.

41. In practice, there will be certain checks and limitations on the exercise of the power in addition to parliamentary scrutiny required by the procedure. The power is limited to specifying conditions relating to 'treaties' that have been 'ratified' by the United Kingdom, applying the definitions found in s.25 Constitutional Reform and Governance Act 2010 (CRAGA 2010). This means that future agreements specified may have already been subject to parliamentary scrutiny via the process set out in section 20 CRAGA 2010 (as was the case with the DAA). In addition, the Secretary of State would, in practice, only add conditions relating to agreements they consider fulfil the other requirements of Article 6(3), 9(2)(g) and 10(1) (as the case may be), including that the relevant international law must meet an objective of public interest and be proportionate to the legitimate aim pursued (Article 6(3)), must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific safeguards (Article 9(2)(g)) and must provide for appropriate safeguards for the rights and freedoms of data subjects (Article 10(1)). Finally, any regulations would be subject to consultation with the ICO and such others as the Secretary of State considers appropriate as required by section 182 DPA 2018.

Justification for the procedure

42. By virtue of section 9A(5), as inserted by this clause, the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that this power will permit direct amendments to the DPA 2018, including adding further conditions to Schedule A1.

43. The procedure is consistent with existing regulation-making powers in DPA 2018 which supplement Articles 9 and 10 of the UK GDPR such as section 10(6) (power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data and criminal convictions data).

Clause 9(6)(f): Power to require controllers to produce guidance about fees

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

44. This clause amends section 53 DPA 2018 and changes the legal test set out for controllers to charge a fee or refuse to comply with a Subject Access Request (SAR). The test is amended from "manifestly unfounded or excessive" to "vexatious or excessive". The provision will allow controllers to charge a reasonable fee for dealing with a SAR (or to refuse to comply) when the request is deemed "vexatious or excessive". This clause amends existing regulation-making powers already conferred to the Secretary of State by section 53. The Secretary of State has the power to specify by regulations limits on the fees that a controller may charge under section 53. The amendment will also allow the Secretary of State to:

    a. Require controllers to produce and publish guidance about the fees that they charge in reliance of section 53 DPA 2018 as amended, and

    b. Specify what this guidance must include.

Justification for taking the power

45. The Secretary of State has an existing regulation-making power in section 53(4) DPA 2018 to specify limits on the fees that a controller may charge under section 53. The new power in

subsection 4A of section 53 of the DPA is needed so that the Secretary of State may also make regulations requiring controllers to produce and publish guidance about the fees they can charge. The purpose of this new power is to ensure that there is consistency and to reduce fragmentation across the Part 2 and Part 3 regimes. An equivalent regulation-making power that already exists in connection with general processing subject to the UK GDPR (see section 12(2) of the DPA).

46. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

The existing regulation-making power under section 53(4) DPA 2018 is subject to the negative resolution procedure and the additional power in section 53(4A), will be subject to the same procedure. The negative procedure remains appropriate as it affords the appropriate level of parliamentary scrutiny for the existing power in s. 53(4) and for the new power to require controllers to produce and publish guidance about fees that they charge . The power to make regulations pursuant to section 12(2) DPA 2018 in respect of controllers processing under the UK GDPR (which this provision is reading across to Part 3), is also subject to negative procedure.

Clause 14 re: Automated decision-making for general/commercial processing

Clause 14: Powers to amend the application of Article 22A (new Article 22D(1) and Article 22D (2))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

47. Article 22 of the UK GDPR sets out the conditions under which solely automated decisions, including profiling, that produce legal or similarly significant effects on data subjects may be carried out ("qualifying ADM"). Existing Article 22 restricts such activity to three conditions: (i) where necessary for entering into, or the performance of, a contract between a controller and a data subject, Article 6(1)(b) UK GDPR; (ii) where such activity is required or authorised by law (which includes circumstances where the processing is necessary to comply with legal obligation, Article 6(1)(c) UK GDPR or to perform a public task, Article 6(1)(e) UK GDPR); or (iii) where a data subject has provided explicit consent, Article 6(1)(a) UK GDPR.

48. Clause 14 replaces Article 22 of the UK GDPR with new Articles 22A-22D which expand the scope of existing Article 22 to all lawful bases for processing personal data to permit processing necessary to protect vital interests, Article 6(1)(d) UK GDPR, and necessary for the purpose of legitimate interests, Article 6(1)(f) UK GDPR.

49. New Article 22A(1)(a) introduces a definition of a decision based on solely automated processing as one that involves no meaningful human involvement. New Article 22A(1)(b)(i) and (ii) set out the meaning of a significant decision as one that produces legal or similarly significant effects on a data subject. New Article 22B(1)-(3) sets out the restrictions on qualifying ADM in respect to sensitive personal data. New Article 22B(4) prohibits a reliance on new Article 6(1)(ea) for the purposes of carrying out qualifying ADM. New Article 22C sets

out the safeguards that must be applied when undertaking qualifying ADM. The government requires regulation-making powers to amend new Article 22A(1).

Justification for taking the power

50. The government requires delegated powers which will allow a dynamic response to the growing evidence base that will emerge from the increased adoption of evolving technologies using solely automated decision-making. The powers will provide clarity to data subjects and controllers as to whether an activity falls within scope of new Article 22A. There are two powers which are required:

    a. The power in Article 22D(1) will enable the Secretary of State to bring in regulations to provide, for the purposes of Article 22A(1)(a), what is, or is not, to be taken to be meaningful human involvement in particular cases. Given the range of use cases that fall within the scope of Article 22A, and the fast-moving pace of innovation and uptake of technology using automated decision-making, it would not be feasible to address the range of specific cases that require clarity, within the timescales needed in practice, in primary legislation. For example, the application of this power is likely to relate to some significant decisions that are taken on the basis of profiling as defined in Article 4(4) UK GDPR, an automated process which, in some cases, can play a heavy role in determining the outcome reached for a data subject. Since profiling can be used in a diverse set of ways and can be relied on to different degrees in different contexts, a delegated power may be exercised to provide legal certainty, if and when, a growing evidence base suggests that certain applications should or should not be regarded as having meaningful involvement. This is necessary to ensure the circumstances in which the prohibitions in Article 22B and applicable safeguards in new Article 22C UK GDPR apply are clear. In contrast a regulation-making power that does not permit the amendment of the UK GDPR would lead to legislative discontinuity given the necessary information is not all in one place. Article 22D(3) enables regulations made under new Article 22D(1) to directly amend Article 22A(1)(a).

    b. The power in new Article 22D(2) serves a similar purpose, ensuring Article 22A(1)(b)(ii), can be amended as necessary to keep pace with the adoption of technologies using solely automated decision-making. The regulation-making power will enable the government to describe decisions that are and are not to be taken as having a "similarly significant effect" for the purposes of Article 22A(1)(b)(ii). This is necessary to ensure the circumstances in which the specific safeguards should apply are clear, and can be updated in line with societal expectations of what constitutes a significant effect in a privacy context. Article 22D(3) enables regulations made under new Article 22D(2) to directly amend Article 22A(1)(b)(ii). The power in Article 22D(2) will ensure legislative coherence and clarity for the reader and user.

51. Before making regulations under these powers the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

52. Both of the powers in Article 22D(1) and Article 22D(2) are subject to the affirmative procedure. This level of scrutiny is considered appropriate for consistency with equivalent powers to amend DPA 2018.

Clause 14: Power to amend safeguards for automated decision-making (New Article 22 D(4))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

53. There are existing safeguards in place to protect the rights and freedoms of data subjects where a significant decision has taken place based solely on automated processing. These are currently contained in Article 22(3)-(3A) of the UK GDPR and are supplemented by section 14 DPA 2018. Under the safeguards in Article 22(3), controllers are required to put in place suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision. Under the safeguards in section 14(4) DPA 2018 the controller must notify the data subject that a decision has been taken based solely on automated processing and within a month of notification the data subject can ask the controller to (i) reconsider the decision, or (ii) take a new decision that is not based solely on automated processing. The controller must then comply with the request pursuant to section 14(5) DPA 2018.

54. There is a significant amount of overlap between the existing safeguards which need to be met by controllers (and processors acting on their behalf) when qualifying ADM is undertaken that are set out in Article 22(3) (ie. where ADM is necessary for the performance of a contract or based on the data subject's explicit consent) and those set out in section 14 DPA 2018 which implement the safeguards provided for in Article 22(2)(b) (ie. where ADM is required or authorised by domestic law).

55. Clause 14 replaces the existing safeguards in Article 22 UK GDPR and section 14 DPA 2018 with new Article 22C, which simplifies and consolidates these safeguards for qualifying ADM. These safeguards include (i) the right to be provided with information with respect to significant decisions taken using solely automated processing; (ii) to make representations about such decisions; (iii) to obtain human intervention on the part of the controller in relation to such decisions and (iv) to contest such decisions.

56. There is an existing power in section 14(7) DPA 2018 for the Secretary of State to add or amend current safeguards, which may be exercised to amend section 14 itself. New Article 22D(4) provides a similar power for the Secretary of State to make further provisions about the safeguards required in new Article 22C(1), including provisions about what is, or is not, to be taken to satisfy a requirement under Article 22C(1) or Article 22C(2) directly; New Article 22D(4) creates a new regulation-making power for the Secretary of State to (i) add new free-standing safeguards (ii) add or vary safeguards listed in Article 22C in regulations and (iii) omit provisions added by regulations made under 22D(4).

Justification for taking the power

57. The government believes a new power is necessary to ensure that the safeguards remain appropriate and effective, in light of the fast-moving advances and adoption of technologies relevant to automated decision-making. This will ensure data subjects are afforded sufficient protections against risks to their rights and freedoms being infringed when their personal data is processed for qualifying ADM purposes. New Article 22D(5) enables regulations to add, or vary safeguards and/or remove safeguards added by regulations, but importantly it does not

include a power to remove safeguards provided in new Article 22C and therefore cannot be exercised to weaken the protections Article 22 affords to data subjects.

58. This power may be exercised to ensure the safeguards remain fit for purpose. This is in light of the rapid advancement and adoption of technologies related to automated decision-making that may inform when meaningful involvement can be said to have taken place, as well as changing societal expectations of what constitutes a significant decision in a privacy context.

59. The power is similar to the existing power under section 14(7) DPA 2018 to add or amend safeguards, but cannot be used to omit safeguards other than those which have been added through the exercise of the new power.

60. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

61. New Article 22D(6) provides that regulations made under Article 22D(3) are subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects. The affirmative procedure is also appropriate for consistency with equivalent powers in DPA 2018. The existing power under section 14(7) DPA 2018 is subject to the affirmative procedure.

Clause 14: Powers for automated decision-making in the law enforcement context under Part 3 DPA 2018

Clause 14: Powers to amend the application of new section 50A (new sections 50D(1) and 50D(2))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

62. These changes to the Part 3 regime mirror the equivalent Clause 14 amendments to the UK GDPR concerning Article 22D set out above and will therefore apply to automated decision-making in the law enforcement context.

Context and Purpose

63. Sections 49 and 50 DPA 2018 provide limitations and safeguards on solely automated decisions under Part 3 of the DPA 2018 (applicable to law enforcement processing), that produce adverse legal or other significant effects on data subjects. Such activity is only permitted where it is required or authorised by law.

64. Clause 14 repeals sections 49 and 50 DPA 2018, replacing them with new sections 50A-D. These new sections align the approach in Part 3 of the DPA with that being provided for in the new Articles 22A-D in the UK GDPR, reflecting the broader aim to ensure consistency across the data protection regimes where possible. New section 50A introduces a definition of 'a decision based on solely automated processing', as one that involves no meaningful human intervention. Sections 50A(1)(b)(i) and (ii) set out the meaning of a significant decision

as one that produces adverse legal or similarly adverse significant effects on a data subject. New section 50B provides restrictions on automated decision-making using sensitive personal data and new section 50C details the safeguards that must be applied when undertaking automated decision making. New section 50D(1) and 50(2) mirrors the powers of the Secretary of State, set out under Article 22D(1) and 22D(2) to make further provisions about automated decision-making relating to the scope of section 50A(1).

Justification for taking the power

65. These changes to the Part 3 regime mirror the equivalent Clause 14 amendments to the UK GDPR set out above. In order to be consistent, they therefore adopt the same approach to powers as those provisions thereby bringing clarity to both controllers and data subjects. The justification is therefore the same as already detailed above for the equivalent UK GDPR reforms. The powers will also enable Part 3 controllers, as with their UK GDPR counterparts, to take a dynamic response to the growing evidence base that will emerge from the increased adoption of evolving technologies using solely automated decision-making. As with the UK GDPR, there are two powers which are required:

    a) The power in subsection 50D(1) will enable the Secretary of State to bring in regulations to provide for the purposes of section 50A(1)(a); i.e., to specify what is, or is not, to be taken to be meaningful human involvement. Subsection 50D(3) enables regulations made under new subsection 50D(1) to amend section 50A(1)(a) directly. 50D(1) is therefore a Henry VIII power that will provide clarity for controllers. Given the range of use cases that fall within the scope of Section 50A, and the fast-moving pace of innovation and uptake of technology using automated decision-making, it would not be feasible to address in primary legislation the range of specific cases that require clarity, within the timescales needed in practice. For example, the application of this power is likely to relate to some significant decisions that are taken on the basis of profiling as defined in Article 4(4) UK GDPR, an automated process which, in some cases, can play a heavy role in determining the outcome reached for a data subject. Since profiling can be used in a diverse set of ways and can be relied on to different degrees in different contexts, a delegated power may be exercised to provide legal certainty, if and when, a growing evidence base suggests that certain applications should or should not be regarded as having meaningful involvement. This is necessary to ensure the circumstances in which the prohibitions in section 50B and applicable safeguards in new section 50C apply are clear. In contrast a regulation-making power that does not permit the amendment of primary legislation would lead to legislative discontinuity given the necessary information is not all in one place. This Henry VIII power will enable rapid agile changes providing legal certainty, as well as importantly ensuring legislative coherence, clarity and simplicity for the reader. Para. 80-82 of the Delegated Powers and Regulatory Reform Committee, 12th Report of Session 2021–22[2]) recognises that there are times when it is appropriate to use a Henry VIII power. We therefore consider the powers within Clause 14 (in the UK GDPR regime and Part 3 DPA 2018) fall within these circumstances.

    b) The power in subsection 50D(2), which will enable regulations to clarify the scope of new section 50A(1)(b)(ii) i.e. what is or is not to be taken to have a "similarly significant adverse effect" on the data subject. Subsection 50D(3) enables regulations

[2] Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, 12th Report of Session 2021–22, published 24 November 2021 https://committees.parliament.uk/publications/7960/documents/82286/default/

made under new subsection 50D(2) to amend section 50A(1)(b)(ii)) directly. The power in subsection 50D(2) is therefore a Henry VIII which will provide consistency across the legislation, clarity for controllers and will ensure it can be amended as necessary to keep pace with the adoption of technologies using solely automated decision-making. The regulation-making power will enable the government to describe decisions that are and are not to be taken as having a "similarly significant effect." This is necessary to ensure the circumstances in which the specific safeguards should apply are clear, and can be updated in line with societal expectations of what constitutes a significant effect in a privacy context.

66. Before making regulations under these powers the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

67. The powers in subsection 50D(1) and 50D(2) are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations will permit the Secretary of State to amend the scope of section 50A.

Clause 14: Power to change safeguards for automated decision-making under Part 3 DPA 2018 (New subsection 50D(4))

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

68. There are existing safeguards in place to protect the rights of data subjects where a qualifying significant decision has taken place based solely on automated processing. These are currently provided for in section 50 of the DPA 2018 and it includes the right for the data subject to ask the controller to review any such decision, with the controller taking a new decision that is not based solely on automated processing.

69. The new section 50C replaces these existing safeguards in section 50, with a similar set of safeguards, but mirroring the drafting approach and reforms being made to the UK GDPR (with the new Article 22C) to ensure greater consistency between the regimes. This includes (i) the right to be provided with information with respect to significant decisions taken using solely automated processing; (ii) to make representations about such decisions; (iii) to obtain human intervention on the part of the controller in relation to such decisions and (iv) to contest such decisions.

70. Subsection 50D(4) creates a new regulation-making power for the Secretary of State to (i) add new free-standing safeguards (ii) add or vary safeguards listed in 50C in regulations (iii) and omit provisions added by regulations made under 50D(4).

Justification for taking the power

71. As already detailed above for the equivalent UK GDPR reforms, the government believes a new power (in this case a Henry VIII power) is necessary to ensure that the safeguards for

significant decisions made using automated decision-making under Part 3 are aligned with those under UK GDPR thereby bringing clarity to both controllers and data subjects. The powers will also enable Part 3 controllers, as with their UK GDPR counterparts, to ensure that they remain fit for purpose as the technology evolves. This will ensure there are sufficient safeguards in place to protect data subjects against risks to their rights and freedoms in light of rapid advancement in technology when personal data is being processed for qualifying ADM purposes. This power will enable regulations to add or vary safeguards, remove safeguards added by regulation, but it will not allow the Secretary of State to remove the safeguards provided for in section 50C.

72. The Secretary of State already has a power under section 50(4) enabled by section 50(5) of the DPA 2018 to add or amend safeguards for significant decisions based solely on automated processing.

73. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

74. The power in new subsection 50D(4) is subject to the affirmative procedure. Given that the power will permit the Secretary of State to directly amend subsection 50C(2) of the Act to vary the current safeguards (i.e. it is a Henry VIII power), this is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects.

75. The affirmative procedure is also appropriate given that this power will permit direct amendments to primary legislation so that new safeguards can be added directly to clause 50C. The existing power under section 50(4) of the DPA 2018 is subject to the affirmative procedure.

Clause 26(2): Power to amend safeguards for processing for research etc purposes

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

76. There are existing safeguards in place to protect the rights and freedoms of data subjects when their data is being processed for research purposes. This includes processing for scientific research, historic research, archiving in the public interest and processing for statistical purposes. These are currently contained in Article 89(1) of the UK GDPR as supplemented by section 19 DPA 2018. Under these safeguards, organisations are required to put in place technical and organisational measures, such as pseudonymisation, to protect the rights of data subjects when they are processing for research purposes. There is also a prohibition on processing for research purposes if processed in such a way that causes substantial damage or distress to the data subject. Processing that supports measures or decisions with respect to a particular individual unless the processing is for approved medical

research as set out in section 19(4) DPA 2018 is also prohibited. There is an existing power in section 19(5) DPA 2018 to allow the Secretary of State to change the meaning of approved medical research by regulations.

77. Clause 26(2) will move and combine the existing safeguards in section 19 DPA 2018 and Article 89 UK GDPR for research, archiving and statistical purposes (referred to as RAS purposes) into a new Chapter 8A of the UK GDPR for greater clarity. Article 84B will set out what these safeguards are and Article 84C will make further provision as to when these requirements are met. This clause also creates a new power in Article 84D for the Secretary of State to make further provision as to when the requirement for appropriate safeguards is met under Article 84B. This power will allow the Secretary of State to add, vary or omit parts of Article 84C. The purpose of the power is to ensure that safeguards for RAS purposes are kept up to date as technology changes. While this power is a new power for the purposes of the new clause, it replicates and adds to the existing powers contained in s 19(5) which is to be omitted by the new clause.

Justification for taking the power

78. The government believes a new power is necessary to ensure there are sufficient safeguards in place to protect data subjects against risks to their rights and freedoms in light of rapid advancement in technology when their data is being processed for RAS purposes. This power will not allow the Secretary of State to omit existing safeguards in paragraphs 2-4 of the new Article 84C and will be limited to adding or varying these safeguards. The Secretary of State will also be able to amend the definition of "approved medical research" under this power by adding, varying or omitting paragraph 5 of Article 84C. This replaces the existing power in section 19(5) DPA 2018. This is considered necessary to ensure the definition of "approved medical research" is kept up to date to provide sufficient protections for data subjects when their personal data is being processed for RAS purposes.

79. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

80. Regulations under new Article 84D will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects.

Clause 29(2): Power to specify which competent authorities may be issued with designation notices for joint processing with the intelligence services

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

81. This clause will enable specified qualifying competent authorities to process data under Part 4 of the DPA 2018 (the regime currently only applicable to the intelligence services) in limited circumstances. The purpose of this proposal is to simplify data protection considerations by enabling a single set of data protection rules to apply to joint processing activity by competent authorities and intelligence services, which is judged to have significant operational benefits, enabling closer working in efforts to detect and combat national security threats.

82. The Secretary of State will have the power to issue designation notices, specifying that joint processing between the intelligence services and specified qualifying competent authorities can be governed by Part 4 of the DPA 2018. Competent authorities are defined in section 30 of the DPA 2018, with a list of named authorities provided at Schedule 7 to the DPA 2018 (including the police, national crime agency etc.). The Secretary of State will have the power to make regulations which specify or describe which of these competent authorities should be treated as "qualifying competent authorities". This means notices cannot be issued to a competent authority listed in Schedule 7, unless specified in regulations made by the Secretary of State.

Justification for taking the power

83. This power is needed to ensure that the Secretary of State can specify which competent authorities can apply for and be subject to a designation notice. Competent Authorities are defined by s.30 DPA 2018 and are listed in Schedule 7, however it is recognised that it is unlikely to be necessary for notices to be issued to some of the competent authorities listed in Schedule 7, so it was important to have the ability to restrict the new notice provisions to a more limited range of "qualifying competent authorities". Given the exceptional effect of a designation notice it is essential that it can and should only be possible for such notices to apply where it is proportionate and necessary to do so. Listing qualifying competent authorities in the DPA 2018 itself was considered, but ultimately such an approach was rejected as tending to be overinclusive. It is more appropriate to consider on a case by case basis (as and when the need arises) whether a particular competent authority should be capable of being subject to a notice based on up-to-date information, rather than attempting to pre-empt such considerations by a wider general listing of such bodies on the face of the legislation. It is also recognised that the list at Schedule 7 to DPA 2018 could be subject to further change, so creating a restrictive list of qualifying competent authorities at this stage would be duplicative and may mean it becomes out of date. The focused and specific regulation-making power ensures that the Secretary of State can more proportionately respond and keep under regular review which competent authorities should be regarded as qualifying.

84. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

85. Regulations designating competent authorities as "qualifying competent authorities" will be subject to the affirmative procedure and require approval by both Houses of Parliament. It is considered that given the Secretary of State can issue designation notices to those competent authorities specified in such regulations, this procedure provides an appropriate level of Parliamentary scrutiny.

Clause 32(2): Power to designate a statement of strategic priorities

Power conferred on: Secretary of State

Power exercised by: Statement of Strategic Priorities

Parliamentary Procedure: Statement laid before Parliament and may not be designated if within the 40 day period after laying either House of Parliament resolves not to approve it.

Context and Purpose

86. This clause inserts new sections 120E to 120H into the DPA 2018 which provide a power for the Secretary of State to designate a statement setting out the government's strategic priorities relating to data protection (a statement of strategic priorities). The statement must be laid before Parliament and may not be designated if within the 40 day period after laying either House of Parliament resolves not to approve it (see new section 120G(2)). The Information Commissioner must have regard to a designated statement of strategic priorities when carrying out functions under the data protection legislation (excluding carrying out functions in relation to a particular person, case or investigation). The Information Commissioner must also publish an explanation of how the Commissioner will have regard to the designated statement of strategic priorities when carrying out these functions (new section 120F(3) and include a review of this in the Commissioner's annual report to Parliament (clause 32(3)).

87. The purpose of the statement of strategic priorities is to enable the government to set out its domestic and international data protection policies in a transparent way and to provide the Information Commissioner with useful context when carrying out its functions related to data protection. The government is committed to ensuring the Information Commissioner's continued independence, therefore, whilst the Commissioner will be required to have regard to the statement, and publish a response on it, the Commissioner will not be legally bound to act in accordance with it or to take it into consideration when making decisions on individual cases.

Justification for taking the power

88. It would not be appropriate to set out the government's strategic priorities relating to data protection in primary legislation because the government's priorities will need to be regularly reviewed and updated to respond to emerging challenges and rapid technological changes arising from the use of personal data. A power to designate a statement allows for the government's priorities to be periodically reviewed and for the priorities set out in that statement to be transparently amended where necessary in accordance with the review procedure set out in new section 120G of the DPA 2018.

Justification for the procedure

89. The government considers that the statement of strategic priorities should be subject to a parliamentary procedure akin to the negative resolution procedure before it can be designated by the Secretary of State. This is considered to provide the appropriate level of parliamentary scrutiny for this type of statement because whilst the statement is intended to

provide helpful context for the Information Commissioner and the Commissioner will be required to have regard to the priorities set out in the statement, there is no requirement to act in accordance with them.

90. There is precedent for the use of this procedure for government strategic priority statements. For example, the same procedure is applied to the statement of strategic priorities which may be designated under section 2A of the Communications Act 2003 by virtue of section 2C(5) of that Act. This parliamentary procedure also applies to the statement which the Secretary of State may publish under section 2A of the Water Industry Act 1991 setting out strategic priorities and objectives for the Water Services Regulation Authority (see section 2A(6) of that Act).

91. It is noted that in some cases, the affirmative resolution procedure applies in relation to government strategic policy statements. In particular, this procedure is applied to the statement which the Secretary of State may designate under section 4A of the Political Parties, Elections and Referendums Act 2000 (PPERA) by virtue of section 4C(8) of that Act (inserted by section 16 of the Elections Act 2022). The affirmative procedure also applies to the strategy and policy statement which may be designated by the Secretary of State under section 131 of the Energy Act 2013 (see section 135(8) of that Act). The statement of strategic priorities under new section 120E of the DPA 2018 can be differentiated from these statements because it is more limited and may not set out any particular role for the Information Commissioner in achieving the government's data protection priorities or require the Commissioner to exercise functions in a manner calculated to achieve particular outcomes. We therefore consider that it is appropriate for a procedure akin to the negative resolution procedure to apply to the statement made under new section 120E.

Clause 33(2): Power to require the Information Commissioner to prepare codes of practice for data processing

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

92. Section 128 DPA 2018 provides a power for the Secretary of State to make regulations requiring the Information Commissioner to prepare codes of practice giving guidance as to good practice in the processing of personal data and to make them available to such persons as the Commissioner considers appropriate. Any code of practice required to be issued under regulations made under section 128 would be in addition to the four topic-specific codes that the Information Commissioner is required to produce under section 121 to 124 DPA 2018. Where a code of practice is issued under section 121 to 124, the code is subject to additional requirements in section 125 to 127 DPA 2018 which set out the process for approval of those codes, requirements for publication and review of the codes and the effect of the codes.

93. Clause 33 replaces section 128 DPA 2018 with new section 124A, restating the Secretary of State's existing power to make regulations requiring a new code of practice to be produced and requiring consultation with the Secretary of State and other relevant persons on the code.

It also provides that where a new code of practice is required by regulations, that code of practice will be subject to the same parliamentary approval process, requirements for publication and review and have the same legal effect as other codes of practice issued under section 121 to 124. This is intended to remedy the discrepancy between codes of practice issued under section 121 to 124 and those that may be required by regulations.

94. As for other codes of practice, codes issued under new section 124A will also be subject to new requirements inserted into the DPA 2018 by clauses 34 and 35 to establish a panel to consider the code, prepare an impact assessment on the code and to submit the code to the Secretary of State for approval.

Justification for taking the power

95. This is a restatement of the Secretary of State's existing power to make regulations requiring the Information Commissioner to prepare a code of practice under section 128 DPA 2018 and the amendments made are intended to remedy the discrepancy between codes of practice issued under section 121 to 124 and those that may be required by regulations made by the Secretary of State. The power to require an additional code of practice through regulations has not yet been exercised by the Secretary of State, but remains necessary as there may be situations where, due to the evolution of new technologies or in response to societal pressure, additional codes of practice may be desirable to set out good practice and support data protection compliance.

96. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

97. The existing regulation-making power under section 128 DPA 2018 is subject to the negative resolution procedure and the power as restated in new section 124A will be subject to the same procedure. The negative procedure remains appropriate as any regulations made under this power will simply impose a duty on the Information Commissioner to provide practical guidance on good practice in the processing of personal data and the negative procedure affords the appropriate level of parliamentary scrutiny for this.

Clause 34: Power to disapply/modify requirements for panels to consider code of practice

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and Purpose

98. This clause inserts new section 124B into the DPA 2018 which requires the Information Commissioner to establish a panel to consider a code of practice which is prepared under section 121 to 124A of the DPA 2018 and submit a report on the code to the Commissioner.

The panel should be made up of individuals with relevant expertise and those who are most likely to be affected by the code. The Information Commissioner is required to publish a statement identifying the members of the panel and the process for selection. The Commissioner is also required to make arrangements for members of the panel to consider the code with one another and prepare and submit a report on the code to the Commissioner. After the report has been submitted, the Commissioner must make any alterations to the code that are considered to be appropriate in light of the report and publish the code in draft along with the report (or a summary of it). Where a recommendation in the report has not been accepted by the Commissioner, an explanation of why it has not been accepted should be published.

99. Subsection (11) of new section 124B allows the Secretary of State to make regulations disapplying or modifying the requirements of new section 124B in the case of a code which the Commissioner is required to prepare under regulations made under new section 124A (as such this is a limited Henry VIII power). This is because, whilst we anticipate that the panel consultation requirements will ordinarily apply to a new code prepared under new section 124A, it may not be feasible or proportionate for all of these requirements to apply to every new code of practice which the Secretary of State requires the Commissioner to prepare under this section. For example, it may be that due to the nature of the matter covered by the code it would not be appropriate for an external panel of experts to consider the code or it may not be appropriate to identify individual panel members.

Justification for taking the power

100. This power is needed as it is not possible to anticipate what codes of practice may be required by regulations made under section 124A because, as set out above, this will depend on the evolution of new technologies or emerging societal issues that need to be addressed. It is therefore not possible to anticipate now whether it will always be appropriate to apply the new requirements for a panel consultation to that code and a power to disapply or modify the new section 124B requirements is needed to allow for this decision to be taken at the time that a new code of practice is required based on the proposed topic of the code.

101. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

102. The negative resolution procedure is considered to be appropriate for regulations made using this power as the regulation-making power may only be used to disapply or modify the new section 124B requirements in relation to codes of practice required by regulations made under new section 124A. Regulations requiring a code to be produced under new section 124A are subject to the negative resolution procedure and before a code takes effect it will be laid before Parliament and be subject to a parliamentary procedure akin to the negative resolution procedure in accordance with section 125(3) of the DPA 2018. It is considered that it is appropriate for the same level of scrutiny to apply to regulations disapplying or modifying the panel consultation requirements for that code. There is no power to disapply or modify the panel consultation requirements for codes of practice which the Information Commissioner is required to produce under section 121 to 124 of the DPA. In

addition, only the requirements in new section 124B relating to a panel consultation on a new code of practice may be disapplied or modified using this power. Where such powers are used, the code would continue to be subject to scrutiny through requirements in new section 124A(4) of the DPA 2018 to consult the Secretary of State and other relevant persons on the code, requirements in new section 124C to prepare and publish an impact assessment on the code and requirements in new section 124D to submit the code to the Secretary of State for approval.

Clause 44: Power to require controllers to notify Information Commissioner of the number of complaints received

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

103. This clause inserts new section 164B into DPA 2018, giving a power to the Secretary of State by regulations to require a data controller to notify the Information Commissioner of the number of complaints made to it under new section 164A. (Section 164A requires data controllers to respond to and make enquiries into the subject matter of complaints from data subjects relating to an infringement of the processing of their personal data.)

104. This provision is part of the government's overall data reform package, which aims to give the Information Commissioner the ability to take a more risk-based approach to complaints and, where possible, to devote fewer resources to low impact complaints in favour of more preventative regulatory activity. This provision gives the Secretary of State the power - if attempts to encourage data controllers voluntarily to report complaints are unsuccessful - to require transparency from controllers regarding the number of complaints they receive, enabling the Commissioner more easily to monitor the volume of complaints data controllers are receiving over a specified period of time.

Justification for taking the power

105. It is important for the Secretary of State to have the power to impose reporting requirements on controllers via secondary legislation. In particular, the government envisages applying different thresholds for the notification of complaints to the Commissioner to different categories of controllers (large controllers, and controllers in certain data-intensive sectors, for example, may be subject to different notification thresholds from some smaller controllers). In the first instance, the intention is to set out a non-legislative route to encourage controllers and organisations to report their own complaints volumes to the Information Commissioner (on a voluntary basis), and then to exercise the power to make regulations only if the non-legislative route does not give the results required (e.g. if insufficient numbers of data controllers report on their complaints). At that stage (assuming voluntary reporting has not yielded the information required), the Information Commissioner would be likely to have a clearer idea of which sectors it should target for reporting purposes: for example, controllers which process a large quantity of data, or particularly sensitive, personal data, may be subject to different notification thresholds or required to always make a notification

(regardless of the number of complaints they receive). The Information Commission will also be in a better position, at that point, to specify the form and manner of notification (including the relevant reporting periods).

106. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

107. By virtue of new section 164B(5), this power is subject to the negative procedure. Controllers will simply be required to provide a figure (the relevant number of complaints received) to the Commissioner, so this is not an overly onerous burden. Nor should such an obligation be controversial: a key principle of the data protection legislative framework is that data protection is processed lawfully, fairly and in a transparent manner, and the publication of the number of complaints received from data protection subjects is likely to support (in particular) the third limb of this principle. The negative procedure therefore affords an appropriate level of parliamentary scrutiny for the exercise of this power.

Clause 53(1): Power to prepare the digital verification services (DVS) trust framework

Power conferred on: Secretary of State

Power exercised by: Document

Parliamentary Procedure: None

Context and Purpose

108. Clause 53(1) confers a duty on the Secretary of State to prepare and publish the DVS trust framework, a document setting out the rules that digital verification services organisations must follow when providing verification services under Part 2. These rules are referred to as the main code. The Secretary of State is also required to set out in that document conditions for the approval or designation of supplementary rules concerning the provision of those services. Under subsection (4) of clause 53 the Secretary of State must consult the Information Commissioner and anyone the Secretary of State thinks appropriate when preparing this document. Under subsection (5) the requirement to consult can be satisfied by the consultation being undertaken before the coming into force of the clause. The Secretary of State must carry out a review of the DVS trust framework at least every 12 months and in doing so must consult the Information Commissioner and anyone the Secretary of State thinks appropriate. The Secretary of State may revise and republish the DVS trust framework following such a review or following an informal review. The DVS trust framework or a revised version of the framework comes into force when the DVS trust framework document specifies it does and this must not be earlier than the time it is published. The DVS trust framework can include different rules for different digital verification services and different conditions for approval or designation for different purposes. It can also include different commencement times for different purposes and transitional provisions and savings.

109. Clause 63 requires the Secretary of State to establish and maintain a register of organisations providing digital verification services. Clause 63(4) provides that where an organisation holds a certificate from an accredited conformity assessment body certifying that digital verification services provided by the organisation comply with the DVS trust framework and the organisation makes a proper application to be included in the register and pays the required fee, the Secretary of State must include that organisation in the register unless the organisation has already been removed from the register for specified period under clause 70 and is seeking to be re-registered during that period. The Secretary of State is also required to record on the register which digital verification services an organisation is registered in respect of. Other clauses place a duty on the Secretary of State to amend the register to record additional services provided in accordance with the main code and to include supplementary notes for services provided in accordance with the supplementary rules of an approved or designated supplementary code.

Justification for taking the power

110. The DVS trust framework document will set out in detail the rules and technical industry standards that digital verification services organisations are required to follow when providing verification services. The document will also cover technical guidance to facilitate interoperability between organisations providing digital verification services; industry standards and best practice for encryption and cryptographic techniques, quality management systems, information management, information security, risk management, fraud management; guidance for dealing with fraud, service delivery or data breaches; guidance for dealing with complaints and disputes and record keeping and record management. The conditions for approval or designation of supplementary rules will similarly include technical rules and standards and will need to be reviewed and updated on regular basis to keep pace with changing technologies and changing market needs. In addition, the approval conditions will require that supplementary rules do not contradict the rules of the main code in the trust framework document. Since the DVS trust framework document will be concerned with complex technical industry standards as well as administrative matters, it would not be appropriate to set out this type of detail in legislation. Accredited conformity assessment bodies will be responsible for certifying organisations against the rules of the main code and the rules of supplementary codes and will provide comprehensive technical auditing and assurance. Under clause 69, if the organisation no longer holds a certificate from an accredited conformity assessment body certifying that they are providing digital verification services in accordance with the trust framework, the Secretary of State must remove the organisation from the register. The Secretary of State has similar duties in relation to the removal of services and removal of supplementary notes under clauses 71, 72 and 73. Under clause 70 if the Secretary of State is satisfied that an organisation is failing to comply with the main code, or a supplementary code, the Secretary of State may remove the organisation from the register.

Justification for the procedure

111. As the DVS trust framework is concerned with technical matters, no Parliamentary procedure is considered necessary. The duty to review the framework at least every 12 months and duty to consult as well as the power to revise and republish the framework following a review or informally provides the ability to modify and adapt the framework promptly if changes are required to the main code to ensure organisations are being assessed against the most up to date rules and industry standards or, if changes are required

to the approval conditions to ensure these are structured to the same high standards as the rules of the main code. Industry standards relating to the provision of digital verification services can change frequently and if an industry standard contained in the main code or in the approval conditions is revised, for example to reduce a threat to security or privacy, the DVS trust framework document would need to be rapidly updated to take account of this. It is important to have the ability to amend the reference to any standard in an appropriately timely fashion. For example, if a particular encryption standard were found to be no longer fit for purpose in ensuring data security or in mitigating cyber risks, the DVS trust framework rules or the approval conditions would need updating in rapid time. Such action will be necessary to maintain the credibility of the trust framework document with actors in the digital identity ecosystem who will be aware of the industry standards changing and will expect the DVS trust framework document to keep reflecting these appropriately. Under clause 81(1) of the Bill the Secretary of State may make arrangements for a third party to exercise her functions under Part 2 of the Bill. The governance of the trust framework will sit within the Department for Science, Innovation and Technology initially and it is possible the Secretary of State will delegate the powers in relation to the trust framework to another public sector body, a regulator or to the private sector in future. If these powers were delegated to a private sector entity, it would be inappropriate to require the trust framework to be set out in regulations subject to parliamentary scrutiny, as the regulation-making power could not be exercised by a non-governmental body. The approach under Clause 53 will ensure that governance of the digital identity ecosystem remains portable outside of the Department.

Clause 68(1): Power to make a determination that fees must be paid to the Secretary of State by a DVS organisation for applications made under clauses 63, 64, 65 and 66

Power conferred on: Secretary of State

Power exercised by: Ministerial Determination

Parliamentary Procedure: None

Context and Purpose

112. Clause 68(1) provides a power for the Secretary of State to make a determination that an organisation must pay a specified fee when the organisation applies to be registered in the DVS Register, to have additional services provided by them added to their entry in the register, to have a supplementary note about services they provide in accordance with a supplementary code added to their entry, and to add services to the supplementary note.. Subsection (3) of the clause allows the Secretary of State to determine that DVS organisations who are already registered must pay a specified fee for continued registration . Subsections (2) and (4) of the clause provide that the Secretary of State can set fees in excess of the administrative costs associated with applications for registration, and continued registration. Subsection (6) provides that a determination may make different provisions for different purposes. For example, a fee could be set at a higher level for a certain type of DVS organisation . The Secretary of State is required to publish a determination setting the fees that are payable under subsection (7). Subsections (8) and (9) allow the Secretary of State to revise fees and require any revised fees to be published.

113. Under clause 81(1), the Secretary of State may make arrangements for a third party to exercise the Secretary of State's functions under Part 2 of the Bill. The governance of the

UK's digital identity ecosystem, including the UK digital identity and attributes trust framework, will sit within the Department for Science, Innovation and Technology for an interim period, while a permanent location is sought for governance to sit as the market develops and matures. It is possible that the Secretary of State will delegate these governance powers outside of the department to another public sector body, a regulator or to the private sector in future. If these powers were delegated to a private sector entity, it would be inappropriate to require fees to be set in regulations which are subject to parliamentary scrutiny, as this regulation-making power could not be exercised by a non-governmental body. Setting the fees by way of a determination will therefore ensure that governance of the digital identity ecosystem remains portable outside of the department. Clauses 68(7) and (9) require a determination and revised determination to be published, ensuring the fee structure is transparent.

Justification for taking the power

114. The fee structure to be set is likely to be technical and complex, with different fees to be applied for different purposes as permitted by subsection (6). The fees can be set at a level which goes beyond purely recovering costs of administering the application to join or remain on the register itself. If the fee were set at such a level as to go beyond cost-recovery, additional revenues are intended to fund wider governance functions necessary to operate the market. The digital identity market is nascent, and the level of fees may need to be adjusted from time to time to keep pace with changes in the market, therefore there needs to be the ability for the Secretary of State to adjust the fee structure fairly and appropriately. Giving the Secretary of State this power to set fees by determination will help to ensure that the government is able to respond swiftly to changes in the market, balance the interests of industry and the taxpayer, and support growth in this evolving market. The voluntary nature of this regime, and the desire to grow this market in a sustainable and inclusive way, means there is a strong incentive for the Secretary of State to set any fees at a level that is competitive, fair, and reasonable. There will be very little incentive for the Secretary of State to set excessively high fees, as to do so would prevent the government from realising its ambitions to grow this market. It would be overly restrictive to commit this fee regime to primary or secondary legislation.

Justification for the procedure

115. Entry onto the DVS register is not mandatory for those wishing to provide digital identity services in the UK. However, entry onto the register does confer certain advantages, notably that a public authority may only disclose information to a DVS provider which is on the register under clause 74. The fees that can be charged under clause 68 form part of this non-compulsory scheme which private, commercial entities can choose to partake in to provide a commercial service to their users. It is appropriate in this scenario for the fee structure to be set out by way of determination rather than primary or secondary legislation, as this legislation does not establish a compulsory regulatory regime and the determination will not impose an obligation on any person. The government considers that publication of the Secretary of State's determinations on fees, as required under clauses 68(8) and 68(9), provide an appropriate level of scrutiny and transparency to this fee regime. If in exercising the powers under clause 81(1), the power to set fees was delegated to a private sector entity, it would be inappropriate to require the fees to be set out in regulations subject to parliamentary scrutiny, as the regulation-making power could not be exercised by a non-governmental body.

116. Insofar as the power could be considered legislative, its scope is limited: the power merely permits the Secretary of State to set the amount or amounts of fees for entering or remaining on the register. These factors all restrict the Secretary of State's power in determining fees to a level that means Parliamentary procedure is not necessary for further scrutiny of the power.

Clause 60(1): Power to make a determination that a fee must be paid to the Secretary of State for approval, reapproval and continued approval of a supplementary code.

Power conferred on: Secretary of State

Power exercised by: Ministerial Determination

Parliamentary Procedure: None

Context and Purpose

117. Clause60(1) provides a power to the Secretary of State to make a determination that a fee is payable for approval, re-approval and continued approval of a set of supplementary rules known as supplementary code and to determine the amount of such a fee. Supplementary rules concerning the provision of digital verification services supplement the rules of the main code and can be made by any public or private organisation in a particular use case or sector. Clause 53 requires the Secretary of State to set conditions for the approval or designation of a supplementary code. Clause 54 provides that a supplementary code made by someone other than the Secretary of State must be approved by the Secretary of State if the code meets the conditions set out the DVS trust framework document so far as the conditions are relevant and, if the person makes a valid application and pays any fee required. Clause 55 enables the Secretary of State to designate a supplementary code of the Secretary of State as one which complies with the conditions set out in the DVS trust framework. Clause 56 requires the Secretary of State to publish and keep up to date, a list of supplementary codes that are approved or designated.

118. Subsections (2) and (4) of this clause provide that the Secretary of State can set fees in excess of the administrative costs associated with applications for approval, re-approval and continued approval. Subsection (6) provides that a determination may make different provisions for different purposes. For example, the Secretary of State may wish to charge different fees for approval compared to the fees for re-approval or to charge different approval fees to encourage the development of supplementary codes in a particular sector. The Secretary of State is required to publish a determination setting the fees that are payable under subsection (7). Subsections (8) and (9) allow the Secretary of State to revise fees and require any revised fees to be published.

119. Under clause 81(1), the Secretary of State may make arrangements for a third party to exercise the Secretary of State's functions under Part 2 of the Bill. The governance of the UK's digital identity ecosystem, including the UK digital identity and attributes trust framework, will sit within the Department for Science, Innovation and Technology for an interim period, while a permanent location is sought for governance to sit as the market develops and matures. It is possible that the Secretary of State will delegate these governance powers outside of the department to another public sector body, a regulator or

to the private sector in future. If these powers were delegated to a private sector entity, it would be inappropriate to require fees to be set in regulations which are subject to parliamentary scrutiny, as this regulation-making power could not be exercised by a non-governmental body. Setting the fees by way of a determination will therefore ensure that governance of the digital identity ecosystem remains portable outside of the department. Subsections (7) and (9) require a determination and revised determination to be published, ensuring the fee structure is transparent.

Justification for taking the power

120. The fee structure to be set is likely to be technical and complex with different fees to be applied for different purposes as permitted by subsection (6). For example, the approval process will require a set of certification assessment criteria to be developed in order that organisations wishing to provide services in accordance with a supplementary code can be assessed. A use case may have a complex set of supplementary rules that will require more detailed and more stringent certification assessment criteria. This will have impacts for the level of resource and expertise needed to process approval. The costs of approval could be greater, and it would therefore be appropriate to charge a different fee in such cases. The fees can be set at a level which goes beyond purely recovering costs of administering the application for approval, re-approval or continued approval. If the fee were set at a level to go beyond cost-recovery, additional revenues are intended to fund wider governance functions necessary to operate the market. The digital identity market is nascent and the level of fees may need to be adjusted from time to time to keep pace with changes in the market, therefore there needs to be the ability for the Secretary of State to adjust the fee structure fairly and appropriately. Giving the Secretary of State the power to set fees by determination will help to ensure that the government is able to respond swiftly to changes in the market, balance the interests of industry and the taxpayer, and support growth in this evolving market. The voluntary nature of this regime, and the desire to grow this market in a sustainable and inclusive way, means there is a strong incentive for the Secretary of State to set any fees at a level that is competitive, fair, and reasonable. There will be very little incentive for the Secretary of State to set excessively high fees, as to do so would prevent the government from realising its ambitions to grow this market. It would be overly restrictive to commit this fee regime to primary or secondary legislation.

Justification for the procedure

121. Approval of a set of supplementary rules for identity and eligibility verification services in a particular use case or sector is voluntary. However, approval of a supplementary code and entry in the public list carries certain advantages for the use case or sector to which the supplementary code relates. For example, a supplementary code that enables digital verification services to be used to check a person's right to work in the UK would support the government's policy on preventing illegal working. The government's aim is to encourage the creation of supplementary codes in a range of sectors where there is market demand and evidence of tangible benefits for the economy and wider society. Having the ability to charge fees for approval by way of determination supports that aim. It is therefore appropriate for the fee structure to be set out by way of determination rather than primary or secondary legislation, as approval is not compulsory, and the determination will not impose an obligation on any person. The government considers that publication of the Secretary of State's determination on fees, as required under subsections (7) and (8), provide an appropriate level of scrutiny and transparency to this fee regime. If in exercising the powers under clause

81(1), the power to set fees was delegated to a private sector entity, it would be inappropriate to require the fees to be set out in regulations subject to parliamentary scrutiny, as the regulation-making power could not be exercised by a non-governmental body.

122. Insofar as the power could be considered legislative, its scope is limited: the power merely permits the Secretary of State to set the amount or amounts of fees for approval, re-approval and continued approval. These factors all restrict the Secretary of State's power in determining fees to a level that means Parliamentary procedure is not necessary for further scrutiny of the power.

Clause 78(1): Power to prepare and publish a code of practice about the disclosure of information

Power conferred on: the Secretary of State

Power exercised by: Statutory Code of Practice

Parliamentary Procedure: Affirmative procedure (negative procedure where the Code is republished).

Context and Purpose

123. This clause requires the Secretary of State to prepare and publish a code of practice about the disclosure of information by public authorities to organisations registered in the digital verification services register. It provides that a public authority must have regard to the code of practice in disclosing information relating to an individual for the purposes of enabling an organisation to provide digital verification services for the individual under clause 74.

124. The code must be consistent with the data sharing code of practice prepared by the Information Commissioner under section 121 DPA 2018 and issued under section 125(4) of that Act. The Secretary of State is able to revise and republish the code from time to time and when doing so, must consult the Information Commissioner and any other persons the Secretary of State thinks appropriate. The consultation requirement may be satisfied by consultation undertaken before the coming into force of this clause.

Justification for taking the power

125. The code will provide guidance to public authorities on disclosing information to an organisation for the purpose of providing digital verification services to an individual. The code will provide practical guidance on the use of the powers in a way that is consistent with the data sharing code prepared by the Information Commissioner. The Code does not create any new legal obligations.

126. In this context, it is appropriate for the power to be conferred on the Secretary of State and there are appropriate safeguards, such as the requirement for consultation before preparing or revising the code, which will contribute to ensuring that the code is drafted to a high standard. There is also strong precedent for powers to be taken for preparing and publishing codes of practice such as the code issued under section 43 of the Digital Economy Act 2017.

Justification for the procedure

127. Publication of the first version of the code will be subject to the affirmative procedure and require approval by both Houses of Parliament, before laying. Republication of the code will be subject to the draft negative procedure with a requirement that before republishing the code a draft is laid before Parliament. Any republication of the code will not become law if either House resolves not to approve it within 40 days.

128. The code provides practical guidance to public authorities on the disclosure of information, including on matters such as data minimisation. It is considered that given the nature of the code, this procedure provides an appropriate level of Parliamentary scrutiny.

Clause 81(1): Power to make arrangements for third party to exercise functions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

129. This clause enables the Secretary of State to make arrangements for a person prescribed by regulations to exercise the functions of the Secretary of State under Part 2.

Justification for taking the power

130. The clauses in Part 2 establish a new, non-compulsory framework for digital verification services and include governance functions conferred on the Secretary of State in order to secure the reliability of digital verification services. The Secretary of State's governance functions and the restrictions on the exercise of those functions are set out on the face of the Bill. These functions include a duty to prepare and publish the DVS trust framework (clause 53); powers to set approval conditions for supplementary codes (clause 53); powers to approve or designate supplementary codes (clauses 54 and 55) ; a duty to establish and maintain a public register of DVS organisations and the services they provide (clause 63); powers to determine how applications to the register should be made and what fees should be paid (clauses 67 and 68); powers and duties to remove DVS organisations and their services from the register (clauses 69 to 73); a duty to prepare and publish a code of practice about the disclosure of information by public authorities (clause 78); a power to designate a trust mark for use by registered DVS organisations only (clause 79); a power to require accredited conformity assessment bodies or registered DVS organisations to provide information to the Secretary of State (clause 80; a duty to prepare and publish a report on the operation of Part 2 (clause 82). The responses to the public consultation identified that the governance of the UK's digital identity ecosystem, including the UK digital identity and attributes trust framework should sit within the Department for an interim period while the market is developing. During this period the Secretary of State will need to react to the governance needs of the nascent digital identity market when deciding how and whether to exercise this power. It is not yet clear where the most appropriate permanent location for these functions should be when the market is larger and more mature. In recognition of this

evolving situation, the government considers the Secretary of State should be able to delegate these governance functions if it becomes appropriate to do so.

131. It would be overly restrictive to identify a particular third party or to define a set of circumstances in which the Secretary of State should exercise the power under clause 81 to delegate functions under Part 2. This could lead to a situation where the governance needs of the digital identity market are not properly met, preventing the government from realising its ambitions to grow this market in secure and trusted digital verification services. But in the future, it is possible that the Secretary of State will consider that trust and security can be better achieved by delegating these governance functions outside of the Department to another public sector body, a regulator or to the private sector.

Justification for the procedure

132. The regulations are subject to the affirmative procedure. This is considered appropriate given the nature of the functions to be delegated. While certain functions are administrative and operational in nature, for example, the duty to establish and maintain a register of digital verification services organisations, there are functions, such as the duty to set the rules of the trust framework and the power to remove digital verification services organisations from the verification services register, that are substantive functions. Parliament should therefore have the opportunity to scrutinise and debate the proposed arrangements for another person to take on these functions. It is considered that the affirmative procedure provides the appropriate level of scrutiny.

Clause 84: Powers relating to verification of identity or status

Power conferred on: Secretary of State

Power exercised by: Orders/Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

133. This clause relates to powers of the Secretary of State to prescribe requirements under section 15(3) of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") and under the suite of powers to prescribe requirements in Chapter 1 of Part 3 of the Immigration Act 2014 ("the 2014 Act") which an employer or landlord respectively must comply with to obtain a statutory excuse against the imposition of a civil penalty for a contravention of section 15 of the 2006 Act or section 22 of the 2014 Act (including in circumstances in which an agent is responsible for the landlord's contravention under section 25 of that Act). It also relates to powers of the Secretary of State to prescribe right to work checks under paragraph 5(6)(b) and (c) of Schedule 6 to the Immigration Act 2016 that a person may be required to carry out to comply with the terms of an illegal working compliance order.

134. In particular, this clause elaborates on the parameters of related order/regulation-making powers by setting out the types of action that the Secretary of State may require employers, landlords, agents of landlords and persons specified in illegal working compliance orders to carry out, including by making provision that specifies documents provided to, and generated by, a DVS-registered person and specifying steps and checks involving the use of services provided by such a person.

135. This clause defines a DVS-registered person as a person who is registered in the DVS register established under Part 2 of this Bill (see clause 63 on the DVS register) and confer a power on the Secretary of State to further define a subset of DVS-registered person by describing/prescribing a description of DVS-registered person which has a supplementary note next to its entry in the DVS register recording that the person provides, in accordance with an applicable recognised supplementary code, specified/prescribed services (see clause 65 on supplementary notes).

136. These powers will enable the Secretary of State to define a sub-set of DVS-registered person in subordinate legislation made under them by reference to a statutory register that changes from time to time. Whether or not a DVS-registered person would fall within that subset will ultimately be determined by whether, at the time the check is carried out, a supplementary note is contained next to its entry on that register which relates to the applicable set of services specified/prescribed in those orders/regulations.

Justification for taking the power

137. DVS organisations may be added to, or removed from, the register (see clause 69 and 70 on the duty and power to remove a person from the DVS register). Moreover, a DVS-registered person may have a supplementary note added or removed from the DVS register (see clause 72 on the duty to remove supplementary notes from the DVS register). The Government considers that there is a compelling justification for enabling flexibility in these circumstances as, without it, subordinate legislation would need to be made every time there is a relevant change to the register. It would also mean that a DVS-registered person could continue to provide digital verification services even after it is removed from the register, or even after a supplementary note confirming its compliance with the applicable approved supplementary code is removed, up until the point that amending regulations/orders could be brought into force to remove those organisations from scope of the orders/regulations made under the powers being amended. The orders/regulations need to be able to keep pace with changes made to the DVS register in real-time to be effective and achieve the policy objective.

Justification for the procedure

138. The amendments do not alter the parliamentary procedure for the regulation/order-making powers they amend. Regulations/orders made under these powers will be subject to negative resolution procedure. The regulation/order-making powers are largely technical and operational in nature and so it is considered that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny. The amendments themselves contain a restriction on what the order/regulation-making powers they amend may be used for. The powers can only be used to make orders/regulations that relate to DVS-registered persons in the DVS-register maintained under Part 2 of the Bill.

Clause 86(1)-(3): Power to require suppliers of goods or services to provide their customers with improved access to their transactional data (smart data schemes)

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure (apart from some amendment regulations)

Context and Purpose

139. Part 3 of the Bill implements a government commitment, made further to a public consultation (Smart data: putting consumers in control of their data and enabling innovation[3]) in 2019, to obtain powers to introduce "smart data schemes" in markets across the economy. The objective is to improve data portability (beyond the limited right to data portability in the UK GDPR, where it applies) between suppliers, their customers and representatives authorised by the customer to help overcome information asymmetry between suppliers and their customers, to enable customer access to data in "real time" and to facilitate better use of customer data for instance to enable customers to compare deals and switch suppliers.

140. Part 3 of the Bill comprises several clauses containing regulation-making powers. Aside from this clause (power to make provision in connection with customer data), there are regulation-making powers in clauses 88 (power to make provision in connection with business data), 92 (enforcement of data regulations), 95 (fees), 96 (levy), 98(1) and (5) (the FCA and financial services interfaces), 100 (the FCA and financial services interfaces: penalties and levies) and 101 (liability in damages). These are explained further below, but as the regulation-making powers in those clauses ensure the effectiveness of smart data schemes, the explanation for this clause is also relevant in considering those clauses.

141. The "principal" power in subsection (1) of this clause allows the Secretary of State or the Treasury, by regulations, to require suppliers of goods, services and digital content specified in the regulations and other persons holding the relevant data (collectively, "data holders") to provide customers or their authorised representatives with access to customer data. Customers (see clause 85(3)) may include both consumers and business customers; small and medium enterprises face many similar disadvantages arising from their ability to access data as consumers. Customer data (clause 85(2)) includes data relating to the goods, services or digital content supplied or provided to the customer, their use or performance and the price paid. It is intended that the regulations will require the provision of data to customers' authorised representatives, but the powers also allow for provision of data directly to customers.

142. Subsections (2) and (3) provide "ancillary" powers which ensure that the "principal" power in subsection (1) can be effective. Subsection (2)(a) confers a power to require suppliers to collect and retain data, to ensure they have specific and accurate data to hand for disclosure. Subsection (2)(b) confers a power to provide for rectification of inaccurate data (this is necessary as not all customer data will be personal data to which the UK GDPR rectification right applies). Subsection (3) confers a power to allow the authorised representative to take, on the customer's behalf, any action that a customer could take in relation to the goods, services or digital content supplied or provided by the supplier ("action initiation": see paragraph 148a).

143. Clause 87 illustrates how the regulation-making power may be used. That includes provisions for the following purposes: requests to access data (subsection (2)); customer authorisation of representatives to access data or act on the customer's behalf (subsection (3)); further requirements that may be imposed upon data holders, customers or their authorised representatives in relation to access or provision of data and action initiation (subsection (4)); collation and retention of records relating to provision of and access to data (subsection (5)); imposing obligations on third parties who process the supplier's customer data to assist the supplier in complying with its obligations (subsection (6)); further requirements on customer's authorised representatives as to onward processing and disclosure of the data (subsection (7)); requirements on data holders and customer's authorised representatives to publish information including information making customers

[3] https://www.gov.uk/government/consultations/smart-data-putting-consumers-in-control-of-their-data-and-enabling-innovation

aware of their data rights (subsection (8)); complaints and disputes resolution (subsections (9) and (10)). Other ancillary clauses include clauses dealing with: the appointment of decision-makers (clause 90), to accredit persons who customers may authorise to receive customer data on their behalf (see clause 87(3)(b)); provision to require data holders and customer's authorised representatives to establish an interface body (clause 91) (explained below); enforcement (clauses 92-94, which are explained in more detail below); powers to enable the charging of fees (clause 95) and the imposition of a levy (clause 96) (both of which are also explained below) and a spending authority (clause 97).

144. Part 3 of the Bill replaces the existing regulation-making powers in sections 89-91 (supply of customer data) of the Enterprise and Regulatory Reform Act 2013 ("ERRA") which enable the Secretary of State to make regulations to require the suppliers of goods or services (see section 89(2)) to provide customer data to a customer or to another person authorised by the customer at the customer's or authorised person's request. The ERRA powers were introduced as a backstop should it not be possible for suppliers to develop voluntary programmes for the release of data to customers. The Department for Business, Innovation and Skills explained those powers in an Addendum to the delegated powers memorandum for that Bill (see the Committee's 14th Report for session 2012-13). Experience to date has shown that industry has not voluntarily put in place such programmes and therefore regulation powers remain necessary.

Justification for taking the power

145. The essential purpose of Part 3 is to update the government's regulation-making powers to allow the government to establish effective smart data schemes. In doing so, the government would like to maintain general regulation-making powers building on those enacted in ERRA. Regulation-making powers of this kind allow the government to tailor each scheme to the circumstances of the sector to which it applies in respect of which provisions, such as the data to which the scheme applies, the persons on whom obligations are imposed and how data may be requested and accessed, may necessarily be detailed and vary. Furthermore, the government considers that seeking primary legislation for the establishment of each specific smart data scheme would significantly limit the feasibility of introducing such schemes. At present, smart data schemes are in contemplation in the areas of retail banking (expanding or replacing the open banking scheme which was introduced by order of the Competition and Markets Authority ("CMA") under its competition powers) and in retail telecoms, such as fixed line broadband and mobile services. A common framework of powers may also facilitate cohesion between smart data schemes for instance in terms of their interoperability.

146. It is not intended to alter fundamentally the activities to which the powers may apply, as compared with ERRA. The regulation-making powers will allow regulations to be made in the context of the provision of goods, services or digital content specified in the regulations, which is intended to replicate the scope of ERRA section 89(2)(d) (the reference to digital content is added to reflect Part 1 of the Consumer Rights Act 2015 which contains separate provisions for the supply of goods, digital content and services). However, the ERRA powers are no longer adequate to enable the introduction of regulations with all the features required to be effective. Since 2013, the government's understanding of what is required for a successful smart data scheme has evolved because of the open banking scheme, which was introduced by order of the CMA under its competition powers in Part 4 (market studies and market investigations) of the Enterprise Act 2002 following a CMA market study in relation to competition within the retail banking market. The open banking scheme enables customers to share their bank and credit card transaction data securely with trusted third parties who can provide them with applications and services. The government has also had regard to the recent enactment of powers in Part 4 of the Pension Schemes Act 2021 (which amends the Pensions Act 2004 and the Financial Services and Markets Act 2000 (FSMA 2000)) for pensions dashboards, an electronic communications service for individuals to access information about their pensions.

147. Aside from the extension of the regulation-making powers to contextual business data (which is dealt with in clause 88), key changes, as compared with ERRA, include:

a. Action initiation (see subsection (3)): this allows an authorised representative to act on the customer's behalf in taking any action that a customer could take in relation to the goods, services or digital content supplied or provided by the relevant supplier: for instance, the regulations might provide for the representative to access the customer's account and make a payment or to negotiate an improved deal on the customer's behalf. This proposal is based both on the experience in Australia with its Consumer Data Right, where action initiation (write access) provisions are being introduced to realise the full potential of smart data use cases, such as enabling more efficient switching of suppliers, and on the read and write access standards adopted under the UK's open banking scheme, and is critical to allow customers to be able to achieve tangible benefits from the improved access to their customer data.

b. Technical requirements set by government or by another body (clauses 87(4) and (7) and 103(1)(f)): to be effective, smart data schemes rely on the secure transfer of customer data in usable formats. Accordingly, data holders, and those requesting and receiving data, may be required to participate in facilities and services, and comply with associated requirements, including electronic communication services such as application programming interfaces (APIs).

   Given the complicated and technical nature of these IT focused requirements, and the need for their rapid update, it is essential that the powers allow for appropriate sub-delegation of rule-making as is permitted by clause 103(1)(f) which allows the regulations to make provision by reference to standards, specifications or technical requirements published from time to time by a specified person. Clause 103(1)(f) reflects section 238A(5)(a) of the Pensions Act 2004 under which regulations may require the pensions dashboards service to comply with standards, specifications or technical requirements published from time to time by the Secretary of State, the Money and Pensions Service or another person specified, or of a description specified, in the regulations.

   While largely re-enacting section 91(1)(b) of ERRA, clause 103(1)(g), which allows the conferral of functions on a person including functions involving the exercise of a discretion, may also be necessary to facilitate the functioning of technical requirements as well as in other contexts in which a discretion might reasonably be conferred (for instance in relation to the accreditation of persons who may be authorised by a customer (clause 87(3)), the resolution of complaints or disputes (clause 87(9) and (10)) or in relation enforcement decisions and the imposition of fees or the levy which are explained further). Clause 103(1)(g) is again similar to the provision made in relation to pensions dashboards by section 238A(6) of the Pensions Act 2004 in which regulations may include provisions for determinations to be made by the Secretary of State, the Money and Pensions Service, or another person specified, or of a description specified, in the regulations.

c. Assistance: given that the provision of goods, services and digital content, and the processing of data in relation to it, can involve multiple parties, in addition to a broad definition of "data holder" (clause 85(2)), clause 87(6) provides that regulations may require other persons who process the supplier's data to assist the supplier in complying with the regulations.

d. Data processing (see clause 87(7)): it is considered prudent for it to be possible for regulations to impose obligations, which are not provided for by ERRA, on the processing and further disclosure of data by customers'

authorised representatives should the government consider this necessary to protect the interests of customers.

e. Enforcement (see clauses 92-94): the ERRA powers are inadequate to allow for effective enforcement of smart data schemes; the enforcement provisions are explained separately.

f. Funding (see clauses 95 and 96): it is intended that the regimes introduced by regulations should be "self-funding" which is not achievable under ERRA; the relevant clauses are explained in more detail. There is also a back-stop spending authority to allow the government to provide financial assistance to persons exercising functions under a smart data scheme (clause97), but it is not anticipated that the government will make regular use of this authority.

g. Several ancillary provisions are introduced including powers to require data holders to publish information to make customers aware of their rights (clause 87(8)) and for complaint and dispute resolution provisions (clause 87(9) and (10)).

h. Confidentiality and data protection: Part 3 introduces specific provisions, reflecting the pensions dashboards provisions in section 238B(6) and (7) of the Pensions Act 2004, on the relationship of the regulations with data protection legislation (clause 102).

148. Amendment at Commons Report Stage - technical requirements set by a new interface body (clause 91): in some smart data schemes specifications or technical requirements will be published by another body; this will be done using the powers described in paragraph 148(b) above. In other smart data schemes, there will not be an appropriate existing entity; in such cases clause 91(3) allows the Secretary of State or the Treasury to require data holders and, where appropriate, customers' authorised representatives ("scheme participants") to set up a body (an "interface body") that can develop the standards (or to itself create and manage the interface that facilitates data access). Clause 91(4)(b) allows the Secretary of State or the Treasury to require such scheme participants to fund the interface body.

149. Clause 91 does not derive from ERRA, but instead from the existing legal instrument underpinning the Open Banking scheme in the UK: the CMA's Retail Banking Market Investigation Order 2017 (see Article 10 of that Order), made under its competition powers in Part 4 (market studies and market investigations) of the Enterprise Act 2002. The effect of clause 91 is to allow the Secretary of State or Treasury to take the same approach for smart data schemes generally as the CMA has done for Open Banking.

150. These changes are balanced by significant strengthening of safeguards on the making of regulations, as compared with ERRA. Aside from the Parliamentary scrutiny of regulations (which is addressed in paragraphs 152-154), the regulation-making powers now require:

a. Substantive preconditions (see subsection (4)): in deciding whether to make regulations, the regulation-maker must consider a number of specified matters. This applies to all regulations: by contrast, the statutory preconditions for exercise of the ERRA powers do not apply in the case of regulations under section 89(2)(a)-(c) (supply of gas or electricity, mobile phone services and provision of current accounts and credit card facilities) and only apply in the case of other goods or services (section 89(2)(d)) (see section 89(7)) (as a result of the application of the conditions, and affirmative scrutiny, to all first regulations about a particular description of customer data, the distinction between the goods and services in subsections (a)-(d) of section 89(2) is not replicated in the new powers).

b. Consultation (see clause 103(9)): there is a requirement of prior consultation of persons likely to be affected by the regulations, or their representatives, and sectoral regulators on all regulations which are subject to affirmative scrutiny.

c. Periodic review (see clause 104): there is a requirement for a periodic review of regulations under this clause, against the substantive preconditions, at least every five years and ministers must publish the outcome of that review and report it to Parliament. This is intended to ensure that smart data schemes are kept under review and is designed to align, in practice, with any review under sections 28 to 32 (secondary legislation: duty to review) of the Small Business, Enterprise and Employment Act 2015 where they apply.

Justification for the procedure

151. The affirmative resolution procedure is required in the case of the first regulation-making provision under subsections (1)-(3) about a particular description of customer data (see clause 103(7)(a)). This is designed to ensure that Parliament has an opportunity to debate the regulations whenever a smart data scheme is first introduced. By contrast, the ERRA powers only require the affirmative resolution procedure in the case of regulations to which section 89(2)(d) applies and for regulations containing enforcement provisions.

152. Subsequent regulations must also be subject to the affirmative resolution procedure (see clause 103(7)(c)-(e)) where those regulations:

a. make the requirements of existing regulations more onerous for data holders or interface bodies;

b. make provision in respect of interface bodies under clause 91, including their establishment and funding, and conferring monitoring powers on an interface body;

c. contain monitoring provisions for decision-makers under clause 90(4) or enforcement provisions under clause 92;

d. contain revenue-raising provisions;

e. amend, repeal or revoke primary legislation: clause 103(6) contains Henry VIII powers for the amendment, repeal or revocation of primary legislation in the case of provisions about the handling of complaints, dispute resolution, appeals and provisions under clause 103(1)(h) (incidental, supplementary, consequential, transitory, transitional or saving provisions) the principal purpose of these powers being to enable regulations to extend, adapt or apply existing statutory complaints, disputes and appeals processes for the purpose of a smart data scheme and to make such consequential amendments as allow the scheme to function effectively.

153. It is, however, considered appropriate for other subsequent regulations to remain subject to negative Parliamentary scrutiny.

154. These requirements, coupled with the requirements of consultation and periodic review, represent a significant strengthening of the procedural requirements as compared with ERRA and a counterbalance to the new provisions sought.

Clause 88(1), (3) and (4): Power to require suppliers of goods or services to publish, or provide their customers with access to, contextual information about their goods and services

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure (apart from some amendment regulations)

Context and Purpose

155. Subsection (1) ensures that suppliers of goods, services or digital content, and other data holders, may be required to publish, or provide customers or other persons with, wider information about the goods, services and digital content they supply or provide that does not relate to individual customers ("business data": see clause 85(2)). This business data may include information on the availability of the supplier's goods or services (for instance, geographic coverage), their use or performance, tariffs, key contractual terms and data on customer feedback.

156. The publication or provision of wider business data is necessary to allow customers and their representatives, and other parties including prospective customers, to understand the relevant market and allows customers to contextualise any customer data provided to them. This may, for instance, allow customers to compare alternative deals best suited to their means and needs.

157. As with clause 86(2)(a) in relation to customer data, subsection (3) provides a power to require suppliers and other data holders to collect and retain specific kinds of business data.

158. Subsection (4) allows regulations to require suppliers and other data holders to provide business data to a public authority or a person appointed by it ("the public authority recipient") and to impose obligations, including publication and disclosure obligations (but not payment of the levy (clause 96)), on that public authority recipient as if it were a data holder. Instead of requiring suppliers to publish or provide business data directly to "end recipients", this model allows that data to be "centrally" collated, and then published or disclosed onwards, by the public authority recipient.

159. Clause 89 illustrates how the regulation-making power may be used and substantially mirrors clause 87.

160. The powers in clause 88 may be used in conjunction with a smart data scheme under clause 86 or separately.

Justification for taking the power

161. The ERRA powers do not extend to business data, so it is necessary to expand regulation-making powers to cover this kind of data. In doing so, subsections (1) and (2) substantially replicate clause 86(1) and subsection (4) provides for an adapted process with data first being provided to or for a public authority recipient before its onward publication or disclosure. A key difference with clause 86 is that it is not necessary for any person to whom the data is disclosed (or is ultimately disclosed under subsection (4)) to be authorised by the customer since business data does not relate to an identifiable customer.

162. The government considers, in relation to the kind of powers proposed in this clause, that the same justifications apply as for clause 86: these being an ability to tailor regulations to the circumstances of the sector in question, that it is not feasible to seek primary legislation for each specific regulatory scheme and to facilitate cohesion between schemes.

Justification for the procedure

163. The powers to make regulations relating to business data are subject to the same parliamentary procedures in the same cases as those proposed for customer data as explained in the context of clause 86 so that the affirmative resolution procedure is required in the case of the first regulation-making provision under subsections (1), (3) and (4) about a particular description of business data (clause 103(7)(b)) and for subsequent regulations of the kind in clause 103(7)(c)-(e). The government considers that this level of scrutiny, the statutory conditions for making regulations and the requirements of consultation and periodic review provide appropriate safeguards, constraints and scrutiny on use of these powers.

Clause 92(1): Enforcement of smart data schemes

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

164. This clause provides powers for regulations to provide for monitoring of compliance with the requirements imposed by, or in exercise of a power of a power conferred by, regulations made under Part 3, and for their enforcement, by a public authority.

165. The regulations may provide for more than one enforcer and, if so, for the relationship between them (subsection (11)).

166. The regulations may confer investigatory powers on the enforcer (subsection (3)), including powers to require provision of documents or information, powers to require an individual to attend at a place and answer questions, and powers of entry, inspection and seizure. However, these are subject to restrictions in clause 93: an enforcer may not enter a private dwelling without a warrant and there are restrictions on the information that the regulations may require a person to provide an enforcer, notably to maintain the privileges of Parliament, to maintain legal privilege and, subject to exceptions, to protect against self-incrimination.

167. In the case of infringement of the regulations or requirements imposed under them, an enforcer may issue a notice requiring compliance with the data regulations or conditions or requirements imposed under them (compliance notice) (subsection (4)(a) and (b)).

168. In the case of infringement of the regulations, or of a failure to comply with a compliance notice or the provision of false or misleading information, the regulations may provide for an enforcer to impose a financial penalty (subsection (6)). An enforcer's powers to do so are subject to the safeguards in clause 94: inter alia, that clause provides that the amount of a financial penalty must be specified in, or determined in accordance with, the regulations, or an amount not exceeding such an amount (subsection (2) of clause 94); it imposes procedural safeguards requiring an enforcer to produce and publish guidance as to the exercise of any discretion provided by the regulations (subsections (3)(a) and (b) of clause 94), and to provide persons on which the enforcer proposes with notice of the proposed penalty and an opportunity to make representations (subsection (3)(c)-(f) of clause 94).

169. The regulations may contain review and appeal rights (subsection (7) of this clause 92) and must provide for appeals in the case of imposition of a financial penalty (clause 94(3)(g) and (h)).

170. An enforcer may also publish a statement that the enforcer considers that a person is not complying with the regulations, a requirement imposed in exercise of a power conferred

by regulations or a compliance notice (subsection (4)(c)) (this would allow "naming and shaming" in, for instance, persistent or egregious cases).

171. Subsection (5) also allows for the creation of offences, punishable only with a fine, for the provision of false or misleading information or preventing an enforcer from accessing information or other material. These are designed to reflect broadly sections 144 and 148(2) DPA 2018.

172. For completeness, clause 90(3) allows a decision-maker to revoke or suspend the accreditation of a person to access data on behalf of customers which functions as a sanction in the case of non-compliance where an authorised representative is permitted to access data.

Justification for taking the power

173. The government considers that the kinds of sanctions which regulations may provide for, including powers to provide for both compliance notices and financial penalties, are necessary and appropriate to deal with infringements of, and incentivise compliance with, the regulations. Regulation-making powers under section 238G of the Pensions Act 2004 in relation to pensions dashboards allow regulations, among other things, to provide for the Pensions Regulator to issue compliance notices and impose financial penalties.

174. For the reasons explained in relation to clause 86 (customer data), it is considered necessary for the regulation-making powers under clause 86 and clause 88 to be framed as general powers which are applicable in a variety of contexts: it follows that the enforcement powers in this clause may be exercised in contrasting contexts. Accordingly, if sanctions are to be effective, it may be problematic for this clause and clause 94 to specify, or limit, the amount of the financial penalties that may be imposed. However, both the investigatory powers (see clauses 92 and 93) and the power to impose financial penalties (clause 94) are subject to statutory safeguards including the requirements that any financial penalties must include the procedural safeguards in clause 94(3) such as mandatory rights of appeal to a court or tribunal.

Justification for the procedure

175. All regulations containing enforcement provisions must be subject to the affirmative resolution procedure (clause 103(7)(d)), which mirrors section 91(3)(b) of ERRA, and consultation (clause 103(9)).

Clause 95(1): Power to allow charging of fees in smart data schemes

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

176. This clause allows for regulations to provide that data holders, decision-makers, interface bodies, enforcers and other persons on whom duties are imposed or functions conferred by the regulations may require other persons to pay fees for the purpose of meeting expenses incurred (or to be incurred) by virtue of the regulations (subsections (1) and (2)).

177. Subsection (3)(b) provides that a fee can exceed the costs in respect of which it is charged: this is intended to ensure the efficacy and workability of the charging system, to allow the regulations to set fees by reference to "standard" amounts, or likely standard amounts, of costs rather than against the specific cost incurred in each particular case.

178. The amount of fees, or maximum amounts, must be specified in or determined in accordance with the regulations in the interests of certainty (subsection (4)). The regulations may allow for increases (subsection (5)) (that might be used, for example, to cater for inflation, or to set a fee cap). Where a person has a discretion to determine the amount of a fee, that person must be required to publish information about the determination of that amount (subsection (6)). Please note that separate provision is made in respect of the FCA and interface bodies linked to the financial services sector: Treasury may delegate the ability to set the amount of fees, or maximum amounts, to the FCA (please see further explanation in respect of clause 98(1) below).

Justification for taking the power

179. The principal objective of this clause, together with clause 96 (levy), is to ensure that smart data schemes are "self-funding" and revenue-neutral to the exchequer with enforcers and decision-makers able to recover the cost of the performance of their functions, which cannot be achieved by the ERRA powers.

180. The clause also allows for provision for the charging of fees by data holders: while it is intended that the provision of data should be free to customers and their representatives, this clause would allow regulations to provide for charges for instance in the case of excessive and burdensome requests for data and is a reasonable safeguard in these cases.

Justification for the procedure

181. All regulations under this clause are subject to the affirmative resolution procedure and public consultation (clause 103(7)(d) and (9)). It is considered that Parliament must have the opportunity to debate any regulations made under this clause bearing in mind the range of persons the clause might allow to impose, or require to pay, fees, the financial burden on those required to pay and the nature of the provisions that may be made under the clause.

Clause 96(1): Power to impose a levy on suppliers of goods or services to which a smart data scheme applies

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

182. This clause allows regulations to impose, or provide for a specified public authority to impose, a levy on data holders, authorised persons (clause 86(1)(b)) and third party recipients (clause 88(2)), for the purposes of meeting expenses incurred by decision-makers, interface bodies, enforcers and public authorities to which clause 88(4) applies (subsection (1)(a)). Subsection (1)(b) allows the regulations to specify how funds raised may or must be used (this might allow an authority collecting the levy to retain some or all funds or require it to provide funds to another body).

183. If the regulations provide for a specified public authority to impose the levy, the regulations must provide how the rate of the levy and the period in which it is payable are to be determined (subsection (4)).

Justification for taking the power

184. The objective of this clause, together with clause 95 (fees), is to ensure that smart data schemes are "self-funding" and revenue-neutral to the exchequer which could not be achieved by the ERRA powers.

Justification for the procedure

185. All regulations under this clause are subject to the affirmative resolution procedure and public consultation (clause 103(7)(d) and (9)), so that Parliament will have the opportunity to debate provisions for the levying of monies in the exercise of the powers of this clause.

Clause 98(1) and (5) - The FCA and financial services interfaces

Power conferred on: Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

186. Clause 98(1) gives Treasury the ability to enable or require the FCA to oversee financial services smart data schemes. The Treasury may empower the FCA to make rules applying to, or to impose requirements on:

a. interface bodies linked to the financial services sector (clause 98(3)(a));
b. financial services providers (that are data holders, authorised persons or third party recipients) required to set up the interface body (clause 98(3)(b)); and
c. any other persons using such interface bodies (98(3)(c)).

187. Treasury may empower the FCA to make rules requiring financial service providers required to provide data (or other persons wishing to receive receiving data) to use specified means of doing so (i.e. a certain interface, certain interface standards when creating their own interface, or certain interface arrangements such as guidance issued by the interface body (clauses 98(1)(a) and (b)). It may also make rules applying to the persons listed in the paragraph above relating to the composition, governance or activities of an interface body, and relating to the interface, interface standards or interface arrangements themselves or to their use (clause 98(1)(c) and (4)) (together, "FCA interface rules").

188. Clause 98(5) allows the Treasury to empower the FCA to impose requirements on persons to whom FCA interface rules apply, either in response to a failure or likely failure by such person to comply with an FCA interface rule, or to advance a purpose.

189. In any regulation made under clause 98(1) or (5) the Treasury may require or enable the FCA to make rules requiring a person required to set up an interface body linked to the financial services sector or a person using such an interface body to pay fees to that interface body (clause 99(6)). Where so empowered, the FCA must specify in the rules the amount of fees, or maximum amounts in the interests of certainty (clause 99(7)(b).

190. Clause 99 places a number of limitations and safeguards on the clauses 98(1) and (5) powers:

a. The FCA cannot be empowered to require financial service providers to set up an interface body; that power may be exercised by Treasury only (clause 99(2);
b. Treasury must set the FCA's purposes and matters to which it must have regard in exercising its powers (clauses 99(3)(a) and (b));
c. Treasury must make provision about the procedure for the FCA's rules setting, including requiring consultation (clause 99(3)(c));

d. Treasury may impose other requirements, such as requiring the FCA to carry out a cost benefit analysis of their proposed rules, requiring the FCA to make clear the effect of rules or requiring the FCA to produce guidance as to how it proposes to exercise its functions (clause 99(4)); and
e. Restrictions on the provision of information in section 93 apply to the exercise of these powers.

Justification for taking the power

191. These powers reflect the central role of the FCA in financial services regulation in the UK. FSMA 2000 is the foundational piece of financial services legislation, and it delegates the setting and enforcement of regulatory standards to the independent financial services regulators, including the FCA, that work within an overall policy framework and "regulatory perimeter" set by Parliament. This model was further strengthened by the Financial Services and Markets Act 2023. The FCA already regulates the conduct of all open banking scheme data holders.

192. It is consistent with the FSMA model that the Treasury is able to empower the FCA to oversee the open banking smart data scheme, and any future scheme in the financial services sector. Treasury will place appropriate limitations and safeguards on the FCA's powers, as required by clause 99.

193. There is an existing open banking scheme in the UK arising from a Competition and Markets Authority ("CMA") investigation into the retail banking market. It is the government's intention to transition the oversight of this scheme from the CMA to the FCA, in order to put the scheme on a longer-term regulatory footing. Therefore, the CMA has already established a clear model for regulator oversight of the open banking interface body.

194. This delegation of oversight applies to the FCA only, and in respect of data schemes in the financial services sector only. For all other sectors, regulations will establish the appropriate oversight framework for interface bodies.

Justification for the procedure

195. All regulations under this clause 98(1) are subject to the affirmative resolution procedure and public consultation (clause 103(7)(d) and (9)), so that Parliament will have the opportunity to debate provisions granting FCA oversight in the exercise of the powers of this clause.

Clause 100 – The FCA and financial services interfaces: penalties and levies

Power conferred on: Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

196. Clauses 100(1) to (3) make clear that Treasury, when exercising its powers under clause 92 to provide for the FCA to enforce requirements under FCA interface rules, may allow the FCA to either set the amount or maximum amount of a penalty, or to set the method for determining such an amount. This is subject to the safeguards that Treasury must or may impose under clause 100(3), including that the FCA publish a statement of its policy with respect to the amount of the penalties.

197. Clause 100(4) allows Treasury to impose, or provide for a specified public authority (for instance the FCA) to impose, a levy on scheme participants to meet the FCA's expenses.

A levy may only be imposed on persons that appear to the Treasury to be capable of being directly affected by the FCA's actions (clause 100(5)), and the power is subject to the same safeguards as described for clause 96(1) above.

Justification for taking the power

198. Clauses 100(1) to (3) are consistent with the FSMA model described for clause 99 above; in the FSMA model, the FCA has the discretion to determine the amount of the penalty, subject to it setting out its policy for such determination.

199. Clause 100(4) ensures that the FCA's expenses are met by the scheme participants to whom the regulation applies; this ensures that financial services smart data schemes revenue-neutral to the exchequer.

Justification for the procedure

200. All regulations under this clause 100 are subject to the affirmative resolution procedure and public consultation (clause 103(7)(d) and (9)), so that Parliament will have the opportunity to debate provisions granting FCA oversight in the exercise of the powers of this clause.

Clause 101 – Liability in damages

Power conferred on: Secretary of State and Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

201. Clause 101(1) allows the Secretary of State or the Treasury to provide that a public authority given functions under Part 3 is not liable in damages for anything done or omitted to be done in the exercise of those functions.

Justification for taking the power

202. Immunity from liability for damages is necessary in order to ensure that the relevant public authority can carry out its functions effectively. The immunity is not total: a public authority would still be liable where an action or omission was in bad faith, or where incompatible with a right under the Human Rights Act 1998.

203. The FCA has immunity from liability for damages under FSMA, which prevents the FCA from the need to defend vexatious claims that are a significant resource burden. We consider that it is appropriate for all public authorities carrying out functions under Part 3 to have similar protection.

204. Regulations made under Part 3 will give affected parties alternative means of recourse: for instance, in respect of public authorities appointed as enforcers, clause 92(8) allows the Secretary of State or the Treasury to require enforcers to implement procedures for the handling of complaints.

Justification for the procedure

205. All regulations under this clause 101 are subject to the affirmative resolution procedure and public consultation (clause 103(7)(d) and (9)), so that Parliament will have the opportunity to debate provisions granting immunity from liability in damages in the exercise of the powers of this clause.

Clause 109(3): Power to provide exceptions to the consent requirements for cookies and similar technologies

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

206. Current regulation 6 of Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "PEC Regulations") sets out rules on the confidentiality of communications in "terminal equipment" such as computers, mobile phones, wearable technology, smart TVs and connected devices, including the Internet of Things. Regulation 6(1) prohibits the storing of information or gaining access to information stored in the terminal equipment of an individual (e.g. via the placement of cookies or similar technologies), unless the individual is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and the individual has given consent.

207. The government wishes to reduce the friction caused by numerous cookie consent pop ups, banners etc that are used on websites and apps to request user consent to cookies and similar technologies. The Bill will therefore introduce some limited exceptions to the requirements that user consent must be obtained for the use of cookies and similar technologies. The exceptions being introduced are considered to present a low risk to people's privacy. For example, clause 109(2), new paragraph 2A of regulation 6 introduces an exception that permits the storage of information, or access to information, for the purpose of collecting statistical information about how an organisation's information society service is used or provided, with a view to making improvements to that service. For example, statistical information showing how many people are accessing a service, what they are clicking on and for how long they are staying on a particular web page. Paragraph (2A)(c) provides a safeguard that prevents onward sharing of information except where the sharing is for the purpose of making improvements to the service or website concerned. The exception applies only where the user is provided with clear and comprehensive information about the purpose and is given a simple and free means of objecting to the storage or access. The other exceptions are set out in clause 109(2), new paragraphs (2B), (2C) and (2D) of regulation 6.

208. Regulation 6A will introduce a power for the Secretary of State to amend the PEC Regulations by adding new exceptions to the cookie consent requirements. The power would also allow the Secretary of State to omit or vary any existing exceptions to the consent requirements as well as make consequential, supplementary, incidental, transitional, transitory or saving provisions which are necessary to give effect to exceptions made by regulations made under these provisions.

Justification for taking the power

209. The government believes a new power is necessary as this is an area where technological advancements are constantly evolving and it is crucial to have a power safeguard and/or to amend regulation 6 to keep pace with the development. The power will

ensure that the government is able to make changes to the exceptions to regulation 6(1) in the light of experience of how the exceptions operate in practice.

Justification for the procedure

210. These regulations will be subject to the affirmative procedure and include a duty to consult. This is considered appropriate given the exercise of the power could alter the scope of the exceptions to the consent requirement and what safeguards are in place to protect individuals' privacy rights.

Clause 109(3): Power to set requirements on suppliers and providers of information technology to enable users of technology to automatically consent or object to cookies and other similar technology when visiting websites

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

211. As outlined above, the Bill removes the need for consent to some forms of cookies and similar technologies that have a low impact on privacy. These changes mean that consumers can direct more of their time and attention to making important decisions about the use of cookies and other similar technology that may have a material effect on their privacy.

212. The government considers that the overall impact of the changes described above could be enhanced if users could express their privacy preferences through software (including browsers) and device settings. This would potentially remove the need for consent pop-up notices on each website or service, allowing individuals to express their privacy preferences on a single occasion and to have control over how these preferences are applied. The power would also allow the Secretary of State to make consequential, supplementary, incidental, transitional, transitory or saving provisions which are necessary to give effect to the requirements made by regulations made under these provisions.

Justification for taking the power

213. At present, the technological options for expressing consent preferences in this way are limited and further work needs to be done with technology providers to increase the range of options available. The government considered including the detailed requirements for these online consent management tools on the face of the Bill. However, primary legislation is not the best place to set out detailed technical specifications, when technology is continuously evolving in this area.

214. It has therefore been decided to introduce a power for the Secretary of State to make regulations providing that a person, for example browser or device suppliers, may not supply Information technology (IT) unless the IT meets requirements specified in the regulations.

Justification for the procedure

215. These regulations will be subject to the affirmative procedure and a consultation requirement. This is considered appropriate given the exercise of the power the first time would commence the principle requiring those subject to Regulation 6 of the PEC Regulations to respect consent/non-consent preferences expressed automatically through software or device settings. The power could also be used to alter the technologies that are recognised for the purposes of providing these automated signals.

Clause 114(1): Power to exclude use of electronic communication for the purposes of democratic engagement from direct marketing provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

216. Under the current PEC Regulations political parties cannot email/text prospective voters without prior consent or make phone calls to people who are registered with the telephone preference service or have previously asked not to be contacted. The government is of the view that this limits democratic engagement.

217. The government considers that democratic engagement is sufficiently important to dispense with the current PEC Regulations where political communication promotes aims/ideals for the purposes of democratic engagement.

218. Clause 114(1) confers powers on the Secretary of State to provide an exception from the direct marketing provision where “communications activity” is carried out solely for the purposes of democratic engagement by certain persons or organisations defined in the clause. The power would also allow the Secretary of State to make consequential, supplementary, incidental, transitional, transitory or saving provisions which are necessary to give effect to the exceptions made by regulations made under these provisions.

Justification for taking the power

219. The government recognises the importance of democratic engagement in a democracy and considers this power will help to facilitate democratic engagement. A number of safeguards have been inserted. The power would only apply in relation to communications sent by certain persons or organisations defined in the clause, for example, elected representatives, candidates seeking to become elected; registered political parties; or ‘permitted participants’ in connection with referendums as defined by relevant UK electoral legislation. The communications activity cannot be directed to individuals under the age of 14.

Justification for the procedure

220. These regulations will be subject to parliamentary scrutiny under the affirmative procedure. There is also a consultation requirement attached to it. Before making the regulations the Secretary of State is also required to consider the effect the regulations may have on the privacy of individuals mindful that many people who responded to the consultation wanted electronic communications sent by political parties for the purposes of democratic engagement to be covered by the direct marketing rules in the PEC Regulations which would have required consent before engagement.

Clause 116(2): Power to amend fixed monetary penalty

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

221. This clause adds a new regulation 26A to the PEC Regulations, which introduces a new duty on a provider of a public electronic communication service or network to notify the Commissioner of any reasonable grounds the provider has for suspecting that a person is contravening or has contravened any of the direct marketing regulations in the course of using the service. The aim is to enable the Information Commission to better target its enforcement activity against nuisance marketing communications. The obligation to report is accompanied by a fixed penalty of £1,000 for failure to comply with any aspect of the reporting requirement (new regulation 26B).

222. The Bill will include a power for the Secretary of State to amend the amount of the fixed penalty. The power would also allow the Secretary of State to make transitional provisions which are necessary to give effect to the new fixed penalty amount made by regulations made under these provisions.

Justification for taking the power

223. The government considers this power necessary to ensure that the amount of the fixed penalty remains appropriate and dissuasive.

Justification for the procedure

224. These regulations will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power would amend the monetary value of the fixed penalty for failure to comply.

Clause 117(4): Power to amend fixed penalty amount

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

225. The PEC Regulations include rules on reporting breaches of personal data to the Information Commissioner for organisations providing electronic communications services to the public (e.g. telecoms providers and internet service providers). These rules are supplemented by provisions in the retained version of the Commission Regulation (EU) No 611/2013 on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC of the European Parliament and of the Council on privacy and electronic communications ("Regulation 611/2013").

226. Under regulation 5A of the PEC Regulations and Article 2 of Regulation 611/2013 if a data breach occurs the "service provider" (a provider of a public electronic communications service) must notify the Information Commissioner no later than 24 hours of becoming aware of the breach, and also the user concerned if the breach is likely to adversely affect their privacy without undue delay. Failure to do so incurs a fixed penalty of £1000 under regulation 5C of the PEC Regulations.

227. Clause 112 amends regulation 5A and Article 2 so that breaches need to be reported without undue delay and, where feasible, no later than 72 hours after having become aware of the breach.

228. Similar requirements exist under articles 33 and 34 UK GDPR. Under article 33, a controller must communicate a personal data breach to the Information Commissioner within 72 hours unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons. Under article 34 the controller must communicate the breach to the data subject if there is a high risk to the rights and freedoms of natural persons without undue delay. Infringement of these obligations is subject to a penalty of the standard maximum level, which could be up to 2% of global annual turnover or £8.7 million (whichever is higher).

229. It has been decided to include a power in the PEC Regulations for the Secretary of State to change the fixed penalty amount set in regulation 5C of the PEC Regulations. The power would also allow the Secretary of State to make transitional provisions which are necessary to give effect to the new fixed penalty amount made by regulations made under these provisions.

Justification for taking the power

230. The Bill will ensure that the enforcement regimes and penalty levels of the PEC Regulations with other data protection legislation create a more cohesive framework, including introducing the two-tier system of fines found in DPA 2018 and UK GDPR. The fixed penalty amount under regulation 5C of the PEC Regulations is a remaining notable disparity between the PEC Regulations and similar infringements under the UK GDPR.

231. However, the reporting requirements under the PEC Regulations and UK GDPR whilst similar are not identical. Articles 33 and 34 UK GDPR have a wider scope relating to controllers/processors, whilst the PEC Regulations relate to public electronic communication service providers (which is mainly telecommunications and internet providers). Therefore, it is not necessary to bring the PEC Regulations' penalty in line with UK GDPR right now as

the government is satisfied that the £1000 fixed penalty is presently sufficient due to the Information Commissioner's effective relationship with the telecommunications sector. This current effectiveness may change in the future as technology and practices evolve and therefore the capability is needed to ensure the fixed penalty amount remains proportionate and dissuasive.

232. Further, as set out above the Bill will introduce a new duty in the PEC Regulations for service providers to report suspicious levels of activity. Infringement of this duty will incur a £1000 fixed penalty, with a power for the Secretary of State to amend this amount. Thus a power to amend the penalty amount under regulation 5C is required to maintain consistency within the PEC Regulations regime.

Justification for the procedure

233. Given the potentially significant increase in monetary penalties, parliamentary scrutiny under the affirmative procedure is considered appropriate. This will also cohere to the approach taken in the power for amending the fixed penalty for failure to report suspicious traffic, as set out above.

Clause 122(1): Power to remove the current recognition of trust services and trust service products which are qualified under equivalent EU law

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

234. This clause will allow for the amendment and revocation of article 24A of *Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market* as amended upon EU exit by S.I. 2019/89 ("the UK eIDAS Regulation").

235. Under the UK eIDAS Regulation, trust service products provided by a *qualified* trust service provider established in the UK ("UK qualified trust service products") (including qualified electronic signatures, seals, timestamps, and registered delivery services) benefit from a presumption of legal integrity (for example Article 25(2) prescribes that a *qualified* electronic signature has the equivalent legal effect of a handwritten signature).

236. Article 24A of the eIDAS Regulation currently allows for elements of trust services (including trust service products) which are qualified under equivalent EU law, to be treated as *qualified* for the purposes of the UK eIDAS Regulation. This legal recognition under UK law is unilateral. Although trust service standards under EU law and UK law currently remain aligned post EU exit, trust services and products which are qualified for the purposes of the UK eIDAS Regulation only (i.e. provided by a qualified trust service provider established in the UK) are not legally recognised under equivalent EU law.

237. Article 24A requires that the UK continues to recognise EU qualified trust services and products on a unilateral basis, even if current aligned EU standards change and continuing to recognise new EU standards is not in the UK's national interests. In future the UK may wish to end the current recognition of EU qualified trust services, either because the EU changes its current trust service standards, and/or the UK qualified trust service market matures to an extent that it is no longer appropriate to unilaterally recognise EU qualified trust services.

Justification for taking the power

238. This clause allows for revocation of Article 24A at the point in future, once it is no longer appropriate from a policy perspective to recognise EU qualified trust services and products.

239. This power will also allow for amendment of Article 24A in order to wind down the current recognition of EU qualified trust services on a staggered basis (this might be necessary depending on potential future changes to EU trust service standards, and the comparative maturity of the UK qualified trust service market in future). For example, if standards for EU qualified signature and seal creation device do not change, whereas other EU trust service standards do, and such devices are still heavily relied upon by UK qualified trust service providers, this power could be exercised to amend Article 24A in order to only allow for the continued recognition of electronic signature and seal creation devices, which are qualified under EU law.

240. A staggered winding down of Article 24A is not possible to achieve, otherwise than through delegated legislation, whilst the final details of the right staggered approach (if necessary) are currently unknown and subject to future changes in EU trust service standards.

241. As well as the revocation and amendment of Article 24A, at the same time as ending the recognition of EU qualified trust services and products, this power will also allow for the revocation (and amendment) of other articles of the UK eIDAS Regulation and associated Implementing Decision (EU) 2015/1506 (which from a policy perspective are contingent upon recognising EU qualified trust services and products). This includes (amongst others) the power to revoke the recognition of EU conformity assessment bodies under new Article 24B, and the power to remove references to a "trust service provider established in the EU".

Justification for the procedure

242. It is appropriate that this power is subject to negative rather than affirmative procedure. This is on the basis that the power is not capable of altering the original policy underlying the UK eIDAS Regulation (standards and regulatory requirements for trust services within the UK) but instead is primarily limited to revoking provisions and removing related references, which were only necessary to insert within the UK eIDAS Regulation upon EU exit to ensure that the qualified trust service market within the UK could continue to operate.

243. So far as the power goes beyond the revocation of provisions and removal of references, in allowing for the amendment of Article 24A, this is to wind down the provision only, and is not capable of altering the fundamental policy behind Article 24A (recognition of

EU trust services). Nor does the power to amend Article 24A allow for a widening of the scope of the provision, as there is no power to add an assumption to Article 24A(2) in order to recognise any element of EU qualified trust services which is not recognised currently.

Clause 123(2): Power to specify that certain overseas trust service products shall be treated as equivalent to qualified trust service products under the UK eIDAS Regulation (New Article 45A(1) of the UK eIDAS Regulation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

244. This clause will insert new Article 45A into the UK eIDAS Regulation, in order to allow the Secretary of State by regulations to specify that certain trust service products (electronic signatures, seals, time stamps and registered delivery services) provided by a trust service provider established in a country or territory outside the UK, shall benefit from the same legal presumption of integrity and accuracy of data, which respective UK qualified trust service products benefit from under the UK eIDAS Regulation.

245. The purpose behind new Article 45A is to allow for the international interoperability of trust service products (in terms of their legal effect). In particular, by allowing the UK to make required changes to domestic law where UK qualified trust service products currently have a specified legal effect, in order to extend that effect to specified overseas trust service products. This will allow for international mutual recognition agreements, where it is agreed on a mutual basis that UK trust service products and their overseas equivalents shall have an equal legal effect.

Justification for taking the power

246. At this stage, recognising specified overseas trust service products on the face of the Bill would be premature. This is given that there are not yet any mutual recognition agreements in place with other countries allowing for the interoperability of trust service products.

247. A delegated power is therefore necessary in order to achieve recognition of specified overseas trust service products, at a point in future once it is appropriate to do so, either in order to give effect to a mutual recognition agreement concerning the interoperability of trust service products, or as part of wider trade negotiations, where the UK wishes to allow for the interoperability of trust service products.

248. Under new Article 45A(3) the Secretary of State may not make regulations specifying that a certain overseas trust service product shall be treated as legally equivalent to a comparable UK qualified trust service product, unless satisfied that the reliability of an overseas trust service product is at least equivalent to the reliability of the comparable UK qualified trust service product.

249. Recognising specified overseas trust service products through a delegated assessment of equivalent reliability, provides the scope to respond to future technological advances or changes to standards, which mean that further and new elements of overseas trust service frameworks will be relevant to consider in ensuring equivalent reliability of end trust service products.

250. The alternative approach of allowing for the recognition of certain overseas trust service products on the basis that rigid standards set within primary legislation are met (likely modelled around the UK's current trust service framework) would be at risk of redundancy, where overseas trust service frameworks advance over time, or differ from the UK's framework.

Justification for the procedure

251. This power is subject to negative procedure and a requirement under new Article 45C(1) for the Secretary of State to consult the UK's supervisory body for trust services (currently the Information Commissioner) before making regulations. Additional parliamentary scrutiny under the affirmative procedure, is not considered to be necessary for the reasons outlined below.

252. The exercise of this delegated power is subject to appropriate safeguards, including the requirement under Article 45A(3) that the Secretary of State must be satisfied that specified overseas trust service products are at least equivalent to the reliability of their counterparts under the UK eIDAS Regulation. There is also an additional constraint on the exercise of this power under Article 45A(4), that when making regulations the Secretary of State must have regard to (among other things) the relevant overseas law concerning the type of trust service product to be recognised.

253. Regulations made under Article 45A are then able to include conditions upon which the legal recognition of specified overseas trust service products is contingent, including conditions as to meeting specific requirements within overseas law, or meeting specific technical or regulatory standards.

254. The assessment of whether certain overseas trust service products are at least equivalent in terms of their reliability to comparable UK qualified trust service products will be technical and will require expertise of the UK qualified trust service industry. Through the consultation requirement under Article 45C(1), the Information Commissioner as the supervisory body for trust services with its technical and industry expertise, will therefore be best placed in order to assist with, and scrutinise, the Secretary of State's assessment as to whether overseas trust service products should be recognised.

255. Detailed and technical assessment of the factors as to whether an overseas trust service product offers equivalent reliability, would also form part of the negotiation process for agreeing any mutual recognition agreement giving rise to the need to exercise this delegated power.

Clause 123(2): Power to specify that certain overseas electronic signatures and seals shall be treated as equivalent for the use of online public services, to their counterparts under Articles 27(1) and (2), and 37(1) and (2) of the UK eIDAS Regulation (new Article 45B(1) and 45B(2) of the UK eIDAS Regulation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

256. Existing Articles 27(1) and 37(1) of the UK eIDAS Regulation (provide respectively for electronic signatures and seals) that public sector bodies must recognise electronic signatures and seals which meet advanced standards, and additional technical standards under Implementing Decision 2015/1506 (assimilated law), where those public sector bodies require an advanced signature or seal for the use of an online public service.

257. Existing Articles 27(2) and 37(2) prescribe the same, but in respect of a requirement to accept, advanced electronic signatures and seals based on a qualified certificate (or qualified signatures and seals) which meet additional technical standards within Implementing Decision 2015/1506, where those public sector bodies require an advanced signature or seal based on a qualified certificate for the use of an online public service.

258. This clause will insert new Article 45B(1) into the UK eIDAS Regulation, in order to allow the Secretary of State by regulations to specify that certain electronic signatures provided by overseas trust service providers shall be treated for the purposes of Articles 27(1) or 27(2) respectively, as equivalent to advanced signatures which comply with Implementing Decision 2015/1506, or as equivalent to, advanced signatures based on qualified certificates (or qualifying signatures) which comply with Implementing Decision 2015/1506.

259. This clause will also insert new Article 45B(2) into the UK eIDAS Regulation, in order to allow the Secretary of State by regulations to specify that certain electronic seals provided by overseas trust service providers shall be treated for the purposes of Article 37(1) or 37(2) respectively, as equivalent to advanced seals with comply with Implementing Decision 2015/1506, or as equivalent to, advanced seals based on a qualified certificate (or qualifying seals) which comply with Implementing Decision 2015/1506.

260. The purpose behind new Article 45B(1) and (2) (as with Article 45A) is to allow for the international interoperability of trust service products (in terms of their legal effect). In particular, by allowing the UK to make required changes to domestic law so that specified overseas electronic signatures and seals are accepted (on an equal basis to their counterparts under the UK eIDAS Regulation) for the purposes of accessing online public services. This will allow for international mutual recognition agreements, where it is agreed on a mutual basis that UK trust service products, and their overseas equivalents shall have an equal legal effect.

Justification for taking the power

261. At this stage, recognising specified overseas electronic seals and signatures (in the context of use within online public services) on the face of the Bill would be premature. This is given that there are not yet any mutual recognition agreements in place with other countries allowing for the interoperability of trust service products.

262. A delegated power is therefore necessary in order to achieve recognition of specified overseas electronic seals and signatures (in the context of use within online public services) at a point in future once it is appropriate to do so, either in order to give effect to a mutual recognition agreement concerning the interoperability of trust service products, or as part of wider trade negotiations, where the UK wishes to allow for the interoperability of trust service products.

263. Under new Article 45B(4) the Secretary of State may not make regulations specifying that certain overseas electronic signatures or seals shall be accepted for the purposes of accessing online public services on an equal basis to their counterparts under the UK eIDAS Regulation, unless satisfied that the reliability of certain overseas electronic signatures or seals is at least equivalent to the reliability of their respective counterparts under Article 27(1), 27(2), 37(1), or 37(2) of the UK eIDAS Regulation.

264. Recognising specified overseas electronic signatures and seals through a delegated assessment of equivalent reliability, provides the scope to respond to future technological advances or changes to standards which mean that further and new elements of overseas trust service frameworks will be relevant to consider in ensuring equivalent reliability.

265. The alternative approach of allowing for the recognition of certain overseas electronic signatures and seals on the basis that rigid standards set within primary legislation are met (likely modelled around the UK's current trust service framework) would be at risk of redundancy, where overseas trust service frameworks advance over time, or differ from the UK's framework.

Justification for the procedure

266. This power is subject to negative procedure and a requirement under new Article 45C(1) for the Secretary of State to consult the UK's supervisory body for trust services (currently the Information Commissioner) before making regulations. Additional parliamentary scrutiny under the affirmative procedure, is not considered to be necessary for the reasons outlined below.

267. The exercise of this delegated power is subject to appropriate safeguards, including the requirement under Article 45B(4) that the Secretary of State must be satisfied that specified overseas electronic signatures and seals are at least equivalent to the reliability of their counterparts under the UK eIDAS Regulation. There is also an additional constraint on the exercise of this power under Article 45B(5), that when making regulations, the Secretary of State must have regard to (among other things) the relevant overseas law concerning the type of electronic signature or seal to be recognised.

268. Regulations made under Article 45B are then able to include conditions upon which the legal recognition of specified overseas signatures or seals is contingent, including conditions as to meeting specific requirements within overseas law, or meeting specific technical or regulatory standards.

269. The assessment of whether certain overseas signatures and seals are at least equivalent in terms of their reliability to their counterparts under the UK eIDAS Regulation will be technical and will require expertise of the UK trust service industry. Through the

consultation requirement under Article 45C(1), the Information Commissioner as the supervisory body for trust services with its technical and industry expertise, will therefore be best placed in order to assist with, and scrutinise, the Secretary of State's assessment as to whether certain overseas electronics signatures or seals should be recognised.

270. Detailed and technical assessment of the factors feeding into whether a type of overseas electronic signature or seal offers equivalent reliability, would also form part of the negotiation process for agreeing any mutual recognition agreement giving rise to the need to exercise this delegated power.

Clause 124(3) & (5): Power to designate overseas authorities with which the Information Commissioner can share information, give assistance, or otherwise cooperate with

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

271. Existing Article 24A of the UK eIDAS Regulation allows for the unilateral legal recognition within domestic law of trust service products which are qualified under equivalent EU law. Linked to this recognition, existing Article 18(1) of the UK eIDAS Regulation allows the Information Commissioner as the UK's supervisory body for trust services to give information and assistance to, and otherwise cooperate with a public authority in the EU, if the Information Commissioner considers that to do so would be in the interests of effective regulation or supervision of trust services.

272. Once the current unilateral recognition of trust service products which are qualified under equivalent EU law ends (through exercise of the delegated power under clause 89) it will no longer be necessary for the Information Commissioner to give information and assistance to, and otherwise cooperate with a public authority in the EU specifically.

273. Instead, once specified overseas trust service products are given a legal effect within domestic law, in the interests of effective regulation and supervision of trust services, it will be helpful for the Information Commissioner to retain the power to give information and assistance to or otherwise cooperate with another supervisory or regulatory body for trust services, but in respect of overseas supervisory and regulatory bodies more widely.

274. Accordingly, this clause amends Article 18(1) of the UK eIDAS Regulation, to include a power for the Information Commissioner to share information with, give assistance to, or otherwise cooperate with a *designated* overseas authority, instead of a public authority in the EU. Article 18(3) then contains a power for the Secretary of State by regulations to designate certain overseas regulatory or supervisory bodies for trust services, for the purposes of Article 18(1).

Justification for taking the power

275. At this stage, recognising certain overseas regulatory or supervisory bodies for trust services with which the Information Commissioner may give information and assistance to, or otherwise cooperate with, would be premature. This is given that overseas trust service products are not yet recognised through either mutual recognition agreements with other countries or within domestic law, and so information sharing and cooperation between the Information Commissioner and overseas supervisory and regulatory bodies, is not yet required.

276. A delegated power can be exercised on multiple occasions, where necessary, each time a mutual recognition agreement is entered into with another country and specified overseas trust service products are subsequently recognised within domestic law through the exercise of the separate new regulation-making powers under Articles 45A and 45B. In contrast to the alternative of recognising relevant overseas regulatory or supervisory bodies in future within primary legislation, a delegated power will allow for information sharing and cooperation between the Information Commissioner and relevant overseas regulatory and supervisory bodies to align with the recognition of specific overseas trust services more widely.

Justification for the procedure

277. This power is subject to negative procedure and a requirement under new Article 18(4) for the Secretary of State to consult the Information Commissioner, as the UK's supervisory body for trust services before making regulations. Additional parliamentary scrutiny under the affirmative procedure, is not considered to be necessary, in part given the scope of the power to designate an *overseas authority* (which is defined as a person, or description of person, with functions relating to the regulation or supervision of trust services outside the UK) is relatively narrow.

278. Once an overseas authority has been designated within regulations, there is also an additional safeguard, in that the Information Commissioner in order to exercise its power under Article 18(1) must consider that giving information and assistance to, or cooperating with a designated overseas authority is in the interests of effective regulation or supervision of trust services. This means that the additional requirement for the Secretary of State to consult with the Information Commissioner before making regulations, should prevent an overseas authority being designated, where the Information Commissioner considers that it would not be able to exercise its power under Article 18(1) in respect of such an authority, in the interests of effective regulation or supervision of trust services.

279. In practice therefore, the exercise of the power to make regulations under Article 18(3) should be limited to the designation of overseas authorities which are responsible for the regulation or supervision of trust service products which are recognised by the UK, as these will be the overseas authorities to which giving information and assistance to and cooperating with, will be in the interests of effective regulation or supervision of trust services.

Clause 125: Power to disclose information to improve public service delivery to undertakings

Power conferred on: The appropriate national authority

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

280. This clause extends section 35 of the Digital Economy Act 2017 to allow information sharing to improve public service delivery to businesses. Currently, information may only be shared between specified public bodies for specific purposes related to public service delivery aimed at improving the well-being of individuals or households.

281. Section 35 of the Digital Economy Act 2017 ('DEA') contains delegated powers to (i) specify data sharing objectives, and (ii) specify public authorities that can share data for a specified objective by amending Schedule 4 to the DEA (a Henry VIII power). These powers are subject to the affirmative procedure and, under section 44(4) DEA, a duty to consult various bodies including the Information Commissioner, the Commissioners for Her Majesty's Revenue and Customs, appropriate national authorities and other persons considered appropriate.

282. The DEA allows the "appropriate national authority" to make regulations to add "specified persons" and "specified objectives". The "appropriate national authority", as defined in sections 44 and 45 of the DEA is the Secretary of State or Minister for the Cabinet Office, Scottish Ministers, Welsh Ministers or The Department of Finance in Northern Ireland.

283. This clause will extend the section 35 public delivery power to include businesses but will not change the robust safeguards in place around the use of section 35 powers.

284. Section 35 is a permissive gateway, which means it is at the discretion of the specified persons whether or not they choose to disclose information under the power.

285. The use of the information sharing power is underpinned by the statutory Code of Practice issued under section 43 of the DEA which contains guidance setting out best practice and the procedures and practices to be followed by specified persons.

Justification for taking the power

286. The specified objectives are set out in secondary legislation rather than primary legislation as the objectives for which information may be disclosed will need to be added to and amended to allow the power to keep pace with emerging social and economic needs, as well as the use of new streams of information to address them.

287. The specified persons are set out in secondary legislation rather than primary legislation as the list needs to be regularly updated to ensure that changing data sharing requirements can be enabled as further use cases emerge. The list may also need to be updated to remove specified persons in accordance with section 35(6)(b) which provides a sanction for non-compliance with the Code of Practice.

288. Given the relative breadth of the power to share information under section 35 it is considered important that there be tightly controlled limits on the delegated power to specify persons, in particular it is recognised that there must be limits around the nature of the bodies

that could be included in these lists. Therefore, there are a number of constraints on this delegated power.

289. To be a specified person the person must be a public authority or a person providing services to a public authority (Schedule 4, paragraph 28). In making regulations under section 35 the appropriate national authority must have regard to the systems and procedures the person has in place to ensure the secure handling of information by that person (section 35 (6)(a)). This is to ensure as far as possible that the integrity of the information shared is maintained.

290. To be a specified objective under section 35(7)-(12), an objective must meet three conditions set out on the face of the legislation. The first is that the objective has as its purpose a) the improvement or targeting of a public service provided to individuals or households, or b) the facilitation of the provision of a benefit (whether or not financial) to individuals or households (section 35 (9)). The second is that the objective has as its purpose the improvement of the well-being of individuals or households (section 35(10)). The third is that the objective has as its purpose the supporting of a) the delivery of a specified person's functions, or b) the administration, monitoring or enforcement of a specified person's functions (section 35(12)). This clause will amend these conditions to include services for businesses, but the essential framework and safeguards remain.

291. When it was introduced, the section 35 delegated powers regime was developed in line with DPRRC's recommendations (13th Report of Session 2016–17, published 19 January 2017 and the government's response in the 18th Report of Session 2016–17 published 23 February 2017). This clause will operate within that same regime.

292. Any data sharing done under section 35 must be carried out in accordance with the requirements of the DPA 2018 and UK GDPR.

Justification for the procedure

293. As this clause provides the appropriate national authority with a delegated power to specify objectives and bodies which bodies may share information under each objective, it is considered appropriate that the use of the power is debated and subject to more intensive scrutiny by Parliament via the affirmative procedure as well as consulting the Information Commissioner, other appropriate national authorities, the Commissioners for Her Majesty's Revenue and Customs and such other persons as the appropriate national authority thinks appropriate.

Clause 126(1): Power to implement international agreements on sharing information for law enforcement purposes

Power conferred on: The appropriate national authority

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

294. The Secretary of State has prerogative powers to enter into international agreements (whether by way of treaties or memoranda of understanding) with third party nations governing the sharing of data for law enforcement ("LE") purposes.

295. It is envisaged that under future agreements LE data will be shared between UK law enforcement agencies, particularly, police forces, the National Crime Agency and Border Force and equivalent organisations in the third countries. The data will likely be shared using a new IT platform.

296. This clause provides the appropriate national authority with the power to make regulations to implement the technical, and, where appropriate operational detail, of any such international agreements.

297. The "appropriate national authority", is defined in clause 127 as, the Secretary of State, Scottish Ministers, and Welsh Ministers, are also appropriate national authorities in relation to regulations under clause 126 which would be within the legislative competence of the Scottish Parliament or Senedd Cymru, respectively. Whilst international relations are a reserved matter, the domestic implementation of such agreements is devolved, and law enforcement is a devolved matter to varying extents in each devolved administration. A concurrent power to make regulations has not been included for Northern Ireland, as presently there is not a functioning Executive, and the Assembly is not sitting. It has been agreed the Secretary of State will make regulations relating to Northern Ireland.

Justification for taking the power

298. UK police forces, the NCA and Border Force already have the ability to share LE data with international partners, using their existing statutory or common law powers.

299. Regulations made under this power will set out the technical details needed to implement an international LE data sharing agreement (e.g., the IT software to be used, the timescales by which data should be provided, etc). Such regulations may also include operational details. Regulations are desirable to provide clarity for frontline officers and international partners.

Justification for the procedure

300. In the circumstances, the negative procedure is appropriate. The technical detail, including IT specification, flowing from the overarching agreements does not require the maximum level of scrutiny of Parliament. The regulations will mostly be for the benefit of frontline officers and the relevant international partners, providing them with clarity and a framework to follow when sharing data. Parliament would likely be neutral about the content of the detailed technical specifications.

301. It would not be a proportionate use of Parliament's time to debate the IT processing or other details flowing from any main agreements.

302. If Parliament were to scrutinise the detail of the implementation SIs, it would not amount to scrutiny of the overarching agreements. In any event, where an overarching agreement is made by way of a treaty, Parliament may scrutinise that treaty pursuant to the Constitutional Reform and Governance Act 2010.

Clause 129(3): Power to describe a kind of regulated service to whom Ofcom must issue an information notice

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

303. This clause amends section 101 of the Online Safety Act 2023 ("OSA") (and other related sections) creating a requirement for Ofcom, when notified of a case by the Coroner (or Procurator Fiscal in Scotland) where they suspect the child may have taken their own life, to issue an information notice requiring retention of certain information relating to a child's use of a regulated service identified under new subsection (E1) by providers of those services. It also gives Ofcom the power, where relevant, to issue such information notices to any other relevant person (as defined in s.101 OSA) requiring retention of information relating to a child's use of a regulated service identified in new subsection (E1)[4].

304. Subsection (3) gives the Secretary of State a power to specify through regulations the kinds of regulated service which are to be caught by this measure (see new s.101(E1)), in addition to any regulated services notified to Ofcom by the Coroner or Procurator Fiscal as having been brought to their attention as being of interest in connection with the child's death.

305. Ofcom will then have to issue an information notice to providers of those services, who will then have to conduct a search for any relevant data held, and make any changes to their processes and systems to ensure that data is not deleted until the information notice expires or is cancelled by Ofcom, following an instruction by the Coroner or Procurator Fiscal. The providers will also be required to respond to the information notice within a specified period by Ofcom to confirm that either no such data is held, or to confirm the steps they have taken to ensure the retention of the data.

306. Failure to comply with the requirements of the information notice may lead to enforcement action, following the processes applicable to information notices issued under s.101(1) of the OSA, and includes a limited number of criminal offences.

Justification for taking the power

307. This clause amends provisions in the OSA, some of which only recently received Royal Assent, and which have not all been commenced yet.

308. Given this is a new regime, there is a need for flexibility in terms of identifying which regulated services ought to be caught by this provision. Specifying the kind of regulated services at this stage and in primary legislation would be premature and may lead to the provision becoming redundant given the rapidly changing landscape of online service providers.

[4] This is intended to capture, for example, information held by ex-providers.

309. Giving the Secretary of State the power to describe the kinds of regulated provider to fall within this provision will provide the opportunity to identify with greater accuracy the kinds of regulated services which need to be caught by the provision, helping to ensure the range of services caught is appropriate and proportionate.

310. In giving the Secretary of State the power to describe the kinds of regulated services caught by this provision, it will be possible to monitor the effectiveness of the provision and amend the kinds of regulated services more quickly should the need arise. This is particularly important given the aim of this provision and the speed with which the online services landscape changes. It would not be feasible to seek primary legislation whenever such a change was required.

Justification for the procedure

311. The regulations are subject to the negative procedure. This is considered appropriate for the reasons below.

312. The requirements and obligations on parties are set out in the clause itself, and this power is limited to naming the kinds of regulated service caught by the provision. The power is limited so that it can only be used to identify kinds of service which fall within the definition of "regulated service" in the OSA, and must be exercised in a proportionate way.

313. Under s.101(1) OSA Ofcom has the power to issue an information notice to any relevant person, and it is left to its discretion as to whom exactly they serve the notices on with no parliamentary scrutiny. With that in mind, it is considered appropriate for the negative procedure to apply when the Secretary of State specifies kinds of regulated service to be caught by this new information notice provision.

314. Further, we note that the negative procedure also applies to the regulation-making powers in Schedule 11 to the OSA, and those regulations have a much more widespread and significant impact on regulated services (although we note there are additional requirements which must be met prior to making the regulations in those cases given the complexity and significance of the impact of those regulations).

315. With the above in mind, the negative procedure is considered appropriate.

Clause 132(3): Retention of biometric data from INTERPOL

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: affirmative

Context and purpose

316. Clause 132 inserts a new section into the Counter-Terrorism Act 2008 ("CTA 2008")). New section 18AA sets out updated retention rules for biometric data that has been received by a UK law enforcement authority from INTERPOL. The NCA, in its capacity as the UK's

National Central Bureau ("NCB"), receives daily notifications from INTERPOL of all new, updated and cancelled requests for co-operation or notification of potential threats, that have been sent to the UK by INTERPOL members through the INTERPOL systems.

317. Such requests etc. are often accompanied by fingerprint data (and could potentially be accompanied by a DNA profile). The information provided with such requests, including the biometric data, is of great assistance to law enforcement authorities, in particular Counter-Terrorism Police, in combatting national security-related threats to the UK.

318. A law enforcement authority processing such biometric data is required to comply with the retention provisions set out in sections 18 to 18E CTA 2008. However, those provisions are not aligned with the data retention rules under which INTERPOL operates. As a result, in some cases a law enforcement authority may be required to destroy biometric data that relates to an ongoing request or notification.

319. New section 18AA provides that a law enforcement authority may retain biometric data received from INTERPOL until the authority has been informed that the request or notification has been cancelled or withdrawn.

320. Clause 132 also inserts new section 18AB into CTA 2008. Section 18AB provides a delegated power for the Secretary of State to amend new section 18AA by way of regulations to recognise any changes that are made in the future to the current INTERPOL arrangements. Amendments can be made to reflect changes to INTERPOL's name, changes to the arrangements under which biometric material is shared with INTERPOL members, and changes to liaison arrangements between INTERPOL and its members or between two members.

Justification for the power

321. The purpose of making this amendment, and inserting new section 18AA into CTA 2008, is to ensure that the UK domestic biometric data retention provisions are aligned with the relevant provisions of INTERPOL biometric data retention regime. The current differences between the two regimes mean that UK law enforcement authorities are, in some cases, required to destroy valuable biometric data that relates to outstanding requests, and that can be retained under the INTERPOL regime.

322. New section 18AA is framed in accordance with the existing arrangements under which biometric data is shared. It is possible that INTERPOL may make changes in the future that could render that section unworkable, and lead to a new divergence between the two regimes. For example, new section 18AA(2) to (4) make reference to the NCB, as under the current arrangements the UK is required to designate an organisation as its NCB to receive requests etc. However, if in the future INTERPOL was to make alternative arrangements that resulted in requests etc. being sent to the UK via alternative means, new section 18AA is unlikely to operate in the way intended by Parliament.

323. The power will enable new section 18AA to be updated to reflect changes to INTERPOL arrangements, and thereby achieve Parliament's intention of aligning the two regimes.

324. It would be possible to make any required amendments to new section 18AA through primary legislation. However, this might result in a period during which that section did not operate as intended by Parliament; which could lead to the loss of biometric data that is of potential value to national security.

Justification for the procedure

325. As the regulations permit amendments to be made to primary legislation, the affirmative procedure is considered to be appropriate.

Clause 135(2): Power to set out requirements in relation to signing a birth or death register

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

326. This clause inserts a new section 38B into the Births and Deaths Registration Act 1953 (BDRA), enabling the Secretary of State to make regulations in relation to the requirement to sign a birth or death register where the register is required to be kept otherwise than in hard copy form. The regulations may provide that a person's duty under the BDRA to sign the birth or death register is to have effect as a duty to comply with alternative, specified requirements, and a person who complies with those requirements is to be treated as having signed the register and to have done so in the presence of the registrar. Under new section 38B(2) of the BDRA, the regulations may (among other things) require a person to sign something other than the birth or death register and/or provide evidence of identity.

Justification for taking the power

327. The main purpose of the "registers of births and deaths" clauses is to remove the requirement for births and deaths registers to be held in hard copy form, thus enabling the introduction of an electronic register. A number of provisions in the BDRA require an informant to sign the register in the presence of the registrar when registering a birth or a death. The power conferred by this clause would enable alternative requirements to be set, so that the informant does not need to sign the register in the presence of the registrar once the register is no longer maintained in hard copy form. It is considered appropriate for the detail of the alternative requirements to be contained in regulations, as they will set out detailed administrative procedure and may require adjustment over time.

Justification for the procedure

328. Regulations made under this power will, pursuant to new section 39A(6), be subject to the affirmative resolution procedure requiring a draft to be laid before and approved by a resolution of both Houses of Parliament. We propose that this is the appropriate procedure for these regulations, allowing Parliament to consider the alternative requirements that will replace signing the register and ensure they are robust.

The National Underground Asset Register

329. Clauses 138 to 141 and Schedule 13 of the Bill set out a new legal framework which will put the National Underground Asset Register ("NUAR") on a statutory footing. NUAR is a digital map that will improve both the efficiency and safety of underground work by providing secure access to location data about pipes, cables and other types of apparatus installed in streets.

330. These clauses build upon and modernise existing provision made by the New Roads and Street Works Act 1991 ("the 1991 Act"). Sections 79(1) and (2) of the 1991 Act currently impose duties on "undertakers" (as defined by sections 48(5) and 89(4) of the 1991 Act in relation to apparatus, or in a context referring to having apparatus in a street) to make and maintain records of apparatus they install or locate in a street. Section 79(3) currently imposes a duty on undertakers to make their records available for inspection, free of charge, to certain persons (including those who have authority to execute works in the street).

331. An undertaker that fails to comply with their duties under section 79 commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale. Their failure can also give rise to liability to compensate any person in respect of damage or loss incurred by that person in consequence of the failure. Section 79(4) and (5) provides further detail in respect of these matters. It should also be noted that there are a number of amendments to the 1991 Act, as made by the Traffic Management Act 2004, which are not yet in force.

332. Existing powers in section 79 of the 1991 Act have been exercised so as to make two sets of regulations. The first, the Street Works (Records) (England) Regulations 2002 (S.I. 2002/3217) were made by the Secretary of State in relation to England. The second (and near identical) were the Street Works (Records) (Wales) Regulations 2002 (S.I. 2005/1812), made by the National Assembly for Wales in relation to Wales. Both sets of regulations prescribe the form of records of apparatus placed in streets to be kept by undertakers, make provision as to the use of electronic records, and set out exceptions to the duty to keep a record in certain cases.

333. Section 80 of the 1991 Act imposes duties on persons executing works of any description in a street to, depending on the circumstances, notify an undertaker or the relevant street authority or take other specified steps where they identify missing or incorrect information in existing records, or where they find apparatus and cannot ascertain its owner. As with section 79, a failure to comply with duties under section 80 is a criminal offence, albeit one that is punishable by a fine not exceeding level 4 on the standard scale. Neither section 80, nor amendments made to that section by the Traffic Management Act 2004, have yet been commenced.

334. In practice, the approach provided for in the 1991 Act gives rise to a number of difficulties and has not kept pace with more recent technological developments. Persons looking to execute works in the street typically have to contact multiple different undertakers to obtain relevant information that each individually holds before works can commence, or to make use of third party intermediaries to assist with this process. The information provided might be in different formats, or in a combination of hard copy or electronic documents.

335. NUAR seeks to address these issues by providing a single source of information for persons looking to execute works in the street. An important change being made by these clauses is the repeal of section 79(3) of the 1991 Act so that undertakers will no longer be required to make their records available for inspection. Instead, this requirement will be replaced with a new duty to share information from those records with the Secretary of State. In turn, the Secretary of State will be required to keep a register - NUAR - that will include this information provided by undertakers. The Secretary of State will also be able to then make information kept in NUAR available to other persons.

336. To facilitate this new approach, and as set out in more detail below, the Secretary of State will be empowered to make regulations setting out exemptions to these requirements, or to specify the type of information that undertakers are to enter into NUAR (and the form and manner in which it must be entered). The Secretary of State will also be empowered to set out in regulations who and in what circumstances a person should be provided with access to information kept in NUAR. Additional provision (as discussed below) is also made which imposes a duty on persons executing works in a street to inform an undertaker of any information recorded in NUAR which is in fact incorrect, or where they identify information that is missing from NUAR.

337. Provision is also made through these clauses, and as set out in more detail below, for the Secretary of State to make regulations setting out a scheme under which undertakers having apparatus in a street will be required to pay fees to fund the running costs of NUAR, and can be required to provide information relating to this new fees scheme. These requirements will be enforced through a power conferred on the Secretary of State to impose monetary penalties for non-compliance. In addition, provision is also made for the Secretary of State to enter into arrangements with one or more other persons to exercise certain functions of the Secretary of State, with a requirement that any such persons be prescribed in regulations.

338. The regulation-making powers conferred on the Secretary of State by these new provisions will be exercisable solely by the Secretary of State. Currently, regulation-making powers in section 79 of the 1991 Act are exercisable by the Welsh Ministers in relation to Wales (noting that Part III of the 1991 Act extends and applies to England and Wales). However, in order for NUAR to operate effectively across England and Wales, it is necessary to ensure consistency in approach across both of these parts of the United Kingdom. As such, provision is made so that regulations which supplement the provision made by these clauses (and the sections of the 1991 Act they amend) are only exercisable by the Secretary of State, who will make provision in respect of both England and Wales. As set out below, wherever the Secretary of State proposes to make regulations in exercise of these powers, they must first consult the Welsh Ministers so as to ensure their views are taken into account.

339. The practical effect of these clauses is that a person looking to execute works in a street will be able to access relevant information from a single, digital source. Such an approach will be significantly more efficient and bring considerable economic benefits. It will also help to reduce inadvertent “asset strikes” on apparatus already buried underground and to reduce disruption for citizens and businesses.

Clause 138(1): New section 106A(3) - National Underground Asset Register

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

340. A key aspect of the new legislative framework for NUAR is the requirement, imposed by new section 106A to be inserted into the 1991 Act, for the Secretary of State to keep a register of information relating to apparatus in streets in England and Wales. This register is referred to in the Act as "NUAR". NUAR will be the central depository of information into which, as discussed elsewhere in this memorandum, certain persons will be required to enter information. It is envisaged that NUAR will be a digital register and the information within it will be used to form a digital underground map displaying information about apparatus "in" a street. In accordance with these new legislative provisions, various persons will be able to access information in NUAR. Section 106A(3) confers a power on the Secretary of State to prescribe, through regulations, the form and manner in which NUAR must be kept.

341. New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of new section 106A(3), as provided for by clause 138.

Justification for taking the power

342. As noted above, new section 106A imposes a duty on the Secretary of State to keep a register. The Government does not consider it appropriate to specify the detail of how this register should be kept, and in what form, in primary legislation; specific aspects of these matters will be further developed as part of the detailed implementation of this provision in due course, taking into account a wide range of practical considerations. In addition, it is important that NUAR, and the form and manner in which it is kept, can change over time so as to adapt to new technological developments or any further expansion of NUAR in order to maximise the public benefit of the information it contains.

343. The Government therefore considers it appropriate for the form and manner in which NUAR is kept to be provided for in regulations. The specific nature of the provision likely to be made, and the requirement for flexibility as set out above, are such as to render it inappropriate to include such provision in primary legislation. The power is limited in scope and does not affect the main duties of the Secretary of State, set out in section 106A(1) and (4) respectively. These duties are to keep a register and to make arrangements so as to enable any person who is required by a provision of Part 3 to enter information into NUAR to have access to NUAR for that purpose.

Justification for the procedure

344. By virtue of new section 106A(5) regulations made in exercise of this power will be subject to the negative procedure. The negative procedure is considered appropriate because, as set out above, the power is limited in its scope and can only be used to set out

the form and manner in which the Secretary of State must keep the register. The provision to be made in regulations will be limited and technical in nature and this power cannot, for example, be used to impose any additional duties on other persons. As such, the Government believes this procedure to strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

Clause 138(1): New section 106B(1) - Access to information kept in NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

345. New Section 106B enables the Secretary of State to, by regulations, make provision in connection with making information kept in NUAR available to others. As per subsection (1), the Secretary of State can provide for this to happen under, or without, a (contractual) licence. It is expected that the vast majority of such regulations will provide for contractual licensing arrangements. However, the Government recognises that contractual arrangements are not always appropriate or legally enforceable (for example, when granting access to NUAR to other Crown entities); in such circumstances, it will be necessary for the Secretary of State to have the option of granting access to NUAR through alternative (non-contractual) arrangements.

346. Subsection (2) sets out a non-exhaustive list of types of provision that can be included in such regulations. This can include provision as to which information may be made available, to whom (by reference to descriptions of persons) and for exceptions to this. Provision can include authorising all information kept in NUAR to be made available to prescribed persons under prescribed conditions, whilst also providing for the purposes for which, and the form and manner in which, information may be made available. In addition, and in recognition of the potential sensitivities of such information, the regulations can require or authorise the Secretary of State to take steps to adapt, modify or obscure information before making it available. The Government currently anticipates that these regulations will be used to make information provided by undertakers available, free of charge, to street works undertakers for the purpose of carrying out street works, while obscuring some data relating to sensitive assets.

347. Other potential uses include permitting access to other government departments to aid in resiliency planning, flood risk, or emergency response. As a further example, future developments might also include the licensing data, for a fee, to planners to inform the roll out of electric vehicle charge points.

348. As provided for in subsection (3), such regulations may make provision about licences under which information kept in NUAR is made available. This will enable a number of more specific matters to be set out in legislation, such as the terms and conditions of a licence and what, if any, fee needs to be paid in order to have information made available under a licence. Provision can also be made about how funds raised through such “licence fees” may be used,

including where funds are to be paid to persons who are required to enter information into NUAR.

349. A form of NUAR has already been developed and is currently being operated on a voluntary basis through collaboration with undertakers; this will be developed further and statutorily underpinned by these new clauses. Access to the information kept in this form of NUAR is currently provided free of charge for the purposes of carrying out street works excavations; however, users must accept an end-user licence agreement which stipulates terms and conditions of use. The Government currently anticipates that data in NUAR, once these new provisions come into force, will generally continue to be supplied under a licence which establishes obligations on the part of the user, including onward use conditions to protect the data held in the register. In the future, the use of information in NUAR may be supplied under licence for other use cases. These licences may include charging end users for access to the information, or allowing third parties to act as intermediaries between the NUAR end users to provide value added services.

350. New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of new section 106B(1), as provided for by clause 140.

Justification for taking the power

351. As set out elsewhere in this memorandum, NUAR (and the information it contains) has the potential to provide significant benefits and to support a range of different types of economic activity. The making available of information held in NUAR to other persons will be a crucial part of achieving this, while increasing the deployment and utilisation of a fixed and non-exhaustible asset (NUAR), thereby promoting efficiency and economic growth. The Government recognises the importance of ensuring that this is done in a carefully considered way, including making provision in respect of some or all of the matters set out in subsections (2) and (3) of new section 106B and the putting in place of any necessary arrangements to ensure information is handled appropriately. Such provision is envisaged to be detailed in nature and to have to apply to a range of different circumstances. The Government also envisages such arrangements changing over time, or being added to, as new or different ways of using information held in NUAR are identified and explored. Undue limitations placed, at this stage, on how NUAR is accessed could result in unnecessary administrative burdens on industry, which would then have to share the same data separately through other means as well as duplicating costs for those requesting that data.

352. As set out above, the Government anticipates a need to make detailed provision in respect of these matters, and to be able to adapt such provision to changing circumstances (such as technological advances), experience gained through the operation of NUAR, and feedback from asset owners and users. In light of this, the Government believes that making such provision through regulations is more appropriate than seeking to do so in primary legislation.

Justification for the procedure

353. By virtue of new section 106B(5) (read with new section 106H(5)), the affirmative procedure will apply to regulations made in exercise of this power. The Government recognises that this power can be used to make comprehensive provision as to the way in which information held in NUAR can be made available to others. Such information will have been entered into NUAR by persons in accordance with new duties being included in section 79 (as amended by clause 139) and the new section 80 (as inserted by that clause) and so must be handled appropriately. As per section 106B(3), regulations made in exercise of this power may make provision for information to be made available under a licence for a fee, and for the use of funds raised by means of such fees. Taking into account all of these factors, the Government believes the affirmative procedure to provide an appropriate level of Parliamentary scrutiny of regulations made in exercise of this power.

Clause 138(1): New section 106B(4) - Access to information kept in NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

354. As set out above, new section 106B enables the Secretary of State, through regulations, to make provision as to the making available of information kept in NUAR. New subsection 106B(4) makes provision, in primary legislation (and subject to section 106G), so as to make clear that the exercise by the Secretary of State of functions under new sections 106A and 106B does not breach any obligation of confidence or any other restriction however imposed.

355. The Government recognises that there could be circumstances, which become apparent as NUAR is implemented and operated over time, in which it would not be appropriate for this general position to apply. New section 106B(4) therefore permits the Secretary of State, through regulations, to prescribe exceptions to this approach.

356. New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of new section 106B(4), as provided for by clause 140.

Justification for taking the power

357. New sections 106A and 106B set out an entirely new legal framework to support the operation of NUAR. The provision made by new section 106B(4) sets out the general approach which reflects the policy intention in respect of these issues. However, as the new legal framework is implemented, unforeseen circumstances or situations may arise which require a different approach to be taken in order to properly strike a balance between the public interest in ensuring NUAR can operate effectively and comprehensively, and the interests of those whose information, for example, would otherwise be protected by an

obligation of confidence. In light of these considerations, the Government believes that having the general approach set out on the face of the Bill, but with the ability for the Secretary of State to provide for exceptions through regulations, is an appropriate approach.

Justification for the procedure

358. By virtue of new section 106B(5) (read with new section 106H(5)), the affirmative procedure will apply to regulations made in exercise of this power. The Government believes this affords an appropriate degree of Parliamentary scrutiny given the important balance that such regulations will need to strike between the public interest and the interests of any affected persons.

Clause 138(1): New Section 106C(1) - Fees payable by undertakers in relation to NUAR

Power conferred on: Secretary of State

Power exercised by: Regulations (and the publication of a statement in certain circumstances)

Parliamentary Procedure: Affirmative procedure (regulations), laying before Parliament (statement)

Context and Purpose

359. The Government's intention is for NUAR to operate on a sustainable funding model, with undertakers with apparatus in a street collectively covering the costs of running the service instead of the taxpayer.

360. The new section 106C(1) makes provision for this by empowering the Secretary of State to make provision, through regulations, requiring undertakers having apparatus in a street to pay fees to the Secretary of State ("the fees scheme"). Such fees will be for the purpose of funding the costs incurred in operating NUAR (or more specifically, to pay fees in connection with the performance of any function of the Secretary of State under the new Part 3A to be inserted into the 1991 Act).

361. New section 106C(2) provides that the regulations may specify the amounts of such fees, or may set out the maximum amounts of the fees that the Secretary of State can require undertakers to pay. Alternatively, the regulations may provide for such amounts to be determined in accordance with the regulations. Where the regulations adopt any of these approaches other than specifying the amount of the fees, there is a further requirement, in new section 106C(4), for the Secretary of State to specify the amounts of the fees in a statement which must be published and laid before Parliament.

362. New section 106C(3) reflects the policy intention that the fees raised through the exercise of this new regulation-making power are intended to match the expenses incurred by the Secretary of State in providing and running NUAR, whilst recognising that there will likely be times where the amounts received, and running costs, vary each year.

363. In addition, new section 106C(5) expressly provides for the regulations to be able to make provision as to when, and the manner in which, a fee is to be paid, together with

provision for discounted fees, exceptions to a requirement to pay fees and for refunds of fees.

New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision.

Justification for taking the power

364. A requirement to pay a fee as set out in regulations made in exercise of this power may be enforced by the Secretary of State through the issuing of a monetary penalty (see new section 106E and the new Schedule 5A this inserts into the 1991 Act).

365. In order to provide for a proportionate, fair and efficient fees scheme, specific and detailed provision is likely to be required in respect of a number of matters. Provision will need to be made as to the amount of such fees. Additional matters will also need to be addressed, as set out at new section 106C(5) (for example, when a fee is to be paid, the manner in which a fee is to be paid and any exceptions to the requirement to pay a fee). Lessons learned or experience gained from the implementation and operation of NUAR over time may necessitate changes to such provision. In those circumstances, the Government considers it will be more appropriate to provide for such matters in regulations rather than be fixed in primary legislation.

366. The power is subject to a number of safeguards. As set out above, clause 106C(3) imposes a requirement on the Secretary of State to seek to secure, so far as possible and taking one year with another, that the amount raised from fees matches the overall cost of running NUAR. Indeed, the need to comply with this requirement, and to change the amount of fees as necessary in order to ensure it is satisfied, is a further reason in support of such provision being made through regulations; it would be disproportionate if, in order to make changes so as to ensure continued compliance with this requirement, primary legislation was required.

367. The Government recognises the impact that the requirement to pay a fee will have on undertakers and has therefore included a consultation requirement in new section 106C(6). Before making regulations under this power the Secretary of State must therefore consult such representatives of persons likely to be affected by the regulations as the Secretary of State considers appropriate, together with any such other persons as the Secretary of State considers appropriate. In addition, as per new section 106H(5), the Secretary of State must also consult the Welsh Ministers. These requirements may be satisfied by consultation undertaken before or after the coming into force of new section 106C(1), as provided for by clause 140.

368. As set out above, the Government's policy as to the amount of any fees will be set out in regulations, which can include the maximum amount of a fee that the Secretary of State may require to be paid, or the setting out of the way in which such an amount is to be determined. Where either of these approaches are taken, the Government considers it appropriate for the *actual* amounts of fees to be clearly and transparently set out for the public and, in particular, for the benefit of those required to pay a fee. In light of this provision is made in new section 106C(4)(a) and (b)(i) for the Secretary of State to specify such amounts

in a statement which must be published. In addition, so as to ensure Parliament is kept informed about these amounts, new section (4)(b)(ii) also requires such a statement to be paid before Parliament.

Justification for the procedure

369. Subsections (7), (8) and (9) make provision as to which Parliamentary procedure applies to regulations made in exercise of the power in new subsection 106C(1). In general the affirmative procedure will apply to such regulations, including where such regulations make provision as to when a fee is to be paid, the payment of discounted fees or exceptions to requirements to pay fees. The Government considers this to be an appropriate level of Parliamentary scrutiny given the scope for such regulations to set out these (and other) "structural" aspects of the fees regime, both in the first instance and if changed in the future.

370. However, as an exception to this general approach, where regulations only make provision of a kind mentioned in subsection (2) (i.e. where regulations only relate to the *amount* of fees to be payable), the Government considers that the negative procedure strikes a good balance between ensuring an appropriate level of Parliamentary scrutiny, effective use of Parliamentary time and a potential need to act promptly, particularly in light of the requirement set out in subsection (3). As discussed above, the Secretary of State does not have unfettered discretion to determine such amounts (or the basis for determining such amounts); the approach must be in accordance with subsection (3) and the requirement therein for the Secretary of State to seek to secure that, so far as possible and taking one year with another, the income from fees matches the expenses incurred by the Secretary of State in operating NUAR in accordance with this new legal framework. In circumstances where regulations are limited to this specific, more focused use of the power in new section 106C(1), the negative procedure is considered appropriate.

371. Equally, the Government acknowledges the likely heightened Parliamentary interest when provision is made in relation to the amounts of such fees for the first time. Accordingly, provision is made in subsection (9) such that the affirmative procedure applies in those circumstances. Thereafter, when such an amount is changed in the future, the negative procedure will apply as set out above.

372. No formal Parliamentary procedure applies in respect of any statement made and published by the Secretary of State pursuant to subsection (4) in which amounts of fees are specified by the Secretary of State, although such a statement must nevertheless be laid before Parliament (as per subsection (4)(b)(ii)). The statement will reflect the amount of fees determined in accordance with (or below any maximum amount specified in) existing regulations made by the Secretary of State (with such regulations themselves having already been the subject of a Parliamentary procedure as set out above). In such circumstances, it is not considered necessary for any formal Parliamentary procedure to apply.

Clause 138(1): New section 106D(1) - Providing information for purposes of regulations under section 106C

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

373. The new section 106D contains two regulation-making powers through which the Secretary of State may require an undertaker having apparatus in a street to provide information to the Secretary of State in the context of fees that can be imposed through regulations under new section 106C(1).

374. The first regulation-making power, set out at new section 106D(1), enables the Secretary of State to request information that will assist in the development of the policy relating to the amount of, and approach to, fees to be paid pursuant to regulations made under new section 106C. This power can be exercised where the Secretary of State is considering what new provision, or changes to existing provision, it would be appropriate to make. For example, if a proposed approach to fees may rely on a form of categorisation of undertakers, or "tiers" to which undertakers will be allocated, the Secretary of State may require information to be provided in order to develop those proposals and ensure that appropriate provision, including compliance with the requirement at new section 106C(3), can be made.

375. The Secretary of State will be required, when making such provision pursuant to new section 106C(1), to satisfy the consultation requirements set out at new section 106C(6); undertaking such consultation will likely result in the provision of helpful information to the Government. However, the Government considers it necessary to have the option of imposing legally binding requirements on undertakers to provide information, so as to enable the Government's approach to fees to be developed on a fully informed basis.

376. Regulations made in exercise of the power in new subsection 106D(1) may require an undertaker to notify the Secretary of State of any changes to information previously provided under the regulations (see new section 106D(3)). They may also, by virtue of new section 106D(4), make provision about when information is to be provided (which may be at prescribed intervals), the form and manner in which information is to be provided, and exceptions to any requirement to provide information.

377. New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of new section 106D(1), as provided for by clause 140.

Justification for taking the power

378. The Government considers it appropriate for the detail of such requirements to provide information to be set out in regulations. When determining the provision that it is appropriate to be made through regulations under section 106C(1), a wide range of different

factors and circumstances will need to be taken into account. It is not possible at this stage to comprehensively identify all of these factors and circumstances, which will likely change over time in any event. The Government recognises the need to only request information that is relevant to the issues under consideration when determining the appropriate provision to be made, and to be proportionate in its approach. Indeed, subsection (1)(a) and (b) sets out clear purposes for which the information can be required.

379. Seeking to fix, in primary legislation, the specific information to be provided risks missing types of information that are subsequently identified as necessary, or alternatively, risks imposing requirements that may, in time, not be required, thus resulting in unnecessary obligations being imposed on undertakers. The ability to make specific provision in regulations will enable these risks to be mitigated, with regulations making more detailed and focused provision that can be modified more easily (and more quickly) over time in response to changing circumstances. Requiring such changes to be included in primary legislation on each occasion would not, in the Government's view, be an appropriate use of Parliamentary time.

380. The Government has carefully considered whether a consultation requirement similar to that in new section 106C(6) should also be included in respect of this power. Given the purposes for which regulations under new section 106D(1) can be made (as set out in subsection (1)(a) and (b)), the inclusion of such a requirement is not considered necessary. Information can be required under section 106D(1) for - in effect - policy development purposes. Where the chosen policy approach results in a need to make regulations under section 106C(1), the existing requirement to consult found in new section 106C(6) would apply in any event. To include an additional stage of consultation would be disproportionate. It would also likely be of limited benefit; the information being sought is for policy development purposes, and so it is likely to be requested at an early stage in the policy development process. A legal duty to consult on what information might be appropriate to request in order to then develop a policy position is unnecessary in such circumstances.

381. However, for completeness, the Government does consider that the overarching requirement to consult the Welsh Ministers in respect of the exercise of any regulation-making power in the new Part 3A should nevertheless apply in respect of the power in new subsection 106D(1).

Justification for the procedure

382. By virtue of new section 106D(5) regulations made in exercise of the power in new subsection 106D(1) are subject to the negative procedure. This level of scrutiny is considered appropriate given that the scope of any information that can be requested is limited; the regulations can only require undertakers to provide information for the purposes set out in new section 106D(1)(a) and (b). As such, the Government considers that the negative procedure strikes an appropriate balance between the need to ensure a proportionate approach to the use of Parliamentary time, whilst still providing a means of Parliamentary scrutiny.

Clause 138(1): New section 106D(2) - Providing information for purposes of regulations under section 106C

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

383. Section 106D(2) sets out the second of the two regulation-making powers through which the Secretary of State may require an undertaker having apparatus in a street to provide information to the Secretary of State in the context of fees that can be imposed through regulations under new section 106C(1).

384. This power enables the Secretary of State to request information for the purposes of ascertaining whether a fee is payable by person under regulations under section 106C(1) and for the purpose of working out the amount of a fee payable by a person. In practice, this will enable the Secretary of State to request information that is more "operational" in nature, relating to the fees scheme as provided for by regulations under new section 106C(1).

385. As set out above, regulations made under new section 106C(1) may make different provision for different purposes (see new section 106H(2)(a) to be inserted into the 1991 Act by this clause). This could mean that different categories of undertakers (with such categories to be set out in the regulations) pay fees of different amounts. Regulations under new section 106C(1) can also provide for fees to not be payable, or for a discounted fee to apply, in different circumstances. In light of this, it is important that the Secretary of State will be able, through regulations made under new section 106D(2), to request information so as to be able to ascertain whether a fee is payable (for example, whether an undertaker is exempt in accordance with any such provision that might be made by the regulations) and, if so, the amount of that fee (including, for example, which category or "tier" an undertaker is to be allocated so as to ascertain the fee they are required to pay).

386. Regulations under new section 106D(2) may require an undertaker to notify the Secretary of State of any changes to information previously provided under the regulations (see new section 106D(3)). They may also, by virtue of new section 106D(4), make provision about when information is to be provided (which may be at prescribed intervals), the form and manner in which information is to be provided, and exceptions to any requirement to provide information.

387. New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of this power, to consult the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of new section 106D(2), as provided for by clause 140.

Justification for taking the power

388. The Government considers it appropriate for the detail of such requirements to provide information to be set out in regulations. The information to be required will likely depend on the approach taken, through regulations made under section 106C(1), to the

imposition of requirements to pay a fee. For example if undertakers were to be assigned categories or "tiers", with a different fee then applying as a result of such categorisation, specific information might be required in order to ascertain or confirm the correct category or tier that will apply in any particular case. Similarly, depending on the nature of exceptions (if any) to the requirement to pay a fee, specific information might be required; this might change over time should the exceptions themselves also be modified. As such, it is not considered feasible to set out such requirements in primary legislation.

389. In addition, the ability to impose requirements to provide information through regulations will enable appropriate and specific provision to be made which can be amended more readily in response to changing circumstances over time. As increased experience of operating the new NUAR framework is acquired over time, new or additional requirements might be identified and there could be a need to impose these comparatively quickly, if crucial to the effective operation of the fees scheme put in place by the Secretary of State. The Government considers that a requirement for any such changes to be made through primary legislation would not be a proportionate use of Parliamentary time.

390. The Government has carefully considered whether a consultation requirement similar to that in new section 106C(6) should also be included in respect of this power. As with the power in new section 106D(1) (see above), and in light of the limited purposes for which regulations under new section 106D(2) can be made (as set out in subsection (2)(a) and (b)), the inclusion of such a requirement is not considered necessary. The information that can be requested through the exercise of this power will be directly linked to provision made as to the "structure" of the fees regime set out through regulations under section 106C(1); the existing requirement to consult found in new section 106C(6) would apply to those regulations in any event. The Government considers the inclusion of an additional stage of consultation, focused solely on specific information to be requested for the purposes set out in new section 106D(2)(a) and (b), to be disproportionate.

391. However, for completeness, the Government does consider that the overarching requirement to consult the Welsh Ministers in respect of the exercise of any regulation-making power in new Part 3A to be inserted into the 1991 Act should nevertheless apply in respect of the power in new subsection 106D(2).

Justification for the procedure

392. By virtue of new section 106D(5) regulations made in exercise of the power in new subsection 106D(2) are subject to the negative procedure. This level of scrutiny is considered appropriate given that the scope of any information that can be requested is limited; the regulations can only require undertakers to provide information for the purposes set out in new section 106D(2)(a) and (b). Any specific requirements to be included in regulations made in exercise of this power will, in effect and in part at least, be linked to the "structure" of the fees regime as provided for through regulations made under section 106C(1); such regulations will themselves have been subject to the affirmative procedure as required by new section 106C(7).

393. As such, the Government considers that the negative procedure strikes an appropriate balance between the need to ensure a proportionate approach to the use of Parliamentary time, whilst still providing a means of Parliamentary scrutiny.

Clause 138(1): Paragraph 1(2) of new Schedule 5A - Monetary Penalties

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

394. As set out above, the new sections 106C(1) and 106D(1) and (2) to be inserted into the 1991 Act empower the Secretary of State to impose, through regulations, requirements on undertakers to pay fees or provide information.

395. Notwithstanding the high level of compliance the Government anticipates in respect of these requirements, provision is made, by the new section 106E and Schedule 13, which inserts a new Schedule 5A into the 1991 Act, for the enforcement of these requirements through the imposition of monetary penalties. The intention is to provide a simple yet effective scheme which can readily be applied in practice. The requirements - in respect of which penalties can be imposed for non-compliance - are anticipated to be straightforward in nature, namely a requirement to pay a fee (in an amount set out on the face of the regulations, or in a statement made and published in accordance with new section 106C(4)) or a requirement to provide specific information to the Secretary of State.

396. The intention behind the penalty scheme is to encourage compliance with any such requirements. The provisions in new Schedule 5A reflect this in a number of ways. The Secretary of State will have discretion over whether to impose a penalty. There will also be a requirement for a "warning notice" to be sent to the person concerned where the imposition of a penalty is being proposed together with provision for a period during which written representations can be made. These provisions, together with the ability to bring an appeal in respect of a decision to impose a penalty, provide a number of safeguards that are built into the process.

397. The Government has carefully considered the most appropriate approach through which the amount of such penalties should be determined. In light of the comparatively uncomplicated nature of a breach of the relevant requirements (that is, it will be readily apparent whether or not the required fee has been paid, or required information has been provided), it is not considered proportionate to create a system whereby the Secretary of State is required to determine the amount of a penalty on a case-by-case basis. Instead, paragraph 1(2) of the new Schedule 5A empowers the Secretary of State to set out, in regulations, the amount of any penalty to be imposed. Should any person then be in breach of a relevant requirement, and the Secretary of State is considering the imposition of a monetary penalty, the amount of such a penalty will be that which is already provided for in existing regulations.

398. New section 106H applies in respect of regulations made in exercise of this power. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of this power, to consult

the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of paragraph 1(2) of the new Schedule section 5A, as provided for by clause 140.

Justification for taking the power

399. As set out above, the Government does not consider it proportionate to provide for a complex system whereby the Secretary of State has to determine a monetary penalty on a case by case basis since the nature of the breach in question will be simple and readily apparent. Equally, it would not be appropriate for the amounts of such fixed penalties to be set out in primary legislation; the amounts may need to change over time in order to reflect the experience of operating this new legislative framework, or to ensure that the penalties continue to serve as an effective deterrent to non-compliance.

400. The Government therefore considers it necessary for a regulation-making power to be conferred on the Secretary of State through which provision can be made as to the amount of such penalties. The use of regulations will enable the Secretary of State to respond to changing circumstances in the future and, if appropriate, to make specific or bespoke provision. In due course it might also be considered appropriate to make provision for penalty amounts to differ depending on the nature of the specific requirement being breached. Since the detail of those requirements will be set out in regulations made under new sections 106C(1) or 106D(1) or (2), it follows that the corresponding penalties should also be set out in regulations.

401. Provision is made in paragraph 1(2) of the new Schedule 5A for the regulations to specify the amount of a penalty, or to set out the methodology through which a penalty should be determined. The Government believes it is important to have both approaches, or a combination of the two, available for the future. Depending on the nature of the requirements to be imposed by regulations, it might be that the amount of specific penalties can be comprehensively determined in advance and set out in regulations. However, it might be considered more appropriate, and reflect an approach that is both proportionate and serves as an effective deterrent for non-compliance, if the regulations can instead set out the way in which the amount of a penalty should be determined. Whichever approach is adopted, by setting this out in regulations the penalty for non-compliance with any relevant requirement will be readily accessible to those to whom such requirements apply and will also, as set out below, be subject to an appropriate degree of Parliamentary scrutiny.

Justification for the procedure

402. By virtue of paragraph 1(5) of the new Schedule 5A, regulations made in exercise of this power are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that this power will enable the Government to set penalties of an amount that, whilst remaining proportionate, must also be capable of serving as an effective deterrent to non-compliance.

Clause 138(1): New section 106F(1) and (6) - Arrangements for third party to exercise functions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

403. The new Part 3A to be inserted into the 1991 Act by clause 138 confers a range of different functions on the Secretary of State as part of the statutory framework for NUAR. Many of these functions are "operational" in nature, relating to the day-to-day running of NUAR. For example, the requirement in new section 106A(1) for the Secretary of State to "keep" a register of information relating to apparatus in streets in England and Wales, or the making of information kept in NUAR available in accordance with new section 106B (and in accordance with any regulations made in exercise of the powers in that section).

404. New section 106F(1) enables the Secretary of State to make arrangements for another person to exercise relevant functions of the Secretary of State. This will enable the Secretary of State to identify which functions, typically those which are more "operational" in nature, could be exercised by another person. As reflected in new section 106F(1), the details of when and how these functions can be exercised by another person will be set out in more detailed arrangements entered into by the parties.

405. As per subsection (2), more than one person can be prescribed for the purposes of subsection (1). In practice, this means that the Secretary of State can, if considered appropriate, enter into arrangements with different persons to exercise different functions, or can enter into arrangements through which more than one person can exercise the same function.

406. New section 106F makes further provision about the arrangements into which the Secretary of State can enter. Subsection (3) expressly provides that such arrangements may provide for the Secretary of State to make payments to the person and to make provision as to the circumstances when any such payments are to be repaid. Entering into arrangements in respect of a function does not prevent the Secretary of State from also exercising that function (see subsection (5)).

407. The Government considers it important that the Secretary of State has discretion to enter into such arrangements as may be appropriate, taking into account all relevant circumstances at the time. However, it is recognised that a crucial element of this approach is the identity of the person, or persons, with whom the Secretary of State will enter into arrangements. The functions which such a person could exercise, although "operational" in nature, are nevertheless important. In light of this and the corresponding importance of the identity of the person, or persons, is such that the Government considers it appropriate for this to be set out in legislation.

408. This is provided for in the first of two powers in new section 106F. As set out in subsection (1), in order to enter into arrangements with a person for that person to exercise a function of the Secretary of State, the person must first be prescribed, through regulations made by the Secretary of State.

409. A second power is conferred on the Secretary of State in subsection (6). This subsection makes similar provision to that found in new section 106B(4), making clear that the disclosure of information between the Secretary of State and a person in connection with the person's entering into arrangements under this section, or exercise of functions to which such arrangements relate, does not breach any obligation of confidence owed by the person making the disclosure, or any other restriction on the disclosure of information however imposed (albeit this is subject to section 106G).

410. As with the provision made in new section 106B(4), the Government recognises that there could be circumstances, which become apparent as any arrangements under new section 106F are entered into and operated over time, in which it would not be appropriate for this general position to apply. New section 106F(6) therefore permits the Secretary of State, through regulations, to prescribe exceptions to this approach.

411. New section 106H applies in respect of regulations made in exercise of these powers. This includes provision, in subsection (2), for such regulations to make different provision for different purposes, and to make supplementary and incidental provision. Subsection (4) requires the Secretary of State, before making regulations in exercise of these powers, to consult the Welsh Ministers. This requirement may be satisfied by consultation undertaken before or after the coming into force of new section 106F(1) or (6) (as the case may be), as provided for by clause 140.

Justification for taking the powers

412. The Government does not consider it appropriate to set out a specific person or persons, in primary legislation, with whom the Secretary of State can enter into arrangements of the type described in new section 106F(1). The identity of such persons will depend on which functions of the Secretary of State the person will be able to exercise, in accordance with relevant arrangements, and could change over time. As reflected by the provision in new section 106F(2), arrangements could be entered into with different persons to exercise different functions, or for more than one person; it is important that there is the ability to reflect any such arrangements in due course. It will also be important, prior to prescribing any person for these purposes, for the Secretary of State to be content that the person is willing and able to enter into arrangements, and to exercise the functions in an effective manner in accordance with all relevant legal requirements. The need might also arise to terminate arrangements with a person and enter into new arrangements with someone different. To identify a specific person in primary legislation at this stage would be an unduly restrictive approach in these circumstances.

413. In addition, the role of a prescribed person, in terms of the functions that they can exercise, is limited. New section 106F(8) makes provision in this regard, defining "relevant function" so as to exclude any regulation-making power of the Secretary of State in new Part 3A and a function of the Secretary of State under section 106B(4).

414. At the same time, and in these particular circumstances, the Government recognises the importance of the identity of a person with whom the Secretary of State is proposing to make arrangements. Accordingly, this new provision adopts the approach of requiring this to be set out in regulations to be made under the first power which, as discussed below, will be scrutinised by Parliament.

415. The Government's rationale for taking the second power is similar to that set out in respect of new section 106B(4), above. Provisions in this Bill set out an entirely new legal framework to support the operation of NUAR, including a range of different functions which, if arrangements are entered into, a prescribed person will be able to exercise. As such arrangements are developed, implemented and then operate in practice, unforeseen circumstances or situations may arise which require a different approach to be taken in order to properly strike a balance between the public interest in ensuring such arrangements can operate effectively and comprehensively, and the interests of those whose information, for example, would otherwise be protected by an obligation of confidence.

416. In light of these considerations, the Government believes that having the general approach set out on the face of the Bill as per new section 106F(6), but with the ability for the Secretary of State to provide for exceptions through regulations, is an appropriate approach.

Justification for the procedure

417. By virtue of new section 106F(7), regulations made in exercise of this power are subject to the affirmative procedure.

418. In respect of the first power, the Government considers this to be an appropriate level of Parliamentary scrutiny in light of the nature of the functions which the person concerned could exercise having entered into appropriate arrangements with the Secretary of State. Although such functions are generally operational in nature, they are nevertheless an important part of the new NUAR regime, such that it is appropriate Parliament should be required to scrutinise any regulations prescribing such a person before they can be made.

419. Further, in respect of the second power, the Government also considers this to afford an appropriate level of Parliamentary scrutiny given the important balance that such regulations will need to strike between the public interest and the interests of any affected persons.

Clause 139 - Amendments to sections 79 and 80 of the 1991 Act

420. Clause 139 inserts a total of twelve new powers into Part 3 of the 1991 Act through which, by making regulations, the Secretary of State can make further provision in order to deliver the Government's policy relating to NUAR as part of the detailed implementation of the new legislative framework.

421. Some of these powers apply in respect of more than one duty imposed by these new provisions, whilst some of the duties are affected by more than one power. In order to address and explain these powers as clearly and comprehensively as possible, the Government has - for the purposes of this memorandum - grouped these powers together, depending on the duty to which the powers relate. There are five groups in total and each of these groups is then considered in a separate section of this memorandum, below. The groupings are as follows:

a. Clause 139(3)(c) inserts a new subsection (1B) into section 79 of the 1991 Act which imposes a duty on undertakers to record, in respect of apparatus belonging to them, other information beyond that that are already required to record under the existing

section 79(1). New subsection (1B) contains two powers which relate to this duty. The first is a power to prescribe cases in which this duty does not apply. The second is a power to prescribe "other information" for the purposes of this duty. Both of these powers are considered together as a single group in this memorandum.

b. Clause 139 (3)(f) and (h) inserts new subsections (3B) to (3F), and (7), into section 79 of the 1991 Act. Six new powers in total are contained across these new subsections. New subsection (3B) imposes a duty on undertakers to complete an *initial* entry of information into NUAR. Five of these six powers relate to that duty, The first is a power set out a prescribed description of "other information" to be included in the initial entry of information into NUAR pursuant to the duty in new subsection (3B). The second is a power to prescribe exceptions to this duty. The third is a power to prescribe the form and manner in which information must be entered into NUAR. The fourth and fifth powers enable the Secretary of State to specify, respectively, a date and a period of time for the purposes of this duty. These five these powers are considered together as a single group in this memorandum.

c. New subsection (3C) imposes an *ongoing* duty on undertakers to enter information into NUAR. Three of the six powers (contained in new subsections (3B) to (3F), and (7)) relate to that duty. The first is a power to prescribe the period within which this duty must be complied. The second is a power to prescribe cases in which this duty does not apply. The third is a power to prescribe the form and manner in which information must be entered into NUAR. These three these powers are considered together as a single group in this memorandum.

d. Clause 139(4)) substitutes a new section 80 into the 1991 Act (bearing in mind that the existing section 80 in the 1991 Act has not yet been commenced). New section 80 imposes two duties on persons executing works in a street to take certain steps in relation to missing or incorrect information in relation to apparatus. The first of these two duties is set out in new section 80(2). There are a total of four powers set out in new section 80; two of these relate to this duty in new section 80(2). The first is a power to prescribe information for the purposes of the duty in section 80(2). The second is a power to prescribe exceptions to this duty. Both of these powers are considered together as a single group in this memorandum.

e. The second of these two duties is set out in new section 80(3). Three of the four powers set out in new section 80 relate to this duty in new section 80(3). The first is a power to prescribe the information for the purposes of the duty in section 80(3). The second is a power to prescribe the form and manner in which such information should be entered into NUAR as required by this duty. The third is a power to prescribe exceptions to this duty. These three powers are considered together as a single group in this memorandum.

422. Section 104 of the 1991 Act, as amended by clause 139(6), will apply in relation to all of these powers. Subsection (1) provides that "prescribed" for these purposes means prescribed by the Secretary of State by regulations.

423. Subsection (1) also provides that such regulations may make different provision for different cases, whilst new subsection (1B) provides for regulations made in the exercise of these powers (and indeed, across Part 3 of the Bill) to be able to make supplementary or

incidental provision. As discussed elsewhere in this memorandum, some of the regulations to be made under these powers will, in practice and in order to provide sufficient clarity and certainty, likely need to make comprehensive provision for a range of different scenarios and circumstances. The provision made by subsection (1) and new subsection (1B) in section 104 therefore reflects the practical realities that will arise in exercising these new powers.

424. New subsection (1A) imposes a requirement on the Secretary of State, before making regulations in exercise of these powers, to consult the Welsh Ministers (for the reasons set out earlier in this memorandum), whilst subsection (2) provides for the negative procedure to apply to such regulations.

425. Finally, subsection (3) provides that such regulations may provide for references in the regulations to any specified document to operate as references to that document as revised or re-issued from time to time. Such provision will enable the Secretary of State, if considered appropriate, adopt a more practical and effective approach in response to particular circumstances. For example, if it was more useful to those persons required to comply with new requirements, the Secretary of State could set out detailed technical standards or specifications in such a document. The ability to revise such a document will ensure such standards or specifications can be adapted quickly where necessary, whilst the technical nature of the document is such that, in the Government's view, it would not be necessary for Parliament to scrutinise revisions each and every time they are made.

Clause 139(3)(c): New section 79(1B) - Information in relation to apparatus

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

426. Clause 139(3)(c) inserts a new subsection (1B) into the 1991 Act which confers two regulation-making powers on the Secretary of State.

427. As set out above, section 79 of the 1991 Act imposes a number of record-keeping requirements on undertakers in relation to items of apparatus belonging to them. Section 79(1) requires an undertaker, as soon as reasonably practicable after specific events occur (as set out in section 79(1)(a) to (c)), to record the location of every item of apparatus, including the nature of the apparatus (if known) and whether it is for the time being in use.

428. As per the new subsection (3C) inserted into section 79 of the 1991 Act (discussed further below), undertakers will be required to enter this information into NUAR. However, NUAR has the potential to include information beyond that which must be recorded pursuant to section 79(1). The Government intends to explore opportunities for such additional information to be included, and made available from NUAR, in order to fully maximise the potential benefits of this new system.

429. New subsection (1B) of section 79 of the 1991 Act imposes a duty on undertakers to record other information beyond that they are required to record under section 79(1). This new subsection also makes clear that this duty must be complied with as soon as reasonably practicable after certain events, as set out in that subsection, occur. Existing section 79(4) and (5) set out the consequences of a failure to comply with this duty.

430. The first power in new subsection (1B) enables the Secretary of State to prescribe cases in which the duty, described in the preceding paragraph, does not apply. This power, which reflects the existing approach in section 79(1) of the 1991 Act, provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection (1B) would be inappropriate or unduly burdensome, make provision to address this.

431. The second power enables the Secretary of State to prescribe the particular information, beyond that required to be recorded pursuant to section 79(1), which the duty in new subsection (1B) requires undertakers to record. This approach therefore builds upon the existing requirement in section 79(1) of the 1991 Act which, following the occurrence of any of the events listed in section .79(1)(a) - (c), requires an undertaker to record the location of apparatus whilst also stating the nature of the apparatus and (if known) whether it is for the time being in use.

432. Existing section 79(4) and (5) set out the consequences of a failure to comply with the duty in new subsection (1B) and, as set out above, section 104 of the 1991 Act (as amended by clause 139(6)) applies in respect of regulations made in exercise of these powers.

Justification for taking the powers

433. As set out above, the first power in new subsection (1B) enables the Secretary of State to prescribe, through regulations, exceptions to the requirement to record additional information. This mirrors existing provision made by section 79(1) in respect of the duty to record information therein. Such exceptions form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

434. The duty to record information in new subsection (1B) is supplemented by the second power conferred on the Secretary of State as described above. The Government considers it appropriate for the detail of this additional information to be set out - or prescribed - in regulations. The nature of the information required could be technical and specific in nature, potentially relating to specific aspects or attributes of a range of different types of apparatus, such that regulations are the most appropriate legislative vehicle for such provision. In addition, it is likely that the information to be recorded (and then in turn, be entered into NUAR) could change over time as new and different uses and benefits of NUAR are identified; the ability to provide for this through regulations is therefore much more appropriate, and a more proportionate use of Parliamentary time, than requiring amendments

to primary legislation for these purposes.

435. As set out above, section 104 of the 1991 Act (as amended by clause 139(6)) applies in respect of regulations made in exercise of these powers.

Justification for the procedure

436. By virtue of section 104(2) of the 1991 Act, regulations made in exercise of these powers are subject to the negative procedure.

437. The application of the negative procedure to regulations made in exercise of the first power is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the Bill in respect of the duty to record information therein. Further, the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new subsection (1B); it cannot be used to impose any additional obligations on undertakers.

438. In considering the Parliamentary procedure which will apply in respect of the second power, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new subsection (1B); the greater the amount of prescribed information, the greater the duty will be on those required to comply with it.

439. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR. This important factor will therefore serve to inform and shape the nature of any provision to be made in regulations under this power, whilst such information will - once included in NUAR - further support the benefits to the public that this new register will offer.

440. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under this power; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in their effect.

Clause 139(3)(f) and (h): New section 79(3B), (3E), (3F) and (7) - Information in relation to apparatus

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

441. Clause 139(3)(f) inserts (among others) new subsections (3B), (3E), (3F) and (7) into section 79 of the 1991 Act. A total of five new powers are conferred on the Secretary of State by these new subsections. Given the interaction between these different powers, they are addressed here as a single group, in order to provide as clear and comprehensive a description as possible of their effect, and the Government's rationale in support of the approach they take.

442. Many of the new provisions relating to NUAR concern how the register will be populated with information, and how the register will operate, in the future. At the core of this is the requirement, in new section 79(3C), that when an undertaker records or updates information as required by section 79(1) or new section 79(1B), the undertaker must then enter the recorded or updated information into NUAR. The three powers through which further provision can be made in respect of new section 79(3C) are considered separately below.

443. However, for NUAR to be a reliable and comprehensive source of information it is crucial that, from the outset, it also contains *existing* information which is already held in undertakers' records. New section 79(3B) requires undertakers to enter relevant information, already held in their records, into NUAR. In practice, this will involve undertakers having to enter the relevant information held in their records as of a fixed date, referred to in new section 79(3B) as the "archive upload date". The entry of such information into NUAR will have to take place within a fixed period, referred to in new section 79(3B) as the "initial upload period". As discussed below, five separate powers are conferred on the Secretary of State that will apply to these requirements.

444. The first power is found in new subsection (3B)(b). As provided for by new subsection (3C) (discussed in more detail below), undertakers will be required, on an ongoing basis, to enter two types of information into NUAR, namely information recorded pursuant to the requirement in section 79(1), and such "other information" as may be prescribed, as per new section 79(1B).

445. To ensure the effective operation of NUAR, the intention is for two types of information to also be included in the "archive" of information that will need to be entered into NUAR before the end of the initial upload period; provision is made for this in the new subsection (3B). These two types of information will be information recorded pursuant to the requirement in section 79(1) and "other information". The Secretary of State may, by regulations, set out a prescribed description of such "other information"; being able to "describe" such information will be necessary in this context, given the need to capture information that is already in an undertaker's records.

446. The approach therefore aligns with that taken in the new subsection (3C) in relation to the entry into NUAR of information on an ongoing basis, save that a standalone power is taken to prescribe "other information" for the purposes of the "initial" upload.

447. The four other powers addressed in this group all interact with and relate to this duty in new subsection (3B):

a. New subsection (3E) empowers the Secretary of State to prescribe, by regulations, cases in which the duty under subsection (3B) (that is, the duty to enter "archive" information into NUAR before the end of the initial upload period) does not apply. This power reflects a similar, existing approach in section 79(1) of the 1991 Act, and the approach set out in respect of new subsection (1B) above. It provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection (3B) would be inappropriate or unduly burdensome, make provision to address this.

b. New subsection (3F) enables the Secretary of State to prescribe, through regulations, the form and manner in which information must be entered into NUAR under subsection (3B).

c. New subsection (7)(a) requires the Secretary of State to specify, by regulations, a date as the "archive upload date" (i.e. the date on which a "snapshot" of the undertaker's information must be taken), which then reflect the information to be entered into NUAR before the end of the "initial upload period", and

d. New subsection (7)(b) requires the Secretary of State to specify, by regulations, a period beginning with the archive upload date as the "initial upload period", by the end of which the "snapshot" of information must have been entered into NUAR.

448. Existing section 79(4) and (5) set out the consequences of a failure to comply with the duty in new subsection (3B) and, as set out above, section 104 of the 1991 Act (as amended by clause 139(6) applies in respect of regulations made in exercise of these powers.

Justification for taking the powers

449. The first power, as provided for by new subsection (3B)(b), is equivalent to the power in new subsection (1B) to prescribe "other information" that must be recorded by an undertaker when one of the events listed in new subsection (1B)(a) to (d) occurs. As with subsection (1B), the nature of the information required is likely to be technical and specific in nature, potentially relating to particular aspects or attributes of a range of different types of apparatus, such that regulations are considered to be a more appropriate legislative vehicle that seeking to set out such matters in primary legislation. Following Royal Assent of the Bill, as detailed work progresses to prepare for the full implementation of NUAR in accordance with these new legislative provisions, additional information which undertakers already have in their records - beyond that already specified in section 79(1) of the 1991 Act - is likely to be identified as useful to be included in the "archive" information that must be entered into NUAR.

450. It is necessary to include in new subsection (3B)(b) a separate power to that in new subsection (1B) for these purposes. The purposes of these two powers, although related in some ways, is different; through the latter power the Secretary of State can specify information that undertakers are to record (and then enter into NUAR) from the point at which these new requirements come into force. However, the former power empowers the Secretary of State to describe existing information, not required to be recorded by section 79(1) but nevertheless already recorded by undertakers, which must be captured (as at the archive upload date) and entered into NUAR before the end of the initial upload period. In the

Government's view, these different purposes, together with the greater clarity provided by such an approach, warrant the conferral of separate regulation-making powers on the Secretary of State.

451. New subsection (3E) empowers the Secretary of State to, through regulations, prescribe cases in which the duty in subsection (3B) does not apply. This reflects the wider approach, which already exists in section 79 of the 1991 Act, and which is being included in the new subsection (1B), whereby provision can be made so that duties to record or share information do not apply. Similar reasons to those set out above in respect of new subsection (1B) apply to this new subsection (3E). Making provision for any such exceptions will form part of the detailed implementation of these new provisions. As such, in light of the potential specificity that will be required, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

452. The Government does not consider it appropriate to specify, in primary legislation, the form and manner in which information must be entered into NUAR under subsection (3B). Instead, a power is conferred on the Secretary of State by subsection (3F), which will enable the specific and potentially detailed nature of such matters to be fully considered and set out in detail in due course, as work progresses on the implementation of the new NUAR legislative framework.

453. Clause 139(h) inserts a new subsection (7) into section 79 of the 1991 Act. As set out above, this new subsection contains <u>two</u> powers which allow the Secretary of State to define the "the archive upload date" or the "initial upload period". Determining these dates will require careful consideration of a range of different factors, including operational readiness of NUAR to receive information being entered into it and identifying, as discussed above, any "other information" that undertakers must enter into NUAR pursuant to the duty in new subsection (3B)(b). As such, it would not be appropriate to seek to specify either of these dates in primary legislation and instead the Government considers provision should be made for this through regulations in due course.

<u>Justification for the procedure</u>

454. By virtue of section 104(2) of the 1991 Act, regulations made in exercise of these powers are subject to the negative procedure.

455. In considering the Parliamentary procedure which will apply in respect of the <u>first</u> power, as with the second power in new subsection (1B) as discussed above, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new subsection (3B); the greater the amount of prescribed information, the more involved the duty will be on those required to comply with it.

456. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR. This important factor will therefore serve to inform and shape the nature of any provision to be made in regulations under this power, whilst such

information will - once included in NUAR - further support the benefits to the public that this new register will offer. Further, in this context, the information will only need to be provided on a "one-off" basis as part of entering "archive" information into NUAR, with this taking place within a period of time also set by regulations, which further limits the extent of any resulting obligation on undertakers.

457. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under this power; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in their effect.

458. The application of the negative procedure to regulations made in exercise of the second power in this group, as set out in new subsection (3E), is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the Bill in respect of the duty to record information therein. As with the "exceptions" power in new subsection (1B) (discussed above), the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new subsection (3B); it cannot be used to impose any additional obligations on undertakers.

459. Equally, the application of the negative procedure to regulations made in exercise of the third power in this group, as set out in new subsection (3F), is also considered appropriate given the limited scope of the power; it can only be used to set out the form and manner in which information must be entered into NUAR and cannot be used to impose any other duties on other persons. As such, the Government also believes this procedure to, in respect of this power, strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

460. The two powers in the new subsection (7) inserted into the 1991 Act are limited in their scope; they simply provide a means through which - taking into account practical considerations of the type discussed above - the Secretary of State can set dates for two aspects of the legislative provision made in primary legislation. Such regulations will be simple and straightforward; as such, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny together with a proportionate use of Parliamentary time.

Clause 139(3)(f): New section 79(3C), (3E) and (3F) - Information in relation to apparatus

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

461. Once the initial upload of "archive" has taken place, undertakers must then continue to enter information into NUAR on an ongoing basis. New subsection (3C) makes provision for this, requiring an undertaker to enter information into NUAR once they have, as required by subsection (1) or new subsection (1B) of section 79, recorded or updated such information in their own records.

462. Three powers are conferred on the Secretary of State in relation to this "ongoing" requirement to enter information into NUAR; given the interaction between these different powers they are addressed here as a single group, in order to provide as clear and comprehensive a description as possible of their effect, and the Government's rationale in support of the approach they take.

463. The first power is set out in new subsection (3C) itself; information that has been recorded or updated by undertakers must then be entered into NUAR "within a prescribed period". The Secretary of State can therefore set the duration of this period through regulations.

464. The second power is set out in new subsection (3E) above and enables the Secretary of State to prescribe, by regulations, cases in which the duty under new subsection (3C) does not apply. This power, which reflects the existing approach in section 79(1) of the 1991 Act, and the approach set out in respect of new subsections (1B) and (3B) above, provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection (3C) would be inappropriate or unduly burdensome, make provision to address this.

465. The third power is set out in new subsection (3F) which enables the Secretary of State to prescribe, through regulations, the form and manner in which information must be entered into NUAR under subsection (3C).

466. Existing section 79(4) and (5) set out the consequences of a failure to comply with the duty in new subsection (3C) and, as set out above, section 104 of the 1991 Act (as amended by clause 139(6) applies in respect of regulations made in exercise of these powers.

Justification for taking the powers

467. The first power, enabling the Secretary of State to determine a "prescribed period" within which the duty in new subsection (3C) must be complied with, relates to the entry into NUAR of information on an ongoing basis. As part of the detailed implementation of these provisions, careful consideration will need to be given to the duration of this period. A number of factors will be relevant, including the nature of any information that might be prescribed for (and therefore need to be provided in accordance with) the duty in new subsection (1B). As such, it will be important that there is flexibility in setting the duration of the prescribed period, including the possibility (as per the existing provision in section 104(1) of the 1994 Act) to

potentially make different provision for different cases where appropriate to do so in light of all relevant circumstances. Experience gained from the implementation and operation of NUAR over time could also inform changes to the duration of this prescribed period such that it would be appropriate to change it in the future; the Government considers that making such changes through regulations, rather than through primary legislation, would be a more proportionate use of Parliamentary time.

468. The second power, in new subsection (3E) empowers the Secretary of State to, through regulations, prescribe cases in which the duty in subsection (3C) does not apply. As already set out above in the context of this power also applying in respect of the duty in new subsection (3B), the inclusion of this power reflects the wider approach, which already exists in section 79 of the 1991 Act, and which is being included in the new subsection (1B) being inserted into that section, whereby provision can be made for duties to record or share information to not apply. Similar reasons to those set out above in respect of new subsection (1B) also apply in this context; making provision for any such exceptions will form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

469. The third power, in new subsection 3F, reflects the Government's view that it would not be appropriate to specify, in primary legislation, the form and manner in which information must be entered into NUAR under subsection (3C). Instead, this power will enable the specific and potentially detailed nature of such matters to be fully considered and set out in detail in due course, as work progresses on the implementation of the new NUAR legislative framework. As NUAR develops and increased operational experience is gained over time, this power will also provide the necessary flexibility to make changes to the form and manner in which information is to be provided, if appropriate.

Justification for the procedure

470. By virtue of section 104(2) regulations made in exercise of these powers are subject to the negative procedure.

471. The application of the negative procedure to regulations made in exercise of the first power discussed above (through which the Secretary of State can determine the "prescribed period" within which the duty in new subsection (3C) must be complied) is considered appropriate given the limited scope of the power; it cannot change the nature of the duty, or extend it to new or different persons, but can only be used to determine the period within which information must be entered into NUAR. Although not a determining factor, circumstances could arise in which it could be useful to make such a change at pace, for example if it becomes apparent that any existing prescribed period is proving impractical or unduly burdensome in practice. Equally, the Government recognises the practical importance of this period, the duration of which will need to strike a balance between operational practicalities and a desire for NUAR to be updated as quickly as possible; as such, Parliament should have the opportunity to scrutinise these regulations if considered necessary. In light

of these considerations, the negative procedure is considered to appropriately balance this potential need for scrutiny and the need to ensure Parliamentary time is used appropriately.

472. The application of the negative procedure to regulations made in exercise of the second power (through which the Secretary of State can prescribe, by regulations, cases in which the duty under new subsection (3C) does not apply) is considered appropriate for similar reasons to those set out above in respect of the application of subsection (3E) to the duty in subsection (3B). Such an approach is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the Bill in respect of the duty to record information therein. In respect of this second power, and as with the "exceptions" power in new subsection (1B) , the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new subsection (3C); it cannot be used to impose any additional obligations on undertakers.

473. Equally, the application of the negative procedure to regulations made in exercise of the third power in this group, as set out in new subsection (3F), is also considered appropriate given the limited scope of the power; it can only be used to set out the form and manner in which information must be entered into NUAR (pursuant to the obligation in new subsection (3C) and cannot be used to impose any other duties on other persons. As such, the Government believes this procedure to strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

Clause 139(4): New section 80(1) and (4) - Duties to report missing or incorrect information in relation to apparatus

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

474. Clause 139(4) inserts a new section 80 into the 1991 Act; as highlighted above the existing section 80 in the 1991 Act has not yet been commenced. The new section 80 sets out two main duties with which persons undertaking works in the street must comply. The first duty is set out in subsection (2) (read with subsection (1)) of new section 80 and applies where a person executing any works in a street finds an item of apparatus belonging to an undertaker in relation to which prescribed information is missing from NUAR, or where such information is in NUAR but is incorrect. In such circumstances, the person must take such steps as are reasonably practicable to inform the undertaker to whom the item belongs of the missing or incorrect information.

475. Two powers are conferred on the Secretary of State in respect of this duty. Given the interaction between these two powers, they are addressed here as a single group, in order to provide as clear and comprehensive a description as possible of their effect, and the Government's rationale in support of the approach they take.

476. The first power, set out in new section 80(1) enables the Secretary of State to prescribe, through regulations, information for the purposes of this duty. That is, the Secretary of State can prescribe information which, if missing from or incorrect in NUAR, triggers the duty to take reasonably practicable steps to inform the undertaker of this.

477. The second power enables the Secretary of State to prescribe exceptions to the duty in subsection (2). This power, which is similar to the existing approach in section 79(1) of the 1991 Act, provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection (2) would be inappropriate or unduly burdensome, make provision to address this.

478. As set out in new section 80(5) and (6), a person who fails to comply with the duty in subsection (2) commits an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

479. As set out above, section 104 of the 1991 Act (as amended by clause 139(6)) applies in respect of regulations made in exercise of these powers.

Justification for taking the powers

480. The first power, set out in new section 80(1), is considered necessary for similar reasons to those set out in respect of the second power taken in relation to the new subsection (1B) inserted into section 79 of the Act by clause 139(3)(c). The nature of the relevant information could be technical and specific in nature, potentially relating to particular aspects or attributes of a range of different types of apparatus, such that regulations are the most appropriate legislative vehicle for such provision. In addition, it is likely that the information to be communicated to an undertaker about apparatus the undertaker owns (and then in turn, be entered into NUAR) could change over time as new and different uses and benefits of NUAR are identified, or as new techniques for recording information about apparatus are developed. There is also likely to be a need to ensure consistency with information, specified in regulations made under other powers provided for by amendments to section 79 and the substitution of section 80, that is also to (ultimately) be entered into NUAR. As such, the ability to provide for this through regulations is much more appropriate, and a more proportionate use of Parliamentary time, than requiring amendments to primary legislation for these purposes. As with the first power in new subsection (1B) as discussed above, setting out such exceptions in primary legislation would be an unduly restrictive approach.

481. The second power, set out in new section 80(4), enables the Secretary of State to prescribe, through regulations, exceptions to the duty set out at new section 80(2). Such an approach already exists in section 79(1) of the Act and, as set out elsewhere in this memorandum, has also been adopted in respect of a number of other new duties and requirements imposed by the amendments this Bill makes to the 1991 Act. Such exceptions form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. Again, to attempt to set out such exceptions at this stage, in primary legislation, would also be an unduly restrictive approach.

482. The Government is mindful that the existing section 80 of the 1991 Act has not been commenced and is, through this clause, being substituted with a new section. The bringing into force of this new section 80 will therefore be the first time persons executing works in a street will be required to comply with duties of the type set out in new section 80(2) and (3). The Government recognises the need to ensure these specific duties are implemented in a practical and effective way, whilst also noting the likely need for a range of specific issues and factors to be taken into account. In light of this, new section 80(7) imposes a requirement on the Secretary of State, before making regulations under new section 80, to consult such representatives of persons likely to be affected by the regulations as the Secretary of State considers appropriate, together with any such other persons as the Secretary of State considers appropriate. Through regulations made in exercise of this power, the Secretary of State will be able to take into account responses to any such consultation. This is in addition to the requirement, as already set out earlier in this memorandum, for the Secretary of State to also consult the Welsh Ministers. These requirements may be satisfied by consultation undertaken before or after the coming into force of new section 80(1), as provided for by clause 140.

Justification for the procedure

483. By virtue of section 104(2), regulations made in exercise of these powers are subject to the negative procedure.

484. As with similar powers discussed earlier in this memorandum, in considering the Parliamentary procedure which will apply in respect of the first power, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new section 80(2); the greater the amount of prescribed information, the more involved the duty will be on those required to comply with it.

485. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR. This important factor will therefore serve to inform and shape the nature of any provision to be made in regulations under this power, whilst such information will - once included in NUAR - further support the benefits to the public that this new register will offer.

486. In addition, the Government highlights the consultation requirements with which the Secretary of State must comply before making regulations in exercise of this power. Any responses received through any such consultation will need to be taken into account by the Secretary of State, serving as a further safeguard in respect of this power.

487. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under this power; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in

their effect.

488. The application of the negative procedure to regulations made in exercise of the second power is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the Bill in respect of the duty to record information therein. Further, the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new section 80(2); it cannot be used to impose any additional obligations on undertakers.

Clause 139(4): New section 80(3) and (4) - Duties to report missing or incorrect information in relation to apparatus

Powers conferred on: Secretary of State

Powers exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

489. As discussed above, clause 139(4) substitutes a new section 80 into the 1991 Act. The second of the two main duties in new section 80 is set out in subsection (3). This duty arises where a person executing works in a street finds an item of apparatus which does not belong to them. If the person is unable (after taking reasonably practicable steps) to ascertain to whom the item belongs, the person must do one of two things. If the person is an undertaker, they must enter prescribed information into NUAR (see section 80(3)(a)). If not an undertaker, the person must inform the street authority of the information (see section 80(3)(b)).

490. Three powers are conferred on the Secretary of State in relation to this duty. Given the interaction between these different powers, they are addressed here as a single group, in order to provide as clear and comprehensive a description as possible of their effect, and the Government's rationale in support of the approach they take.

491. The first power is a power, touched on above and found in section 80(3)(a), to prescribe the information which must be either entered into NUAR (if the person is an undertaker) or of which the street authority must be informed. This is intended to allow the Secretary of State to carefully consider, and then make appropriate provision for, information that would be useful and appropriate to be entered into NUAR, or notified to a street authority, in accordance with the duty in section 80(3).

492. The second power, also found in section 80(3)(a), enables the Secretary of State to prescribe the form and manner in which the prescribed information must be entered into NUAR. This will enable provision to be made which, among other things, can require information to be inserted into NUAR in a consistent format, such that it can easily be incorporated into, and operate effectively within, NUAR.

493. The third power is set out in subsection 80(4); in the same way that this power applies in respect of the duty in subsection 80(2), this power also enables the Secretary of State to prescribe exceptions to the duty set out in subsection 80(3). This power, which is similar to the existing approach in section 79(1) of the 1991 Act, provides a means through which the Secretary of State can, upon identifying circumstances or instances where the imposition of the new requirements in subsection (2) would be inappropriate or unduly burdensome, make provision to address this.

494. As set out in new section 80(5) and (6), a person who fails to comply with the duty in subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

495. As set out above, section 104 of the 1991 Act (as amended by clause 139(6) applies in respect of regulations made in exercise of these powers.

Justification for taking the powers

496. The first power, set out in new section 80(3), is considered necessary for similar reasons to those set out in respect of the second power taken in relation to the new subsection (1B) inserted into section 79 of the Act by clause 139(3)(c), and the first power set out in new section 80(1) as inserted by clause 139(4). The nature of the relevant information could be technical and specific in nature, potentially relating to specific aspects or attributes of a range of different types of apparatus, such that regulations are the most appropriate legislative vehicle for such provision. In addition, it is likely that the information to be communicated to an undertaker about apparatus the undertaker owns (and then in turn, be entered into NUAR) could change over time as new and different uses and benefits of NUAR, and developments in technology to record information, are identified; there may also be a need to ensure consistency with information, specified in regulations made under other powers provided for by amendments to section 79, and the substitution of section 80, that is also to ultimately be entered into NUAR. As such, the ability to provide for this through regulations is therefore much more appropriate, and a more proportionate use of Parliamentary time, than requiring amendments to primary legislation for these purposes. Further, as with the first power in new subsection (1B) as discussed above, setting out such exceptions in primary legislation would be an unduly restrictive approach.

497. The second power, set out in new section 80(3)(a), reflects the Government's view that it would not be appropriate to specify, in primary legislation, the form and manner in which information must be entered into NUAR under new section 80(3)(a). Instead, this power will enable the specific and potentially detailed nature of such matters to be fully considered and set out in detail in due course, as work progresses on the implementation of the new NUAR legislative framework. As NUAR develops and increased operational experience is gained over time, this power will also provide the necessary flexibility to make changes to the form and manner in which information is to be provided, if appropriate.

498. The third power, set out in new section 80(4), enables the Secretary of State to prescribe, through regulations, exceptions to the duty set out at new section 80(2). Such an approach already exists in section 79(1) of the Act and, as set out elsewhere in this memorandum, has also been adopted in respect of a number of other new duties and

requirements imposed by the amendments this Bill makes to the 1991 Act. Such exceptions form part of the detailed implementation of these new provisions and, in light of both the potential specificity that will be required, and the need to be able to create, adapt or remove such exceptions in response to changing circumstances and experience gained from the operation of NUAR, the Government considers it appropriate for such provision to be made by way of regulations. To attempt to set out such exceptions at this stage, in primary legislation, would be an unduly restrictive approach.

499. The Government is mindful that the existing section 80 of the 1991 Act has not been commenced and is, through this clause, being substituted with a new section. The bringing into force of this new section 80 will therefore be the first time persons executing works in a street will be required to comply with duties of the type set out in new section 80(2) and (3). The Government recognises the need to ensure these specific duties are implemented in a practical and effective way, whilst also noting the likely need for a range of specific issues and factors to be taken into account. In light of this, new section 80(7) imposes a requirement on the Secretary of State, before making regulations under new section 80, to consult such representatives of persons likely to be affected by the regulations as the Secretary of State considers appropriate, together with any such other persons as the Secretary of State considers appropriate. Through regulations made in exercise of this power, the Secretary of State will be able to take into account responses to any such consultation. This is in addition to the requirement, as already set out earlier in this memorandum, for the Secretary of State to also consult the Welsh Ministers. These requirements may be satisfied by consultation undertaken before or after the coming into force of new section 106C(1), as provided for by clause 140.

Justification for the procedure

500. By virtue of section 104(2), regulations made in exercise of these powers are subject to the negative procedure.

501. As with similar powers discussed earlier in this memorandum, in considering the Parliamentary procedure which will apply in respect of the first power, the Government has taken into account the fact that information prescribed by the Secretary of State will inevitably affect the breadth of the duty in new section 80(3); the greater the amount of prescribed information, the more involved the duty will be on those required to comply with it.

502. At the same time, the information is likely to be specific in nature and of a level of technical detail such that, in the Government's view, it would not warrant a requirement for Parliament to proactively have to consider regulations setting out, or making changes to, the information in every case. The information that can be prescribed is ultimately for the purposes of it being included in NUAR (or, in the circumstances set out in new section 80(3)(b), for the purposes of a street authority being informed of the information). This important factor will therefore serve to inform and shape the nature of any provision to be made in regulations under this power, whilst such information will - once included in NUAR - further support the benefits to the public that this new register will offer.

503. In addition, the Government highlights the consultation requirements with which the Secretary of State must comply before making regulations in exercise of this power. Any responses received through any such consultation will need to be taken into account by the Secretary of State, serving as a further safeguard in respect of this power.

504. In light of these considerations, the Government considers the negative procedure to provide an appropriate degree of Parliamentary scrutiny for regulations made under this power; Parliament will still have an opportunity to scrutinise the regulations if it wishes to do so, whilst this approach avoids the unnecessary use of Parliamentary time in circumstances where provision about, or changes made to, the prescribed information are more limited in their effect.

505. The application of the negative procedure to regulations made in exercise of the second power, set out in new section 80(3)(a), is also considered appropriate given the limited scope of the power; it can only be used to set out the form and manner in which information must be entered into NUAR (pursuant to the obligation in new section 80(3)(a)) and cannot be used to impose any other duties on other persons. As such, the Government believes this procedure to strike an appropriate balance between affording a degree of Parliamentary scrutiny and making proportionate use of Parliamentary time.

506. The application of the negative procedure to regulations made in exercise of the third power is considered appropriate given that this is consistent with the existing approach, for similar prescribed exceptions, as set out in section 79(1) of the Bill in respect of the duty to record information therein. Further, the negative procedure is considered to strike an appropriate balance between Parliamentary scrutiny and a proportionate use of Parliamentary time, given that the power only enables the Secretary of State to reduce or limit the extent and impact of the duty in new section 80(3); it cannot be used to impose any additional obligations on undertakers.

Clause 149(5): Amendment of duty of board to issue guidance

Power conferred on: Board established under section 63AB of the Police and Criminal Evidence Act 1984

Power exercised by: Code of Practice

Parliamentary Procedure: None

Context and Purpose

507. The amendments made by the Protection of Freedoms Act 2012 to the Police and Criminal Evidence Act 1984 established a DNA Database Strategy Board to oversee the operation of the National DNA Database. The amendments required that Board to issue guidance about the destruction of DNA profiles and also required the chief officer of a police force in England and Wales to act in accordance with the guidance.

508. Clause 149 amends the existing requirement in subsection (2) of section 63AB of the Police and Criminal Evidence Act 1984 for the board to issue guidance to a requirement to issue one or more codes of practice about the erasure of personal data from a database listed in subsection (1), about the destruction of DNA profiles and the destruction of other material which biometric data contained in a database listed in subsection (1) is derived.

Justification for taking the power

509. Clause 149 will require the Board to oversee the national fingerprint database and enable it to oversee other biometric databases as required in the future. In exercising this function the Board needs to set out the policy and procedures police forces must comply with in order to meet the requirements of relevant data protection legislation, including how biometric data should be stored, accessed and deleted on the database. This ensures consistency in procedures across policing. The clause will require the Board to issue codes of practice for this purpose,

Justification for the procedure

510. The codes of practice will provide technical guidance for policing on how the relevant legislation applies to a specific database, supporting chief officers to comply with the requirements of the Police and Criminal Evidence Act 1984 and the data protection legislation, and the operational procedures associated with the destruction of physical material and erasure of personal data. As the code of practices are enabling compliance with an existing statutory framework it is not considered necessary for this to be subject to parliamentary scrutiny.

Clause 149(11): Power to extend the remit of the Board over biometrics databases

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

511. The Protection of Freedoms Act 2012 (PoFA) introduced a new requirement for the Secretary of State to make arrangements for a National DNA Database Strategy Board to oversee the operation of the National DNA Database (section 63AB of the Police and Criminal Evidence Act 1984). PoFA amended the Police and Criminal Evidence Act 1984 to require any DNA profile which is retained under any of the powers in section 63E to 63L of that Act to be recorded on the National DNA Database for use by police forces in England and Wales (section 63AA).

512. Clause 149 amends section 63AB of PACE to require the Board to oversee the database of fingerprints which have been taken from any person under a power conferred by Part 5 of PACE or taken by the police in connection with the investigation of an offence. The clause also changes the name of the Board to the Forensic Information Database Strategy Board.

513. The clause also amends section 63AB to include in subsection (10) a new power for the Secretary of State by regulations to change the databases which the Board is required to oversee to add another database consisting entirely or mainly of biometric data or genetic data which is used for policing purposes. There is an associated power to rename the Board. There is also a power to remove a database. The Secretary of State may also require or authorise the Board to issue a code of practice or guidance. There is a consequential power enabling the regulations to amend section 63AB, or make different provision for different purposes as well as to make any consequential, transitional, transitory or saving provisions

in respect of the removal of a database or the inclusion of a new database in the databases overseen by the Board.

514. Regulations made under this power may amend provisions of primary legislation (subsection (11)(a)), and it is therefore a Henry VIII power.

Justification for taking the power

515. There is a need for flexibility in the databases which the Board oversees given the pace of technological change and requirement for consistent oversight. This will enable a new database of biometric data used for policing purposes to be added to the legislation within the existing framework, or where a database is no longer used, it can be removed. While DNA and fingerprints are well established, biometrics is an area of rapid technological development, including for example iris, face, voice and keystroke patterns. The government is looking to simplify and provide more consistency in the oversight of the police use of biometrics. If and when a new biometric database used for policing purposes reaches a similar level of maturity to DNA and fingerprints, there are likely to be benefits in terms of consistency to bring it within the oversight of the Board, as similar considerations are likely to apply. The delegated power would enable a new database to be added to the existing legislative framework.

516. As the regulations will enable primary legislation to be amended it is appropriate that the regulations should be made under the affirmative procedure.

Clause 150(1): Power to make consequential amendments

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure where regulations amend primary legislation; otherwise negative procedure

Context and Purpose

517. This clause provides the Secretary of State with the power to make provision that is consequential on this Bill.

518. Regulations made under this power may amend or repeal or revoke provisions of primary legislation (subsection (2)(c)), and it is therefore a Henry VIII power.

519. Regulations making provision consequential on the abolition of the Information Commissioner, and his replacement by the new Information Commission, are permitted to amend primary legislation whenever passed or made, including the Bill. But regulations making provision consequential on other provisions of the Bill may only amend primary legislation passed or made before the end of the Session in which the Bill is passed.

Justification for taking the power

520. The power conferred by this clause is wide but is limited by the fact that any amendments made under it must be genuinely consequential on provisions in the Bill. It will be necessary to use this power to amend the Bill itself in order to ensure that the provisions in the Bill operate correctly with respect to the new regulator.

521. The Bill makes numerous amendments to existing legislation, in particular the UK GDPR and DPA 2018, which may require updates to any relevant cross-references in other legislation to provide legal certainty. It is not possible to establish in advance all consequential amendments that may be required. The power will therefore be used to make any relevant provision upon the commencement of the substantive provisions of this Bill. There are numerous precedents for such a power, for example, section 211 DPA 2018.

Justification for the procedure

522. If regulations under this clause do not repeal, revoke or otherwise amend primary legislation they will be subject to the negative resolution procedure (by virtue of subsection (5)). If regulations under this clause amend or repeal provision in primary legislation (including this Bill) they will be subject to the affirmative resolution procedure (by virtue of subsection (4)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 155(1): Power to commence provisions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and Purpose

523. This clause deals with the commencement of the provisions of the Bill. The provisions listed in subsection (2) will come into force when the Act is passed. The remaining provisions will come into force on a day appointed by the Secretary of State through regulations and these can be different days for different provisions.

Justification for taking the power

524. Leaving provisions in the Bill to be brought into force by regulations will enable the government to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, and enable businesses and other organisations adequate time to undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

525. As usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. The principle of the provisions to be commenced will already have been considered by Parliament during the passage of the Bill. Commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 156(1): Power to make transitional provision

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure for amendments to Schedule 21 DPA 2018 and Part 2 of Schedule 7 to this Bill, otherwise none

Context and Purpose

526. This clause confers a power on the Secretary of State to make regulations making transitional, transitory, or saving provision in connection with the coming into force of any provision of the Bill.

527. This power enables the Secretary of State to amend Schedule 21 to DPA 2018 (Further transitional provision etc) or Part 2 of Schedule 7 to this Bill (Consequential and transitional provision) and is therefore a Henry VIII power. Schedule 21 was added to DPA 2018 by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 and includes transitional provisions designed to ensure that established data flows from the UK to third countries could continue after the UK left the EU. Part 2 of Schedule 7 to this Bill includes transitional provisions designed to ensure a smooth transition to new rules on international transfers introduced by this Bill.

Justification for taking the power

528. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation (principally DPA 2018) and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, including in section 213 DPA 2018.

529. If the international transfer rules (currently in Parts 2 & 3 of the DPA 2018 and Chapter V of the UK GDPR) are amended during the Bill's progress through Parliament that might necessitate changes to the transitional provisions in Part 2 of Schedule 7 to the Bill. Ensuring that such provision is as effective as possible for businesses and other organisations affected may require changes to related transitional provisions in Schedule 21 to DPA 2018. For this reason the power enables changes to be made to these provisions, but is limited to these provisions and does not extend to other transitional provisions such as in Schedule 20 to DPA 2018.

Justification for the procedure

530. Exercise of this power is not subject to any parliamentary procedure, except when it is used to amend primary legislation.

531. Such a power is commonly included as part of a bill's power to make commencement regulations and such regulations are not usually subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill

by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies.

532. Where the power is exercised to amend primary legislation it is appropriate to subject it to parliamentary procedure. Whilst powers to amend primary legislation would usually be subject to the affirmative procedure, the negative procedure is appropriate in this case because of the nature of the power as described above. This is consistent with the approach taken in section 213 DPA 2018.

Schedule 5, paragraph 4: Power to approve transfers by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

533. The UK GDPR currently provides for three mechanisms under which personal data can be transferred overseas. The first of these mechanisms is where the Secretary of State has made regulations specifying that the data protection standards of the jurisdiction provide an adequate level of protection. Such regulations effectively 'whitelist' a country for the purposes of personal data transfers.

534. This regulation-making power already exists in the current legislation in section 17A DPA 2018, read alongside Chapter V of the UK GDPR. The Bill will amend the provisions associated with the power to create a clearer regime for approving transfers to other countries, to reflect the way in which the UK approaches such determinations. The regulation-making power and associated provisions will be moved into the UK GDPR.

Justification for taking the power

535. This restates a Secretary of State power that already exists in the current legislation. There will be some changes to the test which has to be met in order for the Secretary of State to approve a country to receive unrestricted transfers of personal data to which the UK GDPR applies, and other aspects of the associated provisions, but the underlying effect of the power will remain the same.

536. Given that countries' data protection regimes evolve frequently, and given the length of time it takes to conduct an assessment of a country's data protection regime, it would be impractical and lead to unnecessary delays if new primary legislation were required each time it was considered appropriate to allow unrestricted transfers of personal data to a new country. Granting the power to the Secretary of State to approve countries which meet the standards set out in primary legislation will mean that countries can be approved more quickly, benefiting UK organisations and individuals. Transfers under this mechanism lead to significant reductions in barriers that businesses, researchers and government organisations face when transferring personal data overseas.

537. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

538. The existing regulation-making power under section 17A DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 4 of Schedule 5 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used.

Schedule 5, paragraph 8: Power to specify standard contractual clauses by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

539. The UK GDPR currently provides for three mechanisms under which personal data can be transferred overseas. The first of these mechanisms is set out above. The second of these mechanisms allows personal data to be transferred, in the absence of adequacy regulations, where appropriate safeguards are in place. Appropriate safeguards may be provided, among other methods, by the use of standard contractual clauses which the Secretary of State has laid by way of regulations.

540. This regulation-making power already exists in the current legislation in section 17C DPA 2018, read alongside Chapter V of the UK GDPR. The Bill will amend the provisions associated with the power to create a clearer regime for transferring data subject to appropriate safeguards. The regulation-making power and associated provisions will be moved into the UK GDPR.

Justification for taking the power

541. This restates a Secretary of State power that already exists in current legislation.

542. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

543. The existing regulation-making power in section 17C DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 8 of Schedule 5 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used.

Schedule 5, paragraph 8: Power to make provision about further safeguards by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

544. This provision will give the Secretary of State the power to recognise new mechanisms for transfers to complement those set out in Articles 46(2) and (3) of the UK GDPR. The Secretary of State will be empowered to recognise new mechanisms as being capable of providing 'appropriate safeguards' for transfer as referred to in Article 46(1). Any new transfer mechanism recognised by the Secretary of State under this power will need to be capable of providing the same standard of protection for data subjects as existing transfer mechanisms under Article 46.

Justification for taking the power

545. This power will support the UK government to adapt at pace to international developments in data protection law, as well as reflect the increasing importance of multilateral cooperation in maintaining global data flows while ensuring a high standard of data protection.

546. The power will complement and extend the Secretary of State's existing power under Article 46(2)(c) and section 17C DPA 2018 to specify standard data protection clauses. While some novel transfer mechanisms (such as the EU's new standard contractual clauses issued in accordance with Article 46(2)(c) of the EU GDPR) could be recognised under this existing power, there are other tools, such as those created under international privacy schemes, which would not fit into the bounds of Article 46(2)(c).

547. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

548. The affirmative resolution procedure will maintain Parliamentary scrutiny over the process of designating transfer mechanisms as capable of providing the appropriate safeguards required by Article 46(1). Opening new routes for personal data flows overseas has the potential to have a substantial effect on data subjects and their rights, so it is appropriate that Parliament maintains scrutiny over this process. It is also a broader power than set out in section 17C DPA 2018, which empowers the Secretary of State to specify in regulations (subject to the negative resolution procedure) standard contractual clauses that the Secretary of State considers to provide appropriate safeguards. As such, and because regulations under this power have the potential to impact data subject rights in a broader manner, it is appropriate that its use is subject to the affirmative resolution procedure.

Schedule 5, paragraph 9(5): Power to specify where a transfer is taken to be necessary or not necessary for the public interest

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Made affirmative procedure where the Secretary of State has made an urgency statement in respect of them, otherwise the affirmative procedure

Context and Purpose

549. The UK GDPR currently provides for three mechanisms under which personal data can be transferred overseas. The first and second of these mechanisms are set out above. The third of these mechanisms allows personal data to be transferred using derogations if specific circumstances apply. One such situation includes where the transfer is necessary for important reasons of public interest which have been recognised in domestic law (whether by regulations or otherwise) ("the Article 49(1)(d) derogation").

550. A power already exists in section 18(1) DPA 2018 to specify by regulations circumstances in which a transfer is taken to be necessary for important reasons of public interest, and circumstances in which a transfer is not taken to be necessary for important reasons of public interest, for the purposes of the Article 49(1)(d) derogation.

551. The Bill moves the existing power in section 18(1) DPA 2018 into Article 49(4A), as part of the restructuring of the international transfers regime provisions in the UK GDPR and DPA 2018 so that all provisions relating to international transfers will be contained in Chapter V of the UK GDPR, for clarity and ease of reference. No changes are being made to the power itself.

Justification for taking the power

552. This restates a power of the Secretary of State which already exists in the current legislation. It is not possible for the UK government to identify and set out all current and future matters of public interest in the Bill - and should any need emerge in future, this power will give the Secretary of State the power to specify any such matters. This power will also give the Secretary of State the ability to stop or prevent improper uses of the Article 49(1)(d) derogation which are not in the public interest, which it is not possible to predict at this time. Although no such uses have been identified for inclusion in the Bill at this time, the power provides a valuable safeguard to help protect individuals' personal data.

553. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate, except where the Secretary of State has made an urgency statement (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

554. The existing regulation-making power in section 18(1) DPA 2018 is subject to the made affirmative resolution procedure where the Secretary of State has made an urgency

statement in respect of them; otherwise it is subject to the affirmative resolution procedure. The power as restated in Article 49(4A) of the UK GDPR will be subject to the same procedure, which is considered appropriate as while Parliament should have the ability to approve matters designated as being necessary or not necessary for important reasons of public interest through the affirmative procedure, there may be circumstances in which action needs to be taken quickly to protect individuals' personal data - particularly in relation to specifying matters not in the public interest - so permitting the made affirmative procedure in urgent circumstances is appropriate.

Schedule 5, paragraph 10: Power to restrict transfers for the public interest

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Made affirmative procedure where the Secretary of State has made an urgency statement in respect of them, otherwise the affirmative procedure

Context and Purpose

555. Section 18(2) DPA 2018 currently confers on the Secretary of State a power to restrict the transfer of categories of personal data to a third country or international organisation, if the Secretary of State considers that such a restriction is necessary for important reasons of public interest. This power can only be exercised where there are no adequacy regulations in place permitting the transfers in question.

556. The Bill moves the existing power in section 18(2) DPA 2018 into new Article 49A, as part of the restructuring of the international transfers regime provisions in the UK GDPR and DPA 2018 so that all provisions relating to international transfers will be contained in Chapter V of the UK GDPR, for clarity and ease of reference. No changes are being made to the power itself.

Justification for taking the power

557. This restates a power of the Secretary of State which already exists in the current legislation. It provides a further safeguard to protect individual's personal data by preventing categories of personal data from being transferred to another country where the Secretary of State believes it is in the public interest to do so. There are no such situations which currently exist, but it is not possible to predict all of the possible future scenarios in which personal data may be at risk, and so it is appropriate for the Secretary of State to be given the power to impose such restrictions.

558. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate, except where the Secretary of State has made an urgency statement (see new Article 91A UK GDPR added by clause 50 of this Bill).

Justification for the procedure

559. The existing regulation-making power in section 18(2) DPA 2018 is subject to the made affirmative resolution procedure where the Secretary of State has made an urgency statement in respect of them; otherwise it is subject to the affirmative resolution procedure. The power as restated in new Article 49A of the UK GDPR will be subject to the same procedure, which is considered appropriate as while Parliament should have the ability to approve restrictions being imposed on the transfer of categories of personal data to another country, there may be circumstances in which action needs to be taken quickly to mitigate against risks to individuals' personal data which arise when they are transferred to other countries, so permitting the made affirmative procedure in urgent circumstances is appropriate.

Schedule 6, paragraph 4: Power to approve transfers by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

560. Chapter 5 of Part 3 of the DPA 2018 currently provides for three mechanisms under which personal data can be transferred overseas for law enforcement purposes. The first of these mechanisms is where the Secretary of State has made regulations specifying that the data protection standards of the jurisdiction provide an adequate level of protection. Such regulations reduce the barriers for sharing personal data with third countries and international organisations, helping to ensure such important data sharing can take place.

561. This regulation-making power already exists in the current legislation in section 74A DPA 2018. This Bill will amend the provisions associated with the power to create a clearer regime for approving transfers to other countries, to reflect the way in which the UK approaches such determinations. The changes being made to this power in Part 3 of the DPA 2018 mirror the changes being made to the equivalent power in the UK GDPR (paragraph 4 of Schedule 5) already detailed above.

Justification for taking the power

562. This restates a Secretary of State power that already exists in the current legislation. There will be some changes to the test which has to be met in order for the Secretary of State to approve a country for transfers of personal data to which Part 3 of the DPA 2018 applies, and other aspects of the associated provisions, but the underlying effect of the power will remain the same.

563. As already detailed for the equivalent change in the UK GDPR (paragraph 4 of Schedule 5), it would be impractical and lead to unnecessary delays if new primary legislation were required each time the Secretary of State assessed and considered it was appropriate to allow transfers of personal data to a new country. Allowing this to be done by regulations ensures the process can be done more quickly, which benefits competent authorities needing to share data for law enforcement purposes overseas, enabling them to share data with international partners.

564. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

565. The existing regulation-making power under section 74A DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 4 of Schedule 6 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used.

Schedule 10, paragraph 1: Power to make provision about penalties

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

566. As part of the objective of aligning the PEC Regulations' enforcement regime with that of the DPA 2018, sections 157 and 159 DPA 2018 will be applied to the PEC Regulations. The applied version of section 157 DPA 2018 sets out the maximum penalty amounts that the Commissioner can impose on a person for infringement of the PEC Regulations. Just as there is under DPA 2018, there are two penalty maximums depending on the nature of the infringements: a higher maximum amount and a standard maximum amount. The higher maximum amount, in the case of "an undertaking", is £17.5 million or 4% of the undertaking's total annual worldwide turnover in the preceding financial year, and in any other case the higher maximum amount is £17.5million. The standard maximum amount, in the case of "an undertaking", is £8.7 million or 2% of the undertaking's total annual worldwide turnover in the preceding financial year, and in any other case the higher maximum amount is £8.7 million.

567. Section 159 DPA 2018 enables the Secretary of State to make regulations which make further provision about administrative penalties and this section will be applied to the PEC Regulations. The provision which such regulations can make are:

a. whether a person is or is not "an undertaking";
b. how an undertaking's turnover is to be determined; and
c. whether a period is or is not a financial year.

568. As section 159 will now be applied to the PEC Regulations, this is effectively an extension of scope of the Secretary of State's powers.

Justification for taking the power

569. The provisions in the DPA 2018 as applied to the PEC Regulations provide for different maximum fines depending on whether the person on whom the fine is to be imposed is an "undertaking". Having established in the DPA 2018 (and on the face of the Bill for

application to the PEC Regulations) a formula for calculating the maximum fine that may be imposed on an undertaking, it is appropriate to leave to regulations the secondary detail as to which legal persons are to be treated as being, or not being, an undertaking (which may range from commercial undertakings to different forms of public body), how to determine an undertaking's turnover (which may vary according to the nature of the undertaking) and how to define an undertaking's financial year.

570. These powers replicate those which already exist in the DPA 2018 and are required to ensure cohesion and consistency between the enforcement regimes of DPA 2018 and the PEC Regulations.

Justification for the procedure

571. These powers are subject to the affirmative procedure. This is considered appropriate given that, in particular, the definition of an undertaking will determine those organisations which are potentially subject to a higher maximum monetary penalty calculated by reference to a percentage of their turnover. This is the procedure already decreed in section 159(3) DPA 2018.

Schedule 11, Part 1 paragraph 6, inserts a new Schedule 3B into Social Security Administration Act 1992.

Schedule 11, Part 1 paragraph 6 - Paragraph 1(1) of Schedule 3B: Power to specify persons to whom an account information notice may be given by the Secretary of State

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

572. Clause 128 introduces new Schedule 11 "Power to require information for social security purposes". Part 1 of Schedule 11 amends the Social Security Administration Act 1992 by inserting new Schedule 3B into the Social Security Administration Act 1992 to make provision about a power for the Secretary of State to obtain information for social security purposes. Part 2 of the Schedule OPC394 amends the Social Security Administration (Northern Ireland) Act 1992 and Part 3 makes related amendments of the Proceeds of Crime Act 2002.

573. In 2022/23, Government lost a total of £8.3bn to welfare fraud and error, a figure that increased during the pandemic and remains high compared to historic levels (2010-2019). The majority of this loss is as a result of claimant fraud or error. These amendments implement a commitment made in the Department for Work and Pension (DWP)'s Fraud plan in May 2022 to tackle and drive down fraud and error in the welfare system, improve the accuracy of payments and reduce key areas of loss. DWP's existing main information gathering powers are set out in 109B Social Security Administration Act 1992 and are limited to requiring the disclosure of information from third parties where there is a reasonable suspicion of fraud occurring. The existing powers do not permit requiring data at scale.

574. The power in Schedule 3B enables the Secretary of State to require from prescribed persons account information signalling a breach of benefit rules at scale. Schedule 3B, paragraph 1 (1) confers a power on the Secretary of State to give account information notices to prescribed persons, for example financial institutions, requiring them to provide certain information as set out on the face of the Bill, relating to accounts which they administer or have access to and match certain criteria. This means the power would allow the Secretary of State to receive required information relating to accounts in bulk provided those accounts are linked to a DWP payment and meet the specified criteria in the account information notice, for example if an account receives a DWP payment but also shows an account balance or savings above the eligibility threshold of a relevant social security benefit where the account information notice criteria relate to capital holdings. This would allow fraud and error to be detected on a broad spectrum, as opposed to on an individual basis. The government would use this data to aid in determining the need for further intervention in a claim for benefits. Additionally, this would be helping to prevent debt building up against individuals due to errors on their claims (which can lead to significant overpayments). For these reasons, this legislation will benefit both the government and individual claimants, as well as reducing the ability of organised criminals to defraud the benefits system.

575. The paragraphs in Schedule 3B sets out what is an account information notice and information may be required from a prescribed person and the types of accounts that may come within the scope of an account information notice. Prescribed persons such as financial institutions do already hold sufficient information which enables them to identify accounts in receipt of all types of DWP payments without any personal data sharing by DWP.

576. The power to give account information notices can only be exercised for purpose of assisting the Secretary of State in identifying cases which merit further consideration to establish whether relevant benefits are being paid or have been paid in accordance with the rules as mentioned above. The power is also limited to obtaining information relating to persons holding accounts matching the criteria which would be set out in an account information notice. The power cannot be used to obtain data which falls within historic data as defined in the provision.

577. This provision comprises of several paragraphs containing regulation-making powers: paragraph 1(1) (power to prescribe persons to whom an account information notice may be given), 9(3) (power to make provision regarding fixed penalties), 12 (power to change maximum penalty) and a power to issue a code of practice – these are explained below. The narrative above would also be relevant to those powers.

578. Paragraph 1(1) allows the Secretary of State to prescribe persons to whom an account information notice may be given requiring the person to provide account information.

<u>Justification for taking the power</u>

579. Regulations will set out persons who are subject to the Secretary of State's power to require account information and may be given an account information notice by the Secretary of State. One of the more significant sources of financial loss to the DWP originates from capital held by claimants either being underdeclared or undeclared altogether. DWP estimates 80% of fraud and error due to under or undeclared capital occurs during the lifetime of a claim to benefit, rather than at the outset which has created a need for broader powers

to gather account information from third parties that administer or have access to those accounts.

580. Organisations such as financial institutions are able to identify accounts held by their customers which are linked to DWP by reason of a benefit being paid or had been paid into an account. They are likely to be the only source holding information that can confirm if declared capital by a claimant is accurate or not and/or an account had been accessed outside of the UK over an extended period of time, both of which could indicate a potential breach of benefit rules. However, at this stage, recognising financial institutions on the face of the Bill would be premature. The government is aware that the banking landscape is changing. Over recent years online banking institutions such as Monzo, Starling, and Atom have seen a sharp rise in popularity, as has potential means for holding capital, such as crypto- assets, so the government will need to ensure the power is future-proofed to enable the government to adapt quickly to current and emerging trends in customer banking habits. Recognising these organisations in primary legislation would mean that the government would risk not being able to respond quickly and make savings as new trends of fraud and error emerge: data held by new types of account administrators would not fall within the scope of the power.

581. In this context a delegated power is necessary to achieve recognition of new persons/organisations who at a point in future may hold account information that could indicate potential breach of benefit rules. Regulation-making powers of this kind, providing the government the opportunity to add new persons, will allow the government to keep pace with changing fraud landscape, technology and evolving ways in which data may be gathered and held and will futureproof the power. Given the pace at which the fraud and error landscape evolve there is a clear need for a rapid recognition of new persons who might administer or have access to accounts that are linked to claimants receiving a DWP payment. It is therefore essential that the powers allow for persons subject to the power to be updated by regulation providing more flexibility without the need for new primary legislation.

Justification for the procedure

582. The affirmative resolution procedure will maintain Parliamentary scrutiny over the process of prescribing a new person against whom the Secretary of State's power to require information may be exercised. Mandating supply of information has the potential to have a substantial effect on the person subject to the power as well as data subjects whose data would be shared. Therefore, it is appropriate that the Parliament maintains scrutiny over this process.

Schedule 11, Part 1 Paragraph 6 - Paragraph 6 (1) of Schedule 3B: Provision to issue a code of practice in connection with account information notices

Power conferred on: The Secretary of State

Power exercised by: Statutory code of practice

Parliamentary procedure: Laying only

Context and purpose

583. Paragraph 6(1) enables the Secretary of State to issue a code of practice in connection with account information notices. This code might include provisions about what considerations may be relevant to the exercise of the power to issue an Account Information Notice and the imposition of penalties. The code will also be designed to assist persons given account information notices in how to comply with them and also how to complain to the Department about such notices.

Justification for the power

584. The Department of Work and Pensions considers that a code of practice is the most appropriate vehicle to set out expectations and responsibilities on both Secretary of State and prescribed individuals. There is a vast range of statutory guidance issued each year and it is important that this guidance can be readily updated to keep pace with the regulations and other events, such as changes in technology and operational good practice.

Justification for the procedure

585. The first code of practice (and any future revisions of the code where there are more than minor corrections or updates of references to legislation or document which have become of date) should be published in draft and the Secretary of State may consider any representations and make any changes that the Secretary of State deems necessary. After that the Secretary of State must issue the code of practice and lay it before Parliament. This is considered appropriate because it enables affected stakeholders the ability to consider before the document becomes the statutory code. Given the likely content and nature of the code, and in particular the fact that it will not define or create new legal responsibilities, it is not considered necessary for the code to be subject to any more than laying in parliament.

Schedule 11, Part 1 Paragraph 6- Paragraph 9(3) (a) of Schedule 3B: Power to specify an amount payable by a person who has been given an account information notice for failing to comply with it

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

586. Paragraph 9 (3) of Schedule 3B provides a power for the Secretary of State to issue a notice requiring a person to pay a penalty where that person has failed to comply with an account information notice. The notice may require the person to pay a penalty of a prescribed amount (a fixed penalty) or a penalty calculated by reference to a daily rate (daily rate penalty) or a fixed penalty and a daily rate. The provision sets out a penalty notice must specify certain information about the penalty and that the Secretary of State may vary of cancel a penalty notice. The burden of proof for applying such a penalty in the first instance is that the Secretary of State has reasonable grounds to suspect that a person has failed to comply with an account information notice and had no reasonable excuse for the failure. The Secretary of State must also give an opportunity to the person to make representations about

the failure. The Bill on the face of it sets out the maximum amount of a fixed penalty that may be prescribed is £1000 and the daily rate must not exceed £40.

Justification for taking the power

587. The government considers this power is necessary to ensure that the amount of the fixed penalty remains appropriate and dissuasive. The paragraph 9 (1) ensures the power is exercised proportionately requiring the Secretary of State to provide an opportunity to the persons served with a penalty notice to make representations about the failure comply with the account information notice. The Secretary of State also has to be satisfied that the person has failed to comply and had no reasonable excuse for the failure. As noted above the maximum amount that can prescribed as a fixed penalty is set out on the face of the Bill.

Justification for the procedure

588. The affirmative resolution procedure will maintain Parliamentary scrutiny over the process of prescribing a new fixed penalty amount.

Schedule 11, Part 1 Paragraph 6 - Paragraph 12 of Schedule 3B: Power to change maximum amount of penalties

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

589. Paragraph 12 includes a power for the Secretary of State which allows, by regulation, to amend the maximum penalty amounts for the time being specified on the Bill: paragraph 9(9) sets out that a maximum of £1000 for a fixed penalty, paragraph 9(10) sets out a maximum of £40 for a daily rate penalty and paragraph 10(5) sets out the maximum of a daily rate penalty the Tribunal may determine, to reflect a change in the value of money over time.

Justification for taking the power

590. The power will enable the Secretary of State to amend the amounts for the maximum penalty specified on the face of the Bill. This would be necessary to ensure that the penalties would reflect the change in value of money over time.

Justification for the procedure

591. These regulations will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter the maximum value of the penalties specified on the face of the Bill.

Schedule 14, paragraphs 3 and 5: Power to publish information standards

Power conferred on: Secretary of State

Power exercised by: Published standards

Parliamentary Procedure: None

Context and Purpose

592. Section 250 of the Health and Social Care Act 2012 (HSCA 2012), as amended by the Health and Care Act 2022, concerns information standards. These are standards in relation to the processing of information which may be prepared and published by the Secretary of State (in connection with the provision of health and adult social care) and NHS England (in connection with the provision of NHS services). Under section 250, as amended, information standards must be complied with.

593. These provisions amend section 250 to make it clear that information standards published under that section can include standards relating to information technology or information technology services used to process information. They also extend the categories of persons to which information standards may be applied to include information technology providers i.e. persons involved in making available information technology, information technology services or a service which consists of processing information using information technology, for use in connection with the provision in, or in relation to, England of health or adult social care. Currently, under section 251(3) of the HSCA 2012, the Secretary of State or NHS England may adopt an information standard prepared or published by another person. These provisions expand this to such information standards as they have effect from time to time, and enable provision to be made by reference to international agreements or other documents (including as they have effect from time to time).

594. These provisions would also have the consequential effect of expanding the scope of regulation-making powers and duties which apply in relation to section 250 under the HASCA 2012, namely:

a. a power for regulations to enable the Secretary of State or NHS England to waive compliance with information standards (section 250(6B)) which may limit the circumstances in which waivers may be granted, set out the procedure to be followed in connection with waivers, and require an information standard to include specified information about waivers (section 250(6C));

b. a duty to make regulations about the procedure to be followed in connection with the preparation and publication of information standards (section 251(1)(a));

c. a power for regulations to require an information standard to be reviewed periodically (section 251(1)(b));

d. a power for regulations to provide for financial penalties in respect of failure to comply with information standards (section 277E(1)(a)); or in respect of a requirement imposed under section 251ZA(1) to provide the Secretary of State with information for the purposes of monitoring compliance with information standards (section 277E(1)(b)); or in respect of the provision of false or misleading information (section 277E(1)(c)).

Justification for taking the power

595. The information standards to be applied in relation to information technology and information technology services will largely be of a technical nature (for example, interface specifications) and relate to matters such as design, quality, capabilities, arrangements for marketing and supply, functionality, connectivity, interoperability, portability and storage and security of information. These are matters of detail that are more appropriate for published, technical standards which are created and can be updated through a statutory procedure. The information technology landscape is an evolving one and could necessitate frequent changes to the standards imposed in order for them to be kept up to date. The delegated powers engaged by these provisions will enable the government to keep pace with change and adapt the standards accordingly.

Justification for the procedure

596. Given that the information standards will largely be of a technical nature and reflect the current state of advancement in the field of information technology, and given that the provisions extend the scope of existing legislation with respect to information standards, it is not considered necessary for such information standards to be subject to Parliamentary scrutiny when published. The regulation-making powers and duties affected by these changes (including powers and duties to make provision about the procedure by which information standards are prepared and published and about financial penalties) will be subject to the affirmative Parliamentary procedure and this continues to represent the appropriate level of scrutiny.

Schedule 14, paragraph 8, new section 251ZD: Power to direct a public body or to make arrangements for a person prescribed by regulations to exercise functions relating to monitoring and requesting compliance

Power conferred on: Secretary of State

Power exercised by: Regulations and directions

Parliamentary Procedure: Negative procedure in relation to regulations; no procedure in relation to directions

Context and Purpose

597. New section 251ZD(1) enables the Secretary of State to direct a public body (person whose functions are of a public nature) to exercise Secretary of the State's functions under section 251ZA of the HSCA 2012 (power to require information for the purposes of monitoring compliance with information standards) so far as they relate to information technology providers, and under section 251ZB (power to request information technology providers to comply with information standards). It also enables the Secretary of State to give directions about the exercise of those functions, including directions as to the processing of information obtained by exercising the functions. New section 251ZD(2) also enables the Secretary of State to make arrangements for a person prescribed by regulations to exercise those functions.

Justification for taking the power

598. The Secretary of State needs to have options for the exercise of the functions in operational terms, and to retain the discretion to delegate, or to not delegate, them to another person, to revoke a decision to delegate and to ensure that the most appropriate person exercises the functions, the identity of which may fluctuate over time. The power to direct a public body about the exercise of the functions in question is necessary in order to cover matters such as how the functions are to be exercised. Thus, the directions would contain matters of administrative or operational detail which may need to be updated regularly. This would enable the Secretary of State to cater to changing circumstances.

Justification for the procedure

599. The regulations would relate to the identity of the person to whom the Secretary of State's functions are to be delegated and this may fluctuate over time. The negative procedure is considered to provide the appropriate level of scrutiny for this. In relation to directions, which would be required to be given in writing, the power would concern the question of whether an existing function should be exercised by a public authority rather than the substance of the functions. The authority would be bound by any constraints which apply in relation to the exercise of the functions. Given the administrative and operational nature of the directions, Parliamentary scrutiny is considered unnecessary.

Schedule 14, paragraph 8, new section 251ZE: Power to establish accreditation scheme

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

600. This provision would enable the Secretary of State, by regulations, to establish an accreditation scheme that might be run by a specified body. The scheme would relate to information technology or information technology services. Subsections (3) and (4) of inserted section 251ZE set out the potential scope of the regulations, for example they may require the operator to set accreditation criteria by reference to information standards or to provide for the review of decisions. The operator may also be required by the regulations to provide advice to applicants for accreditation. An accreditation scheme would be intended essentially to grant a quality mark to information technology and information technology services that meet specified criteria to enable information technology providers to demonstrate that that technology or those services meet the necessary quality standards. The operator of a scheme could be given power under the regulations to determine the accreditation criteria or be permitted to charge a reasonable fee in respect of an application for accreditation.

Justification for taking the power

601. The procedures for the operation of an accreditation scheme would be technical and require more detail to describe than would usually be included in primary legislation.

Justification for the procedure

602. The negative resolution procedure provides for the appropriate level of scrutiny for standard provisions of this kind. There is precedent for this in relation to regulations concerning accreditation schemes under section 267 of the HSCA 2012, which are similarly subject to the negative procedure.

Schedule 15, paragraph 2(3) of new Schedule 12A to the DPA 2018: Power to amend maximum number of members

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

603. The purpose of this part of the legislation is to change the governance structure of the office of the Information Commissioner, formerly a corporation sole with all powers and responsibilities vested in the role of the Information Commissioner, creating instead a new statutory corporation with a new governance model to be known as the Information Commission which, in particular, provides that the current functions of the Information Commissioner are shared between the executive and non-executive members of the board. In accordance with recent practice, the legislation expressly provides for a minimum and maximum number of board members. This provision gives the power to the Secretary of State to make regulations to alter the maximum number of members of the Commission set out in paragraph 2(2) of new Schedule 12A to the DPA 2018, and it is therefore a Henry VIII power. There is a relevant precedent for a power of this sort to be subject to the negative resolution procedure: see section 1(7) and (8) of the Office of Communications Act 2002 (establishing the regulator Ofcom).

Justification for taking the power

604. A power to vary the maximum number of members is needed to ensure that the new governance model works efficiently and effectively. It may be necessary, over time, to make changes to the number of members of the new body so it can adapt to meet its objectives and ensure that the requisite skills and expertise are at all times represented on the board. It is appropriate that the Secretary of State is able to maintain strategic oversight of the Information Commission as it evolves under its new board structure, as the Secretary of State remains accountable for the costs incurred by the Information Commission, its effectiveness and efficiency, and its strategic direction.

605. Before making regulations under this power the Secretary of State is required to consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (see section 182 DPA 2018).

Justification for the procedure

606. The negative resolution procedure affords an adequate level of parliamentary scrutiny in the case of this Henry VIII power: it is a narrow power to enable the Secretary of State to alter the maximum number of board members. Such a power is necessary to ensure that the newly constituted body can perform effectively under its new governance model and, in particular, that the Secretary of State can ensure a diversity of candidates and perspectives are represented on the board while retaining some control over the overall costs incurred by the Information Commission in relation to the remuneration of the members. Section 1(7) and (8) of the Office of Communications Act 2002 sets a precedent for a power of this sort to be subject to the negative resolution procedure.

Schedule 15, paragraph 3(6) of the new Schedule 12A to the DPA 2018: Power to set a maximum and minimum number of executive members by direction

Power conferred on: Secretary of State

Power exercised by: Directions

Parliamentary Procedure: None

Context and Purpose

607. This provision states that the Secretary of State may set a direction as to the maximum and minimum number of executive members.

Justification for taking the power

608. This provision should be read together with paragraph 2 of Schedule 12A to the DPA 2018, which sets a maximum and minimum number of members of the Commission and enables the Secretary of State to make regulations in order to vary the overall maximum number of members of the board. Within the parameters set by paragraph 2(2) and any regulations under paragraph 2(3), it seems appropriate to give the power to the Secretary of State, if necessary, to determine by a simple direction the maximum and minimum number of executive members, assisting her to fulfil her strategic and financial responsibilities in relation to the Information Commission. The Secretary of State in exercising the power to set a direction must comply with her statutory obligation to secure, so far as practicable, that the number of non-executive members is, at all times, greater than the number of executive members.

Justification for the procedure

609. To ensure the agility and efficiency of the Information Commission, and to ensure a range of skills are represented on the board, it is important that the Secretary of State should have the power to set a simple direction to vary the maximum and minimum number of executive members. There is a precedent for this approach at section 1(6)(a) of the Office of Communications Act 2002.

Department for Science, Innovation and Technology
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