EMPLOYMENT RIGHTS BILL

Memorandum from the Department of Business and Trade to the Delegated Powers and Regulatory Reform Committee

Contents

A. INTRODUCTION 15

B. PURPOSE AND EFFECT OF THE BILL 15

Summary of Powers 16

Henry VIII Powers 19

Abbreviations 20

C. DELEGATED POWERS 21

Part One – Employment Rights 22

Clause 1: Right to guaranteed hours - New section 27BA(3)(a)(ii) Employment Rights Act 1996: Power to define contracts in scope of right 22

Clause 1: Right to guaranteed hours - New section 27BA(3)(d) Employment Rights Act 1996: Power to specify conditions as to number, regularity or otherwise 23

Clause 1: Right to guaranteed hours - New section 27BA(5)(b) Employment Rights Act 1996: Power to set the length of the initial reference period 24

Clause 1: Right to guaranteed hours - New section 27BA(6) Employment Rights Act 1996: Power to set and maintain the length of the subsequent reference period(s) 25

Clause 1: Right to guaranteed hours - New section 27BA(11) Employment Rights Act 1996: Power to determine categories of workers excluded from the scope of the right to guaranteed hours 27

Clause 1: Right to guaranteed hours - New section 27BB(2) Employment Rights Act 1996: Power to set the conditions for an offer to meet to be classed as a guaranteed hours offer 27

Clause 1: Right to guaranteed hours - New section 27BB(5) Employment Rights Act 1996: Power to set out set out how it should be determined how many hours should be included in the offer of guaranteed hours, where applicable, how to determine whether an offer reflects when the hours were worked 28

Clause 1: Right to guaranteed hours - New section 27BB(9)(c) Employment Rights Act 1996: Power to define 'temporary need' 29

Clause 1: Right to guaranteed hours - New section 27BB(10) Employment Rights Act 1996: Power to set the guaranteed hours offer process 30

Clause 1: Right to guaranteed hours - New section 27BB(11) Employment Rights Act 1996: Power to define when an offer of guaranteed hours should be treated as made 31

Clause 1: Right to guaranteed hours - New section 27BD(6) Employment Rights Act 1996: Power to define circumstances where employers would be exempt from having to offer guaranteed hours 31

Clause 1: Right to guaranteed hours – New section 27BD(10) Employment Rights Act 1996: Power to define the form and manner of employer notices where the duty to make a guaranteed hours offer does not apply or no longer applies and when notices are treated as having been given 32

Clause 1: Right to guaranteed hours - New section 27BD(12) Employment Rights Act 1996: Power to set the length of the 'response period'................... 33

Clause 1: Right to guaranteed hours - New section 27BE(8) Employment Rights Act 1996: Power to define the form and manner of the notice by which an offer should be accepted or rejected by the worker.................................... 34

Clause 1: Right to guaranteed hours - New section 27BF(1) Employment Rights Act 1996: Power to specify the information an employer must provide a worker who may qualify for a guaranteed hours offer about their rights 35

Clause 1: Right to guaranteed hours - New section 27BI(4)(a) Employment Rights Act 1996: Power to set the maximum number of weeks' pay which is the maximum amount which can be awarded by an ET 36

Clause 1: Right to guaranteed hours - New section 27BI(4)(b) Employment Rights Act 1996: Power to set the maximum amount of compensation which may be awarded by an ET 37

Clause 2: Shifts: rights to reasonable notice - New section 27BJ(1)(b) Employment Rights Act 1996: Power to specify contracts in scope 39

Clause 2: Shifts: rights to reasonable notice - New section 27BJ(2)(a) Employment Rights Act 1996: Power to specify contracts in scope to cover those with timings of shifts guaranteed 40

Clause 2: Shifts: rights to reasonable notice - New section 27BJ(4) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable... 41

Clause 2: Shifts: rights to reasonable notice - New section 27BK(3)(a) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable for cancellations of shifts 42

Clause 2: Shifts: rights to reasonable notice - New section 27BK(3)(b) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable for changes to when a shift starts 43

Clause 2: Shifts: rights to reasonable notice - New section 27BK(3)(c) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable for other changes to shifts.......................... 44

Clause 2: Shifts: rights to reasonable notice - New section 27BL(6)(a) and (b) Employment Rights Act 1996: Power to specify formalities for notices of shifts 45

Clause 2: Shifts: rights to reasonable notice - New section 27BN(2) Employment Rights Act 1996: Power to specify factors to be considered to determine reasonableness 46

Clause 2: Shifts: rights to reasonable notice - New section 27BO(2) Employment Rights Act 1996: Power to specify the maximum amount of compensation for unreasonable notice.. 47

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(1) Employment Rights Act 1996: Power to specify the payment amount ... 48

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(2)(c) Employment Rights Act 1996: Power to specify contracts in scope of the right ... 49

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(3)(a) Employment Rights Act 1996: Power to specify contracts in scope to cover those with timings of shifts guaranteed ... 50

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(5) Employment Rights Act 1996: Power to specify a timeframe for payment ... 51

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(a) Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for cancellations ... 52

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(b) Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for movements alone or with curtailments ... 53

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(c) Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for curtailments changing the start time ... 54

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(d) Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for curtailments not changing the start time ... 55

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(7) Employment Rights Act 1996: Power to specify when notices are deemed to be received ... 55

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(9) Employment Rights Act 1996: Power to exclude movement of shifts within a minimum timeframe ... 56

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BR(1)(c) Employment Rights Act 1996: Power to make exceptions 57

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BR(5) Employment Rights Act 1996: Power to specify formalities for notices of exceptions ... 58

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BU(2) Employment Rights Act 1996: Power to specify a maximum amount of compensation regarding notices of exceptions ... 59

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: Right to guaranteed hours – New Paragraph 1(3)(b) in Part 1 of new Schedule A1 to the Employment Rights Act 1996: Power to specify conditions as to number, regularity or otherwise ... 60

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: Right to guaranteed hours - New Paragraph 1(5)(b) in Part 1 of Schedule A1 to

the Employment Rights Act 1996: Power to set the length of the initial reference period 61
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 1(6) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the length of the subsequent reference period(s) 62
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 1(10) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to determine categories of agency workers excluded from scope 63
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(2) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the conditions for an offer to meet to be classed as a guaranteed hours offer 64
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(5) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to determine how many hours should be included in a guaranteed hours offer and, where applicable, how to determine whether an offer as to whether an offer reflects when hours were worked..... 65
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(7)(c) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to define ‘temporary need’..... 66
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(8) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set out further details regarding the process of hirers offering a guaranteed hours arrangement..... 67
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(9) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to define when an offer of guaranteed hours should be treated as made 68
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 4(6) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to define specific circumstances in which hirers would be exempt from offering agency workers guaranteed hours. 68
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours – New Paragraph 4(10) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the form and manner of hirer notices where the duty to make a guaranteed hours offer does not apply or no longer applies and when such notice is to be treated as having been given 69
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 4(11) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the length of the response period 70
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 5(5) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the form and manner of the notice by which an agency worker to accepts or rejects a guaranteed hours contract 71

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 6(1) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to specify the information which the agency must provide to an agency worker about their rights 72

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: Right to guaranteed hours - New Paragraph 10(4)(a) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the maximum employment tribunal award (number of weeks' pay).. 73

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency Workers: Right to guaranteed hours - New Paragraph 10(4)(b) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the maximum amount of compensation which may be awarded by an ET 74

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: right to guaranteed hours – New Paragraph 11(1) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to change the effect of Part 1 of Schedule A1 (Henry VIII).. 75

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 12(3) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to define an 'excluded shift' 76

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraphs 13(2) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable 77

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 14(3)(a) in Part 2 of Schedule A1 to the Employment Rights Act 1996 78

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 14(3)(b) in Part 2 of Schedule A1 to the Employment Rights Act 1996 Power to specify the timeframe within which notice is presumed unreasonable for changes to when a shift starts 79

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 14(3)(c) in Part 2 of Schedule A1 to the Employment Rights Act 1996 Power to specify the timeframe within which notice is presumed unreasonable for other changes to shifts 80

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice - New Paragraph 15(4) of Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify a person not liable for breach of the duties to give reasonable notice 82

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice - New Paragraph 16(4)(a) and (b) of Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify formalities for notices of shifts 82

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice – New Paragraph 18(2) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify factors to be considered to determine reasonableness 83

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice – New Paragraph 19(2) in Part 2 of Schedule A1 to the

Employment Rights Act 1996: Power to specify the maximum amount of compensation for unreasonable notice.. 84
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts – New Paragraph 21(1) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify the payment amount... 85
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts – New Paragraph 21(2) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify a timeframe for payment 86
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(a) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for cancellations..................................... 87
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(b) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for movement alone or with curtailments 88
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(c) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for curtailment changing the start time.... 89
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(d) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes “short notice” for curtailment not changing the start time 90
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(4) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify when notices are deemed to be received 91
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(5) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to exclude movement of shifts within a minimum timeframe 91
Clause 4: Agency Workers – Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 23(1)(c) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to make exceptions 92
Clause 4: Agency Workers – Schedule 1: Agency Workers: New Paragraph 23(2) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to define an ‘excluded shift’ 93
Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 23(7) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify formalities for notices of exceptions.. 94
Clause 4: Agency Workers - Schedule 1: Agency Workers – Right to payment for cancelled, moved and curtailed shifts – New Paragraph 25(9) of Part 3 of

Schedule A1 of the Employment Rights Act 1996: Power to specify hirers not liable for breach of requirements regarding notices 95

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 26(2)(b) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify a maximum amount of compensation for untrue, inadequate or missing notices of exceptions 96

Clause 4: Agency Workers - Schedule 1: Agency Workers – Right to payment for cancelled, moved and curtailed shifts – New Paragraph 27(2) of Part 3 of Schedule A1 of the Employment Rights Act 1996: Power to specify hirers from whom short notice payments cannot be recovered 97

Clause 5: Allowing for opt-out through collective bargaining – New section 27BZ(1) Employment Rights Act 1996: Power to make further provision in relation to opting-out through collective agreements 98

Clause 9(5): Right to request flexible working - Section 80G(1E) Employment Rights Act 1996: Right to request flexible working – Power to determine steps for an employer to comply 99

Clause 11: Statutory sick pay in Great Britain: lower earnings limit etc - Section 157 Social Security Contributions and Benefits Act 1992: Power to amend the percentage rate 100

Clause 13: Statutory Sick Pay in Northern Ireland: lower earnings limit etc – Section 153 Social Security Contributions and Benefits (Northern Ireland) Act 1992 – Power to amend the percentage rate 101

Clause 18(3), (4) and (10): Bereavement leave - Section 80EA Employment Rights Act 1996 - Bereavement leave – Power to extend Parental Bereavement Leave to other bereaved persons..102

Clause 21(2): Sexual harassment: power to make provision about “reasonable steps - New section 40B Equality Act 2010: Power to specify “reasonable steps” 103

Clause 23: Right not to be unfairly dismissed: removal of qualifying period, etc - Schedule 3, Paragraph 3, New section 98ZZA(1) Employment Rights Act 1996: Power to make provision about fair dismissal during a statutory probationary period (Henry VIII) 104

Clause 23: Right not to be unfairly dismissed: removal of qualifying period, etc - Schedule 3, Paragraph 3, New section 98ZZA(4) Employment Rights Act 1996: Power to make provision for a statutory probationary period 106

Clause 23: Right not to be unfairly dismissed: removal of qualifying period etc. Schedule 3, Paragraph 4, amendment to section 15 Enterprise and Regulatory Reform Act 2013: Power to increase or decrease limit of compensatory award (Henry VIII)..107

Clause 24(4) and (6): Dismissal during pregnancy - Sections 49D and 49E Part 5B Employment Rights Act 1996 - Dismissal during pregnancy – Power to regulate dismissal during pregnancy (Henry VIII)..108

Clause 25: Dismissal following period of statutory family leave - Sections 74(2), 75C(1)(b), 75J(1)(b), 80D(1A)(b) and (3)(b) and 80EH Part 8 Employment Rights Act 1996: Power to regulate dismissal during periods of statutory family leave..111

Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(5)(e) Employment Rights Act 1996: Power to specify factors to be considered when determining fairness of a dismissal for variation of contract of employment 112

Part 2- Other matters relating to employment 114

Clause 27(5): Collective redundancy: extended application of requirements - New section 195A Trade Union and Labour Relation (Consolidation) Act 1992: Power to specify provision for inclusion in relevant outsourcing contracts 114

Clause 27(3A): Collective redundancy: extended application of requirements - amendments to section 197 Trade Union and Labour Relation (Consolidation) Act 1992: Power to amend collective redundancy requirements 115

Clause 30(2): Public sector outsourcing: Protection of workers – New section 83C (1), (2) and (3) Procurement Act 2023: Power to specify provision for inclusion in relevant outsourcing contracts. 116

Clause 30(2) Public sector outsourcing: Protection of workers - New section 83F Procurement Act 2023: Power of Scottish Ministers to amend this Part (Henry VIII) 118

Clause 31: Equality action plans - New section 78A(1) Equality Act 2010 - Equality Action Plans: Power to set out the requirement to publish an equality action plan 118

Clause 32: Provision of information relating to outsourced workers - Sections 78(3A), 153(1A) and 154(3A) Equality Act 2010 - Outsourced workers: Power to set out requirement for employers to provide information relating to outs ..119

Clause 34: Extension of regulation of employment businesses – New section 13(3) Employment Agencies Act 1973: Extension of power to regulate employment businesses (and employment agencies) 121

Part 3 - Pay and Conditions in Particular Sectors 122

Clause 35: Pay and conditions of school support staff in England – Schedule 4, Paragraph 1 – New section 148B(2) Education Act 2002: Power to determine matters within the SSSNB’s remit 122

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148C(3)(b)(ii) Education Act 2002: Power to specify the meaning of “school support staff 122

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148C(4)(b) Education Act 2002: Power to prescribe in regulations persons who are not within the SSSNB’s remit 123

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148H(2)(a) Education Act 2002 – Power to make regulations to ratify agreements submitted by the SSSNB 124

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148J(2)(a) Education Act 2002: Power to make regulations that ratify agreements reached by the SSSNB following reconsideration of a matter 124

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148J(2)(c) Education Act 2002 – Power to require

prescribed people to have regard to agreements of the SSSNB in exercising prescribed functions 125
Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148J(2)(d) Education Act 2002 – Power to make regulations that make provision in relation to a matter that has been referred to the SSSNB other than in the terms of the SSSNB agreement 126
Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148K(2)(b) & (4)(b) Education Act 2002: Power to make regulations that make provision in relation to a matter that has been referred to the SSSNB other than in the terms of the SSSNB agreement in circumstances where there is an urgent need to do so 127
Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 2 – New Schedule 12A – Paragraph 1(2) Education Act 2002: Power to prescribe in regulations the school support staff organisation and employer organisation representative members of the SSSNB....................128
Clause 36: Power to establish Social Care Negotiating Body: Power to establish the Adult Social Care Negotiating Body in England and the Social Care Negotiating Bodies in Scotland and Wales 128
Clause 37: Membership, procedure etc of Negotiating Body Power: Power to make provision in regulations for the operation of the Adult Social Care Negotiating Body in England and the Social Care Negotiating Bodies in Scotland and Wales (Henry VIII) 129
Clause 38(1): Matters within Negotiating Body's remit: Power to amend the Body's remit....................130
Clause 40: Consideration of matters by Negotiating Body: Power to make regulations regarding the Body's negotiations....................131
Clauses 41(1) and (2): Reconsideration by Negotiating Body: Power to make provision for the appropriate authority to refer agreements back to the Body for reconsideration....................132
Clause 42(1): Failure to reach an agreement: Power to make provision about cases where the Body is unable to reach agreement, including dispute resolution....................132
Clause 43(2): Power to ratify agreements: Power to give effect to the Negotiating Body's agreements....................133
Clauses 45(1) and (2): Powers of appropriate authority to deal with matters: Power to make provision in cases where the Negotiating Body is unable to reach an agreement 134
Clause 46: Guidance and codes of practice: Power to make provision about issuing codes of practice and guidance....................135
Clause 47: Duty of employers to keep records: Power to impose record keeping requirements on employers....................136
Clause 51: Status of agreements, etc: Power to provide that agreements reached by the Negotiating Body are not collective agreements under the Trade Union and Labour Relations (Consolidation) Act 1992....................137
Clause 53: Schedule 5 – Paragraph 9 – New section 4A Seafarers' Wages Act 2023 – Power to specify remuneration regulations....................137

Clause 53: Schedule 5 – Paragraph 9 – New section 4B(1)(b) Seafarers' Wages Act 2023 – Power to specify the number of occasions a service must call at a UK port for a harbour authority to request a remuneration declaration 138

Clause 53: Schedule 5 – Paragraph 9 – New section 4B(2) Seafarers' Wages Act 2023 – Power to specify the time period within which a harbour authority must request a renumeration declaration. 139

Clause 53: Schedule 5 – Paragraph 9 – New section 4D Seafarers' Wages Act 2023: Movement of existing powers to specify the national minimum wage equivalent rate..140

Clause 53: Schedule 5 – Paragraph 10 – New section 4E Seafarers' Wages Act 2023: Power to specify safe working requirements 140

Clause 53: Schedule 5 – Paragraph 10 – New section 4F(1)(b) Seafarers' Wages Act 2023 – Power to specify the number of occasions a service must call at a UK port for a harbour authority to request a safe working declaration 141

Clause 53: Schedule 5 – Paragraph 10 – New section 4F(2) Seafarers' Wages Act 2023 – Power to specify the time period within which a harbour authority must request a safe working declaration 141

Clause 53: Schedule 5 – Paragraph 21 – New section 16A Seafarers' Wages Act 2023: Power to provide for the form and manner and time period for declarations 142

Clause 54: International agreements relating to maritime employment – New section 84A(1) of the Merchant Shipping Act 1995: Power to make regulations to give effect in UK law to the Maritime Labour Convention and the Work in Fishing Convention..143

Clause 54: International agreements relating to maritime employment – New section 84A(2) - (4) of the Merchant Shipping Act 1995: Power to make regulations to give effect in UK law to an international agreement that has been ratified by the United Kingdom, or to amendments to such an agreement, so far as the agreement relates to maritime employment..143

Part 4 – Trade Unions and Industrial Action, Etc 145

Clause 55(2): Right to statement of trade union rights, New section 136A(2)(b), Trade Union and Labour Relations (Consolidation) Act 1992 (Right to statement of trade union rights): Power to require that the statement to inform workers of their right to join a trade union is also given to the worker at other prescribed times 145

Clause 55(2): Right to statement of trade union rights, New section 136A(3)(a)(b), and (c), and (4) and (6) Trade Union and Labour Relations (Consolidation) Act 1992 (Right to statement of trade union rights): Power to make provision as to what information the statement of trade union right should include and what form it should take 145

Clause 55(5) Right to statement of trade union rights, section 286 Trade Union and Labour Relations (Consolidation) Act 1992: Extension of existing power to exempt certain classes of employees from the requirements of section 136A without the need for further primary legislation..146

Clause 56: Right of trade unions to access workplaces, New section 70ZB(3)(a) to (c), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe terms covering aspects of trade unions' requests to access workplaces 147

Clause 56: Right of trade unions to access workplaces, New section 70ZB(5)(a) to (c), Trade Union and Labour Relations (Consolidation) Act 19922: Power to prescribe terms covering aspects of trade unions' requests to access workplaces 148

Clause 56: Right of trade unions to access workplaces, New section 70ZC(a), Trade Union and Labour Relations (Consolidation) Act 1992 – Response period and negotiation period: Power to set the time period for responding to a trade unions' requests to access workplaces 148

Clause 56: Right of trade unions to access workplaces, New section 70ZC(b), Trade Union and Labour Relations (Consolidation) Act 1992 – Response period and negotiation period: Power to prescribe the time period, starting on the day the response notice was given, by which the employer and trade union should complete negotiations on the terms of access...149

Clause 56: Right of trade unions to access workplaces, New section 70ZD(1)(d), Trade Union and Labour Relations (Consolidation) Act 1992: Power to provide the form and manner for notification of the CAC of the terms of the access agreement 149

Clause 56: Right of trade unions to access workplaces, New section 70ZE(5)(b), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe the time period, starting on the day the access request was given, after which an application for a determination by the CAC cannot be made 150

Clause 56: Right of trade unions to access workplaces, New section 70ZF(3), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe terms of an access agreement that the CAC must consider as not unreasonably interfering with the employer's business; must consider as being reasonable steps an employer should take to facilitate the access; and must consider as being terms that are reasonable for the union to comply with 150

Clause 56: Right of trade unions to access workplaces, New section 70ZF(4) and (5), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe the circumstances where it is to be regarded as reasonable for the CAC to make a determination that the union should not have access, or circumstances in which the CAC must make a determination refusing access 151

Clause 56: Right of trade unions to access workplaces, New section 70ZF(6), Trade Union and Labour Relations (Consolidation) Act 1992: Power to make regulations setting out matters which the CAC must have regard to, when considering an application for a determination, where an access request has not been agreed within the relevant timeframes..152

Clause 56: Right of trade unions to access workplaces, New section 70ZG(5)(a), Trade Union and Labour Relations (Consolidation) Act 1992: Power to provide the form and manner of notification to the CAC of variation or revocation of access agreements...153

Clause 56: Right of trade unions to access workplaces, New section 70ZJ, Trade Union and Labour Relations (Consolidation) Act 1992 – Powers to make provision about amounts payable under Section 70ZI....................................153

Clause 56: Right of trade unions to access workplaces, New section 70ZJ(4) Trade Union and Labour Relations (Consolidation) Act 1992 – Enforcement of access agreements: subsequent complaint 154

Clause 57: Trade union recognition - Schedule 6: Trade union recognition: Conditions for trade union recognition, Schedule A1 paragraph 171B(2)(3) Trade Union and Labour Relations (Consolidation) Act 1992: Power to amend the required percentage for trade union membership of the proposed bargaining unit (Henry VIII)...155

Clause 62(7): Facilities for equality representatives, section 173(3) Trade Union and Labour Relations (Consolidation) Act 1992 1992: Power to update and change the purposes for which an employee can take time off as a union equality representative 155

Clause 64(2)(3) and (4): Blacklists: additional powers, section 3(1)(b), (2A) and (3)(za)(e) Employment Relations Act 1999: Extending existing power to make regulations to prohibit compilation, use, sale or supply of blacklists to cover compilation of lists where there was no intent to discriminate when the list was originally compiled...156

Clause 73(2): Protection against detriment for taking industrial action, New section 236A(1) Trade Union and Labour Relations (Consolidation) Act 1992: Power to specify by regulations the prescription of detriment of a specific description, or prescription of detriment of any description 158

Part 5 – Enforcement..159

Clause 87: Part 2 of Schedule 7, paragraph 35, subparagraphs (1) to (3): Power to amend, by regulations, Part 1 of Schedule 7 (the list of relevant labour market legislation) (Henry VIII) 159

Clause 101(2): Notices of Underpayment (“NoU”) – Calculation of the required sum – Power to make regulations setting out how the required sum should be calculated 160

Clause 101(5): Notices of Underpayment – calculation of required sum: Power to set the maximum sum of arrears 161

Clause 102(3): Notices of Underpayment – Period to which notice of underpayment may relate: Power to amend claim period (Henry VIII)_ 162

Clause 104(7): Notices of Underpayment - Penalties for Underpayment: Power to amend penalties in the future (Henry VIII) 162

Clause 105(1): Notices of Underpayment – further provision about penalties: power to make directions 163

Clause 115: Powers relating to civil proceedings – recovery of costs of legal assistance: Power to provide for how to calculate the Secretary of State's expenditure in providing legal assistance under this clause, for the purposes of recovery of such expenditure 164

Clause 117(3): Measures in LME undertakings: Power to make regulations to add measures which may be included in Labour Market Enforcement Undertakings 164

Clause 123(3): Measures in LME orders – Power to make regulations to add measures which may be included in Labour Market Enforcement Orders 166

Clause 132(6): Disclosure of information: Power to amend, by regulations, Schedule 9 containing the list of bodies for information sharing purposes (Henry VIII) 166

Clause 140: Power to recover costs of enforcement: to make regulations providing for charges to be imposed to recover the costs of enforcement action taken by the Fair Work Agency where businesses are found to be non-compliant. 167

Clause 146: Consequential and transitional provision - Part 2 of Schedule 10, Paragraph 63: Consequential amendment to the Police and Criminal Evidence Act 1984 (PACE): Power to make regulations applying provisions of PACE to enforcement officers appointed under the Employment Rights Act 2025.......169

Clause 146: Consequential and transitional provision - Part 2 of Schedule 10, Paragraph 74(3): Consequential amendment to the Police Reform Act 2002: Power to make regulations conferring functions on the IOPC in relation to functions exercised by enforcement officers appointed under the Employment Rights Act 2025 169

PART 6 – General...171

Clause 151(1): Power to make Consequential Amendments (Henry VIII)......171

Clause 152(1): Power to make transitional or saving provisions 171

Clause 156(3): Commencement...172

D. Non-Legislative Powers 173

Part 2 – Other Matters Relating to Employment...173

Clause 30(2): Public sector outsourcing: protection of workers – New section 83D(1) and (2) Procurement Act 2023: Power to issue a code of practice on relevant outsourcing contracts...173

Part 3 – Pay and Conditions in Particular Sectors 175

Clause 35: Pay and conditions of school support staff in England - Schedule 4 - Paragraph 1 - 148P(1) Education Act 2002: Power to issue guidance about an agreement of the SSSNB 175

Clause 35: Pay and conditions of school support staff in England - Schedule 4 - Paragraph 1 - 148P(2) Education Act 2002: Power to issue guidance about an agreement of the SSSNB 175

Part 4 – Trade Unions and Industrial Action etc...177

Clause 57: Recognition – Paragraph 8 of Schedule 6– New Paragraph 19L(1) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition...177

Clause 57: Recognition – Paragraph 9 of Schedule 6 – New Paragraph 19M(6) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition...178

Clause 57: Recognition – Paragraph 33 of Schedule 6– New Paragraph 81F(1) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act

1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition..179

Clause 57: Recognition – Paragraph 34 of Schedule 6– New Paragraph 81G(6) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition..179

Clause 57: Recognition – Paragraph 40 of Schedule 6 – New Paragraph 116F(1) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition.........................180

Clause 57: Recognition - Paragraph 41 of Schedule 6 – New Paragraph 116G(7) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition.........................180

Clause 61(2)(a) and (3)(a): Facilities provided to trade union officials and learning representatives, Section 168 and 168A Trade Union and Labour Relations (Consolidation) Act 1992: Amending existing power for ACAS to issue a code of practice on trade union facilities 181

Clause 62(2): Facilities for equalities representatives, New section 168B(6),(8) and (9) Trade Union and Labour Relations (Consolidation) Act 1992 and Clause 62(8)(9) and (10) amending sections 199, 200 and 203 Trade Union and Labour Relations (Consolidation) Act 1992: Amending existing power for ACAS to issue a code of practice to cover certain matters in relation to trade union equality representatives..181

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Employment Rights Bill ("the Bill"). The Bill was introduced in the House of Commons on the 10 October 2024 and transferred to the House of Lords on 13 March 2025.

2. This memorandum identifies the provisions of the Bill that confer 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

3. The Employment Rights Bill will deliver the key legislative reforms set out in the Government's Plan to Make Work Pay. The Bill includes measures to strengthen employment rights and other protections in relation to employment matters, make provision in relation to pay and conditions in particular sectors, update the law relating to trade unions and industrial action, and enable the Secretary of State to transform employment rights enforcement. The measures are intended to support employers and businesses across the country, creating a fair and level playing field and modernising the employment rights framework to suit the economy of today.

4. With the exception of provisions which relate to (i) pay and conditions in particular sectors (social care) and (ii) the enforcement of labour market legislation, the Bill achieves this by making amendments to other relevant legislation.

5. The employment rights measures will introduce new rights to guaranteed hours, reasonable notice of shifts and compensation payments for shift cancellation and curtailment at short notice for those on zero and certain minimum hours contracts. They will further update the right to request flexible working, remove the waiting period and amend the lower earnings limit which apply in relation to statutory sick pay and strengthen protections in relation to tips and gratuities. The Bill will also provide a right to paternity and parental leave from day 1 of employment, a right to bereavement leave, and introduce provisions to require employers to take all reasonable steps to prevent sexual harassment at work. Sexual harassment is also added to the list of relevant failures that a worker can blow the whistle on and qualify for their employment protections.

6. In relation to dismissal, the Bill makes provision to remove the qualifying period in relation to unfair dismissal, treat dismissal where employees are dismissed for failing to agree to a change in their contract of employment as automatically unfair, and extend existing powers to protect pregnant women and new mothers from dismissal except in specific circumstances, and extend similar powers for those taking a period of statutory family leave.

7. Regarding other protections in relation to employment, the Bill will extend the application of the requirements which apply in relation to collective redundancy and amend the requirements concerning collective redundancy notification which apply to ships' crew. The Bill further updates the legislative framework in relation to the duties of employers relating to equality and the transfer of workers under public contracts. The Bill will introduce a new duty on employers to keep records

relating to annual leave. The Bill will also make provision which will enable the regulation of so-called "umbrella companies".

8. The measures concerning pay and conditions in particular sectors make provision for the reinstatement of the School Support Staff Negotiating Body in England and the establishment of an Adult Social Care Negotiating Body in England and Social Care Negotiating Bodies in Scotland and Wales.

9. The Bill also makes further provision in relation to seafarers and other maritime employment. It includes powers to provide additional employment protections to seafarers working on services visiting the UK frequently and provides powers to implement certain international agreements related to maritime employment.

10. The trade union and industrial action provisions will update the legislative framework in this area. The Bill will remove restrictions on trade unions, giving them greater freedom to organise, represent and negotiate on behalf of their workers, repeal the Strikes (Minimum Service Levels) Act 2023, and make it easier for trade unions to gain recognition. The Bill also makes provision to regulate access to workplaces for trade union members meeting and representing their members, provision for trade union equality representatives, and for facilities to be provided to trade union officials and learning representatives. It further provides for additional powers in relation to the prohibition on blacklisting, and makes reforms in relation to industrial action ballots and mandates, political funds the provision of information to employers regarding industrial action and picketing, protections for taking industrial action and the functions of the certification officer.

11. The Bill also makes provision for the enforcement of labour market legislation by the Secretary of State, to consolidate and extend the scope of state enforcement through the establishment of the Fair Work Agency, and to extend the time limits which apply in relation to the issue of proceedings before the Employment Tribunal.

Summary of Powers

12. The Bill is structured in 6 Parts and 12 Schedules. It amends a number of other pieces of legislation in relation to employment rights and industrial relations and other matters relating to employment and equality of opportunity. Provision is made within the Bill itself in relation to pay and conditions in the social care sector and the enforcement of labour market legislation.

13. Aspects of the various measures will need to be determined under the Bill, using secondary legislation to set out further detailed and technical aspects of the rights which are amended and conferred. The provision for delegated powers, subject to appropriate scrutiny and safeguards, is proposed to enable the Government to react quickly and ensure the operation of the provisions remains relevant to the needs of the labour market.

14. The delegated powers in the Bill fall into four categories. First there are provisions which create new delegated powers which will give effect to the new or amended regimes and set out technical details to support their operation, or which follow existing legislative precedent in relation to employment rights. Second there are powers where due to the novel nature of the policy a degree of flexibility is

required to keep the provisions up to date with the changing nature of employment relationships and where consultation will take place on the detailed implementation of the policy. Third are provisions which expand existing delegated powers to reflect changes to primary legislation or improve their efficacy. Finally, there are general provisions which are required for the bill to have effect.

15. In the first category are those delegated powers which will allow technical or operational details to be set out in secondary legislation. Examples of these powers include:

    a. Right to guaranteed hours: requirements relating to a guaranteed hours offer. Clause 1 inserts new section 27BB into the Employment Rights Act 1996 (the ERA) which sets out the requirements relating to a guaranteed hours offer and gives for instance a power at new section 27BB(9)(b) to the Secretary of State to provide for the form a guaranteed offer should take.

    b. The Bill amends the ERA to insert powers to introduce a right to bereavement leave for employees, who qualify as a "bereaved person", to be absent from work on leave for at least a period of one week. Clause 18(3) makes amendments to section 80EA of the ERA requiring the Secretary of State to make regulations to provide for this right and to lay down the detail on when it arises. This follows the usual split for family related leave, where the power to introduce the right is set out in primary and the technical detail of when the right arises and how the leave will be taken is left for regulations. Clause 18 also amends several existing powers, to provide protections for persons taking family leave, to include the new bereavement leave. This is indicative of the introduction of this new right following precedent in its approach to the taking of powers.

16. Provisions falling into the second category require powers in order to maintain a degree of flexibility in novel areas. Provisions may have a need to be amended quickly or regularly in order to keep up with the changing nature of employment relationships. The Bill introduces new employment rights where powers will enable changes to be made quickly and to accommodate small policy changes once implemented if unintended consequences or changes in employers' practices are identified, without the need to wait for appropriate primary legislation. Due to the novel nature of much of the policy to which the powers in this category relate, consultation will also take place in relation to the detail of the measures before the powers are exercised. For example:

    a. The Bill introduces a right to guaranteed hours of work for those who are within scope of the provision and meet the relevant requirements. Clause 1 inserts new Section 27BA into the ERA which provides for a qualifying worker (i.e. Worker on a worker's contract during the reference period, being a zero hours contract or as a result of a zero hours arrangement, or whose contract guarantees hours below the specified number whilst they work in excess of their contractual hours – while meeting the conditions as to the regularity or number of their hours worked, as prescribed in regulations) to be entitled to guaranteed hours. There are powers to define what constitutes a

minimum hours contract, being those falling below the specified threshold, and the reference period. As this is a complex and novel policy area changes may need to be made to these definitions in light of new evidence and evolving work practices.

b. Clause 3 inserts new Chapter 4 into Part 2A of the ERA which introduces the right to payment where shifts are cancelled or curtailed at short notice. This is a wholly novel area and so a degree of flexibility is needed to accommodate small policy changes. Additionally, it will be appropriate to consult on much of the detail prior to powers being exercised, for example on the specified amount of this payment, which may also need to change over time.

c. The Bill amends the law on unfair dismissal at Clause 26 so that, where employees are dismissed for failing to agree to a change in their contractual terms and conditions, those dismissals will be treated as automatically unfair unless the employer can demonstrate it was experiencing, or was at risk of experiencing in the imminent future, financial difficulties, which changes to contracts were needed to address, and that the employer could not reasonably have avoided the need to make the changes. The dismissal must also be reasonable in all the circumstances. The clause provides a power for the Secretary of State to make regulations specifying additional factors the Employment Tribunal (ET) must consider when determining whether an employer has acted reasonably, including any specific procedural steps.

17. In the third category are provisions where existing powers are modified or clarified to reflect changes to primary legislation or improve their efficacy. Examples of these amendments to existing powers include:
    a. Clause 34 amends the definition of an employment business, set out at section 13 of the Employment Agencies Act 1973, which has the effect of broadening the regulation making power in section 5 of that Act, which allows the Secretary of State to make provision to secure the proper conduct of employment agencies and employment businesses. This would allow the Secretary of State to make provision in relation to so-called umbrella companies, which sometimes employ individuals on behalf of employment businesses (often referred to as recruitment agencies) who are then supplied to end clients. This will allow the existing regulatory framework to be used and applied to this comparable type of business.
18. Clause 23 and Schedule 3 amend the regulation making power at section 15 of the Enterprise and regulatory Reform Act 2013 which allows the Secretary of State to set a different maximum level of compensation which an ET may make, from the one which will normally apply to successful claims for unfair dismissal.

19. Provisions falling into the final category are powers to make consequential provision, supplementary, incidental and transitional or saving provision, and to bring the Bill into force.

Henry VIII Powers

20. The Bill contains 12 powers to amend primary legislation through secondary legislation.

21. Henry VIII powers have only been taken where strictly necessary in order to ensure that legislation continues to operate effectively, and the statute book is kept up-to-date regularly.

22. The regulations made under Henry VIII powers will be subject to the draft affirmative procedure, ensuring that both Houses retain a key say and vote on any final proposals in these areas.

Abbreviations

23. This Memorandum contains the following abbreviations:

Legislation	
The Bill / ERB	Employment Rights Bill
ERA	Employment Rights Act 1996
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
NMWA	National Minimum Wage Act 1998
Other	
ACAS	Advisory, Conciliation and Arbitration Service
ASCNB	Adult Social Care Negotiating Body
CAC	Central Arbitration Committee
ET	Employment Tribunal
FWA	Fair Work Agency
LME	Labour Market Enforcement
LMEU	Labour Market Enforcement Undertaking
LMEO	Labour Market Enforcement Order
SSSNB	School Support Staff Negotiating Body
SSP	Statutory Sick Pay
NoU	Notice of Underpayment

C. DELEGATED POWERS

24. The Bill confers delegated powers on the Secretary of State and Ministers of the Crown. In deciding whether matters should be specified on the face of the Bill or whether they are more appropriately dealt with by delegated legislation the Government has carefully considered the following:
    a. To avoid too much administrative detail on the face of the Bill;
    b. To allow detailed administrative arrangements to be set up and kept up to date within the parameters of the structures and principles set out in primary legislation, subject to Parliament's right to challenge inappropriate use of powers;
    c. Whether to follow the precedent of existing legislation where relevant in assessing the proper split between primary and secondary legislation;
    d. To allow the legislation to respond to changing circumstances and the developing needs of the labour market so that requirements can be adjusted without the need for further primary legislation;
    e. To allow robust parliamentary scrutiny and oversight to ensure any delegated power is used appropriately and proportionately.

25. In deciding what procedure is appropriate for the exercise of the powers in the Bill, the Government has considered:
    a. Whether the measures amend primary legislation;
    b. The significance of the amendments.

26. The powers detailed in this document will ensure the employment rights framework remains up to date. This is complex legislation, and it is crucial that is responsive to the needs of the modern labour market and economy and can be adapted as needed without needing to revisit primary legislation. The powers will allow the Government to react quickly to changes in the labour market and economy and continue to deliver on the government commitments in Make Work Pay.

Part One – Employment Rights

Clause 1: Right to guaranteed hours - New section 27BA(3)(a)(ii) Employment Rights Act 1996: Power to define contracts in scope of right

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

27. This clause introduces a new right for a worker to have guaranteed hours under a contract. The contract will reflect the numbers of hours regularly worked, and this is to be calculated based on a reference period. That reference period may be either an initial reference period, or the subsequent reference period(s), as set out in new section 27BA(4). The right to guaranteed hours is intended to provide those workers without, or with limited certainty of their working hours with more predictability, so that they are able to plan their work, home lives and finances better.

28. The new section 27BA makes provision for the right to a guaranteed hours offer. Section 27BA(3) concerns who is in scope for that right, "qualifying workers". Who is a qualifying worker is defined in relation to various criteria which must be met during the reference period.

29. Workers whose contracts guarantee that work will be made available to them for a minimum number of hours during the reference period ("the minimum hours contracts"), as well as workers on zero hours contracts and workers' contracts resulting from zero hours arrangements, are to be in scope of the new right. New section 27BA(3)(a)(ii) empowers the Secretary of State to set out in regulations the maximum number of hours which will act as an upper threshold to the minimum hours contracts in scope of the right to guaranteed hours. The purpose of the power is to ensure that the threshold is set, and can be maintained, at an appropriate level to ensure that it is effective in offering protections to the intended group of workers.

Justification for taking the power

30. Taking this power allows the Secretary of State to define what constitutes a "minimum hours contract" by setting an upper threshold to the minimum hours contracts in scope of the right to guaranteed hours. This has not previously been defined in legislation, so taking this power will enable the Secretary of State to make changes to the hours threshold in light of evolving work practices, or in light of new evidence emerging around working hours and the practical impact of the new rights.

31. Given the novelty of the provisions and potential for the new law to change working practices of employers, the Government wishes to retain flexibility to amend the application of the policy in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

32. Additionally, what is considered a minimum hours contract for this provision may not be the case for another one, therefore the definition is best suited to be set out in secondary legislation.

33. The Government will consult on which contracts beyond zero hours contracts should be included within the scope of the right to guaranteed hours.

Justification for the procedure

34. The Government considers that the affirmative procedure is appropriate as the "minimum hours contract threshold" could materially affect the number of workers in scope of these measures and in turn the economic impact of the measure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BA(3)(d) Employment Rights Act 1996: Power to specify conditions as to number, regularity or otherwise

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

35. The context for this power is as set out above at paragraphs 27 and 28.

36. New section 27BA(3)(d) empowers the Secretary of State to set out in regulations conditions as to number, regularity or otherwise, which hours worked during the reference period must meet, for the worker to be a qualifying worker and so in scope of the new right to a guaranteed hours offer. This will allow the Secretary of State to refine which workers are in scope for the new right, with the intention being that only those who work regularly should benefit, and not those engaged by an employer on a sporadic basis.

Justification for taking the power

37. This power is necessary to allow the Secretary of State to set out conditions in respect of the hours worked by the worker during a reference period to ensure that they meet the conditions as to regularity, number or otherwise in line with the policy. This power will be necessary to refine the scope of workers and can adapt in response to new evidence emerging around the use of atypical contracts or in light of evolving working practices. No similar conditions are set out in existing legislation. This involves a novel and complex concept and refinement to the conditions may be required over time.

38. The conditions are also likely to be technical in nature, as they may make reference to a specific number of hours or frequency of work. The Government considers it appropriate to include such technical definitions in regulations, rather than on the face of the Bill.

39. The Government will look to specify that these conditions define the requirements as to regularity or number of the reference period hours in a manner that ensures that the measure is appropriately targeted at those workers who are regularly working in excess of their contracted hours and does not include those workers who have very sporadic hours of work.

40. This power may be supplemented by the provisions made under s. 27BA(10. This section would allow to make provisions when this power is exercised, to take

account of time when a worker does not work for a specified reason. This power will allow the Secretary of State to specify reasons why an individual may not work during the reference period and outline how the time spent not working due to such reasons should be accounted for, including how this should be taken into account in respect of meeting the condition as to regularity or number or otherwise. The Government envisages that this could cover reasons such as sick leave or parental leave.

Justification for the procedure

41. The Government considers that the affirmative procedure is appropriate because setting out and thereafter possibly amending the conditions as to regularity or number of hours could materially affect how many workers are in scope of this new right. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BA(5)(b) Employment Rights Act 1996: Power to set the length of the initial reference period

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

42. The context for the power is as set out above at paragraphs 27 and 28.

43. New section 27BA(5) allows the Secretary of State to set out in regulations the length of the initial reference period, that is the period during which the worker must meet the qualifying conditions to be in scope for the new right, and during which the hours they have worked will determine how many hours they have a right to be guaranteed by the employer.

44. The purpose of the power is to ensure that the period can be set, and maintained, at a length that is appropriate both as to the period at which a worker should benefit from the new right, and the basis on which their guaranteed hours offer should be made.

Justification for taking the power

45. There is precedent for powers to be taken regarding the qualifying period for different employment rights. For example, existing section 80F(8) of the ERA allows the Secretary of State to specify the duration of employment required in order for a worker to be eligible to request flexible working.

46. This power is necessary to allow the Secretary of State to make changes to the reference period for this novel right, for example in response to evidence emerging around the use of zero hours and “minimum hours contracts”, around how the new right is working in practice, or in light of evolving working practices.

47. The Government has made clear already during the passage of the Bill to date, that 12 weeks is the expected duration for the initial reference period which will be set out in regulations. This will help to provide clearer expectations around the length of the reference period.

48. This power may be supplemented by the provisions made under s. 27BA(10). This section would allow to make provisions when this power is exercised, to take account of time when a worker does not work for a specified reason. This power will allow the Secretary of State to specify reasons why an individual may not work during the reference period and outline how the time spent not working due to such reasons should be accounted for. The Government envisages that this could cover reasons such as sick leave or parental leave.

Justification for the procedure

49. This power will set the initial reference period during which the worker must satisfy conditions in order to be in scope of the new right. The Government considers that this is a discrete, operational detail, for which the negative procedure is appropriate. This is consistent with the s.80F(8) ERA power mentioned at paragraph 29 above, and the provisions from the Workers (Predictable Terms and Conditions) Act 2023 (due to be repealed by this Bill) for a qualifying period to be subject to the negative procedure.

Clause 1: Right to guaranteed hours - New section 27BA(6) Employment Rights Act 1996: Power to set and maintain the length of the subsequent reference period(s)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

50. The context for the power is as set out above at paragraph 27. The initial reference period is the period which will be considered by employers when determining how many hours have been worked regularly by the worker, and therefore how many hours should be guaranteed (the first time they are offering a worker a guaranteed hours arrangement). It will also be the relevant qualifying period for workers to accrue the right to a guaranteed hours offer.

51. Following the initial reference period, the subsequent reference period(s) will require employers to review a qualifying worker's worked hours and – if applicable – make a guaranteed hours offer. This power allows the Secretary of State to define the timing and length of the subsequent reference period(s).

52. This may impact a worker who has previously declined an offer of guaranteed hours after the initial reference period, a worker who was not previously in scope of the measure and has since fallen into scope, or a worker whose existing guaranteed hours arrangement no longer reflects the hours they regularly work and ought to be offered more hours.

Justification for taking the power

53. As in relation to the length of the subsequent reference period(s), specifying the length and occurrence of that period in secondary legislation will allow it to be set and maintained at an appropriate duration to ensure it is effective at protecting workers

54. It will also allow flexibility, for example it may be deemed that a different reference period is appropriate in order to allow the subsequent reference period(s) to reflect different periods of the year. For example, the subsequent reference

period(s) might reflect 6 months or one year. This may be appropriate to ensure that workers with seasonal fluctuations in their work do not repeatedly fall out of scope of the right to guaranteed hours because of where successive reference periods fall. The subsequent reference period(s) have more nuances and details than the initial reference period, as it may act both as a review provision but also as an anti-avoidance measure, and it could apply in different ways to different workers depending on the regulations. The Government intends to consult on the proposed timing and length of the subsequent reference period(s).

55. Whilst the initial reference period also effectively acts as a qualifying period, it may therefore be appropriate to have a shorter initial reference period – ensuring that workers do not have to wait long to become eligible following the introduction of this new right – followed by a longer reference period for subsequent offers.

56. As with the initial reference period, this power is necessary to allow the Secretary of State to make changes to the subsequent reference period(s) for this novel right, for example in response to evidence emerging around the use of zero hours and minimum guaranteed hours contracts, around how the new right is working in practice, or in light of evolving working practices.

57. This power may be supplemented by the provisions made under s. 27BA(10). This section would allow to make provisions when this power is exercised, to take account of time when a worker does not work for a specified reason. This power will allow the Secretary of State to specify reasons why an individual may not work during the reference period and outline how the time spent not working due to such reasons should be accounted for. The Government envisages that this would cover reasons such as sick leave or parental leave.

Justification for the procedure

58. The Government considers that the affirmative resolution procedure is appropriate because the length of the subsequent reference period(s), as well as the recurrence of a subsequent reference period could materially affect how many workers are eligible for offers of guaranteed hours, and the nature of these offers. For example, the length of the subsequent reference period(s) will materially affect how many workers with seasonal variations in their work fall into scope. This power provides for more nuances and details than the initial reference period, to be worked out when setting out the details of the subsequent reference period(s) including their occurrence, impacting workers and employers. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BA(11) Employment Rights Act 1996: Power to determine categories of workers excluded from the scope of the right to guaranteed hours

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

59. The context for this power is as set out above at paragraph 26. New section 27BA(11) will allow the Secretary of State to define categories of workers who are excluded from the scope of the right to guaranteed hours.

Justification for taking the power

60. Taking this power will provide flexibility to exclude specific groups of workers from this measure in future. This is a new, novel right. It may be necessary for the Secretary of State to define the scope of the right over time, in order to react to changing employer practices and respond to circumstances where it becomes evident that it is appropriate to exclude certain workers from scope.

61. For example, it may transpire that severe adverse unintended consequences would result from the application of the new right to a certain type of worker with an unusual combination of characteristics, and that the only effective approach to address this problem is to provide an exemption.

Justification for the procedure

62. The Government considers that the affirmative procedure is appropriate because the exclusions could materially affect which workers are in scope and how many workers are eligible for a guaranteed hours offer. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BB(2) Employment Rights Act 1996: Power to set the conditions for an offer to meet to be classed as a guaranteed hours offer

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

63. New section 27BB makes provision regarding the guaranteed hours offer which must be made to a qualifying worker. An offer will be a guaranteed hours offer for the purposes of the new right where it is an offer to vary the worker’s terms and conditions of employment, or an offer to enter into a new worker’s contract, where the terms and conditions as varied or offered will require the employer to provide work for a number of hours which the worker must work, and that number of hours must reflect the hours worked during the relevant reference period.

64. Section 27BB(2) provides a discretionary regulation making power for the Secretary of State to provide that an offer is a guaranteed hours offer, only if it meets the conditions referred to in subsection (3), that is that the offer sets out the specific days and times to be worked, or a working pattern, and that those days and times or working pattern reflect the hours worked during the relevant

reference period. This is because guaranteeing only a certain number of hours per week without a clear work pattern may not work for all workers.

Justification for taking the power

65. Taking this power will also provide flexibility to amend in future the requirements of a guaranteed hours offer. It may be that a setting out a clear work pattern, or fixed times and days does not suit employers and workers using the new right to guaranteed hours, or it may be that to the contrary, guaranteed hours offers are only meaningful to workers where a clear work pattern is set out (if for instance an employer keeps offering unsuitable times for the shifts). The Government believes that switching on these conditions may not be suitable for all workers but could for instance benefit those who already have a clear work pattern. In such case, it may be more appropriate to make regulations for those workers but not all.

66. In any event, taking this power would allow the Government to retain flexibility to amend the application of the policy in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

Justification for the procedure

67. The Government considers that the affirmative procedure is appropriate because the times or days over which hours must be guaranteed could make a material difference to the types of working patterns which employers are required to offer to individual workers and would impact businesses and workers equally. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BB(5) Employment Rights Act 1996: Power to set out set out how it should be determined how many hours should be included in the offer of guaranteed hours, where applicable, how to determine whether an offer reflects when the hours were worked

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

68. The context for the power is as set out at paragraph 63. New section 27BB(5) allows the Secretary of State to set out in regulations how it should be determined how many hours should be included in the offer of guaranteed hours, and if regulations are made under section 27BB(2) and apply to a guaranteed hours offer, then how to determine whether an offer reflects when the hours were worked.

Justification for taking the power

69. Taking this power will allow the Secretary of State to set out in detail how it is to be determined whether an offer of guaranteed hours reflects the hours worked during the reference period. The Government does not consider that it is appropriate to set out this level of technical detail in primary legislation – a significant degree of details will need to be included to advise employers of the specific calculations they should carry out to arrive at an appropriate number of guaranteed hours.

70. The provisions as to how this is determined may also need to be adapted over time in light of changing employers' practices and evidence around employers' and workers' experience with the operation of this novel measure once implemented.

Justification for the procedure

71. The Government considers that the affirmative procedure is appropriate because the manner in which guaranteed hours should be calculated could materially affect the number of hours that employers are required to offer and that individual workers are guaranteed. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BB(9)(c) Employment Rights Act 1996: Power to define 'temporary need'

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

72. The overarching context for the power is as set out above at paragraph 63. New section 27BB(87) provides that a guaranteed hours offer that takes the form of an offer to enter into a new worker's contract must (among other things) not propose a new contract that is for a limited term, unless it is reasonable for it to be entered as such a contract. Similarly, where the offer takes the form of a variation of existing terms and conditions (section 27BB(7)), any limited-term should be removed unless it is reasonable to consider, as the time the offer is made, that the contract should remain of a limited-term. This is to prevent an employer offering a qualifying worker a limited-term contract, being a temporary guaranteed hours arrangement where there is no justification to do so.

73. New section 27BB(9) sets out the circumstances where it would be reasonable for a worker's contract to be of a limited term: that is a) the worker is engaged only to perform a specific task and the contract terminated once the task has been carried out, or b) the worker is engaged only until the occurrence or failure of occurrence of an event and the contract terminates once that event has occurred or failed to occur, and c) the worker is engaged if there is a 'temporary need' and the contract expires at a time that the employer considers is reasonable for the temporary need to come to an end. New section 27BB(9)(c) provides a power for the Secretary of State to define in regulations that temporary need.

Justification for taking the power

74. The Bill provides powers for the Secretary of State to define a temporary need, which is neither defined in relation to a specific task nor to the occurrence of an event. This narrow power allows the Secretary of State to specify additional circumstances in which a work need may be reasonably expected to come to an end (and therefore a temporary work need exists).

75. This is a novel right, and the term 'temporary need' has not previously been defined. This power will allow the Secretary of State to further provide circumstances where employers may offer limited-term contracts, to react to changing employers' practices and respond to circumstances where employers

identify genuine temporary work needs that are not covered by a specific task nor the occurrence of an event.

Justification for the procedure

76. The Government considers that the affirmative procedure is appropriate because the definition of temporary need will give rise to specific grounds for employers to offer guaranteed hours for a limited term only. It could materially affect the way employers run their organisations and forecast work needs. It could also materially affect the term of guaranteed hours offers received by individual workers. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours - New section 27BB(10) Employment Rights Act 1996: Power to set the guaranteed hours offer process

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

77. The overarching context is as set out in paragraph 63. New section 27BB(10) allows the Secretary of State to set out further details regarding the process of employers offering a guaranteed hours arrangement, including how soon after the end of the reference period an employer must offer the new / varied contract and in what form the offer must be made, and to specify which information must be given along with the offer.

78. The Government considers that the point at which a guaranteed hours offers must have been made should be outlined, to give employers and workers certainty over the point at which the offer must have been made (and therefore the point at which workers may take a case to an ET as their employer has failed to offer guaranteed hours).

79. The Government considers that the form in which the offer should be made should also be outlined, to ensure that employers and workers are clear on when an offer has been made; as well as the information which must accompany the offer.

Justification for taking the power

80. This power will allow the Secretary of State to set out details about the timeline for guaranteed hours offers to be made and to specify which information must be given by the employer in relation to the offer. The Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include very specific details around the point in time at which a guaranteed hours offer should be made and the form in which the offer is made. The Government envisages that employers will be required to make the offer of guaranteed hours in writing.

81. In addition, this is a novel right. Flexibility may be required to make changes to how soon the employer must offer a new contract / terms and conditions, depending on how this new right operates in practice.

82. There is precedent for similar powers to be taken around the form of a notice / application. Section 80F(5)(a) of the ERA (flexible working) allows regulations to be made setting out the form in which a flexible working request must be made.

Justification for the procedure

83. The Government considers that the negative resolution is appropriate due to the discrete and technical issue covered by these regulations.

Clause 1: Right to guaranteed hours - New section 27BB(11) Employment Rights Act 1996: Power to define when an offer of guaranteed hours should be treated as made

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

84. The context is as set out in paragraph 63. This power allows the Secretary of State to define when an offer of guaranteed hours should be treated as having been made.

Justification for taking the power

85. The Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include specific details around the point in time at which a guaranteed hours offer is treated as having been made.

86. There is existing precedent for such power, at section 80F(5)(b) of the ERA (flexible working), where that power allows regulations to be made to define when a flexible working application is to be taken as having been made.

Justification for the procedure

87. The Government considers that the negative resolution is appropriate due to the discrete and technical issue covered by these regulations, following existing precedents.

Clause 1: Right to guaranteed hours - New section 27BD(6) Employment Rights Act 1996: Power to define circumstances where employers would be exempt from having to offer guaranteed hours

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

88. New section 27BD makes provision regarding the exceptions to the duty on an employer to make a guaranteed hours offer, and the circumstances in which a guaranteed hours offer which has been made is to be treated as having been withdrawn. New section 27BD(6) allows the Secretary of State to define specific circumstances in which employers are to be exempt from offering workers a guaranteed hours offer, or for a guaranteed hours offer that has been made to be treated as having been withdrawn.

Justification for taking the power

89. This power will allow the Secretary of State to list the circumstances, if any, in which employers would be exempt from offering workers guaranteed hours. If these circumstances apply, any guaranteed hours offer which has already been made will be treated as having been withdrawn. It will allow changes to be made to those circumstances if required.

90. This power is necessary to allow the Secretary of State to react dynamically to changing employment practices that may arise, thereby maintaining the original policy intent while allowing reasonable exemptions. Employers could be exempted from the requirement to offer a guaranteed hours contract in very specific circumstances where the measure would otherwise have very significant adverse impacts even where employers and workers act with good intentions, and there is no other acceptable way to mitigate the risks.

91. The Government also considers that consultation on any potential exemptions will be required, to determine which specific circumstances may justify a potential exemption.

Justification for the procedure

92. The Government considers that the affirmative procedure is appropriate because the definition of the exemptions could materially affect how many workers are eligible for a guaranteed hours contract. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 1: Right to guaranteed hours – New section 27BD(10) Employment Rights Act 1996: Power to define the form and manner of employer notices where the duty to make a guaranteed hours offer does not apply or no longer applies and when notices are treated as having been given

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

93. New section 27BD(2) sets out circumstances in which a guaranteed hours offer made by an employer to a qualifying worker is to be treated as having been withdrawn, where there has been a “relevant termination” of the worker’s contract, or the arrangement in accordance with which the worker has been working. Where this is the case, new section 27BD(7) requires the employer to give the worker a notice stating this to be the case. Similarly, where the Secretary of State has exercised the power at new section 27BD(6) to set out exemptions to the duty to make a guaranteed hours offer, and an employer seeks to rely on one of these, section 27BD(8) requires the employer to give a notice to the qualifying worker informing them of the same.

94. The power at 27BD(10) allows the Secretary of State to make regulations which set out the form and manner in which these notices must be given, and when a notice is treated as having been given.

Justification for taking the power

95. Taking this power will allow the Secretary of State to set out in detail the form and manner of a notice given under s. 27BD(7) or (8), which must be given to a

qualifying worker where the employer's duty to make a guaranteed hours offer does not apply or no longer applies by virtue of the provisions of s. 27BD(2) or of regulations made under s. 27BD(6). It will also set out the details around when such notice is to be treated as having been given. The Government does not consider that it is appropriate to set out this level of technical detail in primary legislation.

96. It is standard practice for such technical detail to be set out in regulations. The regulations will need to include specific details around the form, and manner of that notice and when it is treated as having been given.

97. There is precedent for similar powers to be taken around the form of a notice / application and when it is to be taken as made. Section 80F(5) of the ERA (flexible working) allows regulations to be made setting out the form in which a flexible working request must be made as well as when it is taken to be made. This is a discrete power – the substantive requirements on the employer to provide this notice are outlined on the face of the Bill.

Justification for the procedure

98. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations. There is also existing precedent for such power and procedure in the ERA.

Clause 1: Right to guaranteed hours - New section 27BD(12) Employment Rights Act 1996: Power to set the length of the 'response period'

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

99. After a guaranteed hours offer is made by an employer to a worker, the worker must accept or decline the offer during the response period. The response period begins on the day after the day on which the offer is made by the employer.

100. This power allows the Secretary of State to specify the day on which the response period ends. It therefore allows the Secretary of State to define the length of this response period.

101. The Government considers that the timing and length of the response period should be defined in order that it is clear to both workers and employers when a response should be received (and therefore at what point it is to be taken that a worker has not responded in time).

Justification for taking the power

102. This power will allow the Secretary of State to set out details about the timeline for an offer of guaranteed hours to be responded to. The Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include very specific details around the point in time at which a guaranteed hours arrangement should be either accepted or declined.

103. In addition, this is a novel right. Flexibility may be required to make changes to how soon the worker must accept or decline an offer of guaranteed hours, depending on how the Government finds that this new right operates in practice.

Justification for the procedure

104. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 1: Right to guaranteed hours - New section 27BE(8) Employment Rights Act 1996: Power to define the form and manner of the notice by which an offer should be accepted or rejected by the worker

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

105. New section 27BE makes provision regarding the acceptance or rejection of a guaranteed hours offer. A worker may accept the guaranteed hours offer or – if they wish – reject the offer of a guaranteed hours contract and remain on their existing arrangement, by giving notice of their decision to the employer within the response period.

106. New section 27BE(8) provides a power for the Secretary of State to set out in regulations the details of the required form and manner of the worker's notice accepting or rejecting their employer's offer of a guaranteed hours contract, as well as when it is to be treated as having been given.

Justification for taking the power

107. This power will allow the Secretary of State to set out practical details as to the form and manner of a worker's notice – i.e. the worker's acceptance or rejection of the guaranteed hours offer - and when that notice will be treated as having been given. It will allow the Secretary of State to outline the process which a worker must follow to accept or reject the offer of a guaranteed hours contract. The Government considers it necessary to define explicitly how a worker should accept or reject an offer, in order that it is clear to both worker and employer when an offer has been accepted or rejected.

108. It is standard practice for such technical detail to be set out in regulations. The regulations will need to include specific details around the form, manner and when such notice will be treated as having been given.

109. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, which provides a power for the Secretary of State to define the form of an employee's application for flexible working, as well as when that application is taken as being made.

110. The substantive right to accept or reject the offer is included in primary legislation. This power is limited to allowing the Secretary of State to define the form and manner of the notice by which the offer should be accepted or rejected by the worker, along with when that notice is treated as having been given.

Justification for the procedure

111. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations, and this follows from existing precedents in the ERA.

Clause 1: Right to guaranteed hours - New section 27BF(1) Employment Rights Act 1996: Power to specify the information an employer must provide a worker who may qualify for a guaranteed hours offer about their rights

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

112. New section 27BF(1) and (2) impose a duty on employers to take reasonable steps to ensure that workers who have the potential to qualify for a guaranteed hours offer are aware of certain information about their rights under Chapter 2 (guaranteed hours). The duty applies both within the initial information period and on an ongoing basis thereafter where it is reasonable to consider that a worker may qualify for a guaranteed hours offer at the end of a relevant reference period and that worker remains employed by the employer.

113. New section 27BF(1) provides a power for the Secretary of State to specify in regulations the information which an employer must provide to a worker about their rights.

Justification for this power

114. The information provided to workers (as specified in regulations) would allow them to make informed decisions about their working hours during the reference period with the knowledge of their potential right to a guaranteed hours offer. By including this power in regulations, the Secretary of State will have the flexibility to make changes to the information that must be provided to workers. In particular, changes may be required if regulations are made in the future under the other powers in clause 1 which necessitate changes to the required information.

115. In addition, the Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include specific details around which information the employer must take reasonable steps to ensure the workers are aware of. The nature of this information will likely be contingent on other regulations which will be made setting out the further detail of the right to guaranteed hours. It would therefore not be adequate to outline on the face of the Bill the information which must be provided to workers.

Justification for this procedure

116. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 1: Right to guaranteed hours - New section 27BI(4)(a) Employment Rights Act 1996: Power to set the maximum number of weeks' pay which is the maximum amount which can be awarded by an ET

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

117. Where an employer fails to make a guaranteed hours offer to a qualifying worker in accordance with the new rights, the qualifying worker may present a complaint to an ET. The grounds on which a complaint may be presented are set out in new section 27BG. New section 27BI deals with the remedies which an ET may award where a complaint made under section 27BG is found to be well-founded. These include a declaration to that effect, and the award of compensation to be paid by the employer to the worker.

118. The maximum amount of compensation which may be awarded by an ET differs depending on the basis on which the complaint is founded.

119. Where the complaint is made under new section 27BG(1), (2), (3), (7) or (8), the maximum amount is to be such number of weeks' pay as the Secretary of State may specify in regulations. These complaints concern where:
    a. an employer has failed to make a guaranteed hours offer within the required time period;
    b. the offer made does not constitute a guaranteed hours offer, for example because of the way the reference period or the hours worked during the reference period have been calculated therefore do not reflect the hours which should have been guaranteed to the qualifying worker in that offer;

120. the guaranteed hours offer includes variations to terms and conditions that are prohibited by section 27BB(6), or the offer is not compliant with the prohibitions or requirements around offers of a fixed term (or limited-term) contract, as outlined in section 27BB(7) or, (8) ;
    a. the employer fails to give a worker a notice under section 27BD(7) or (8), outlining why the employer's duty to make a guaranteed hours offer does not apply or an offer already made has been withdrawn, or the employer gives a notice under section 27BD(7) or (8)(b) in circumstances where one should not have been issued, or the employer gives a notice in purported compliance with s. 27BD(8) but it does not refer to any provisions of the regulations or refers to the wrong provisions in the regulations;
    b. the employer fails to comply with its duty under section 27BF(1) to take reasonable steps to ensure workers who have the potential to qualify for a guaranteed hours offer are aware of certain information (to be specified in regulations) about their rights under Chapter 2 (guaranteed hours) during the initial period, or the employer fails to comply with their duty under section 27BF(2) to ensure that the worker continues to have access where they are employed by the employer and it is reasonable to consider they have the potential to qualify for guaranteed hours at the end of a relevant reference period.

Justification for taking the power

121. Taking this power allows the Secretary of State to set in regulations the maximum number of weeks' pay which is the maximum amount which can be awarded by an ET for a well-founded complaint as mentioned above.

122. The Government considers that it is appropriate to set a maximum amount of compensation to provide more certainty to workers and employers. Employers will be able to quantify their maximum potential liability where a worker makes a successful claim to an ET. Workers will be able to quantify the maximum award they may receive, if their claim is successful.

123. This will also ensure that the new right remains in line with the awards made in relation to other rights. If the awards for other employment rights are amended, or if different awards are applied for new rights in the future, it may be necessary to amend the award for this right accordingly to ensure that a consistent approach to enforcement is taken. Such award will be subject to the statutory maximum in any event, set at s. 227 of the ERA, by virtue of the consequential amendment made at para 14 of Schedule 1.

124. It also follows the precedent set for existing employment rights – for example in existing section 80I of the ERA (Flexible Working).

125. Taking this power will also allow the maximum level of payment to be adapted in light of inflation, changes to the minimum wage, or any other relevant changes in the wider economic context.

Justification for the procedure

126. The Government considers that the negative procedure is appropriate due to the discrete issue covered by these regulations. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions on compensation amounts awarded by an ET, including the power at section 80I ERA.

Clause 1: Right to guaranteed hours - New section 27BI(4)(b) Employment Rights Act 1996: Power to set the maximum amount of compensation which may be awarded by an ET

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

127. The context for this power is as set out in paragraphs 101 and 102. This power allows the Secretary of State to set out in regulations the maximum award which an ET may make in relation to a complaint which is founded on the basis that the guaranteed hours offer made is a reduced offer, as a result of the employer limiting the number of hours of work made available to the worker during the reference period, or as a result of the employer making work available the way they did, for the sole or main purpose of complying with their duty by making a reduced offer and the worker complains that the employer would have been under a duty to make a guaranteed hours offer, had they not limited the hours of work made available or had they not offered work in the way they did, for the sole or

main purpose of preventing the worker from meeting one or more conditions under 27BA(3)(b)-(d);

Justification for taking the power

128. Taking this power allows the Secretary of State to set in regulations the maximum amount of compensation which may be awarded by an ET where a well-founded case is taken on the grounds detailed above, set out at s. 27BG(4) and (5).

129. As set out above in paragraph 103, in the majority of cases an ET may make an award up to a maximum, defined by a specified number of weeks' pay. However, it would not be appropriate to set the maximum level of compensation in this manner where an employer limits the hours they provide to a worker or provide hours in a certain way to result in no guaranteed hours offer or a reduced offer. This is because – in these instances – the worker may have worked no hours, and therefore their weekly pay cannot be calculated or cannot be meaningfully used to set a maximum level of compensation. As such, where an ET case is taken on these grounds, it is appropriate for the maximum level of compensation which may be awarded to be set as a specified sum.

130. The Government considers that it is appropriate to set a maximum amount of compensation to provide more certainty to workers and employers. Employers will be able to quantify their maximum potential liability where a worker makes a successful claim to an ET. Workers will be able to quantify the maximum award they may receive, if their claim is successful.

131. This will also ensure that the new right remains in line with the awards made in relation to other rights. If the awards for other employment rights are amended, or if different awards are applied for new rights in the future, it may be necessary to amend the award for this right accordingly to ensure that a consistent approach to enforcement is taken.

132. Taking this power will also allow the maximum level of payment to be adapted in light of inflation, changes to the minimum wage, or any other relevant changes in the wider economic context.

Justification for the procedure

133. The Government considers that the negative procedure is appropriate due to the discrete issue covered by these regulations. The changes will be technical in nature and the level of compensation will likely follow the maximum permitted amount in relation to the other claims and / or the maximum statutory cap applying to week's pay in the ERA. The procedure is also consistent with the procedure for other powers to make technical provisions on compensation amounts awarded by an ET.

Clause 2: Shifts: rights to reasonable notice - New section 27BJ(1)(b) Employment Rights Act 1996: Power to specify contracts in scope

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

134. The right to reasonable notice of shifts and changes to these is intended to provide those without, or with limited, certainty of their working hours with more predictability of these, so that they are better able to plan their work, home lives, and finances.

135. Workers on zero hours contracts and arrangements have no predictability of when their shifts will take place, therefore they are one of the key groups that will benefit from this policy. Accordingly, the new sections 27BJ(1)(a) and (3) ensure that workers on zero hours contracts and arrangements have a right to reasonable notice of shifts.

136. However, other workers with low guaranteed hours also suffer from limited predictability where the timing of their hours is not guaranteed by their contract or where they are requested to work additional hours to those guaranteed in their contract.

137. The new section 27BJ(1)(b) therefore provides other workers on contracts of a specified description who are guaranteed some work with a right to reasonable notice. It then grants the Secretary of State the power to specify a description of those contracts. This enables the Secretary of State to include workers with guaranteed hours below a threshold within scope of the right.

138. The new section 27BJ(5) provides that the description of contracts in scope may be defined by reference to a maximum payment amount and/or working hours.

Justification for taking the power

139. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, in particular to respond to new avoidance measures or previously unidentified consequences.

140. The Government would like to consult on which contracts beyond zero-hour contracts should be included within scope of the right to reasonable notice of shifts. In particular, consultation would help to ensure that the policy is appropriately targeted at workers who suffer limited predictability of their hours.

141. Whilst the Government considers it likely that the contracts in scope will be specified by reference to the numbers of hours that they guarantee, it is considered appropriate to have the option of specifying the contracts by reference to a maximum payment amount. For example, it may be considered appropriate to exclude higher earners from the policy as such workers are unlikely to suffer from a lack of predictability in the same way as low earners.

Justification for the procedure

142. Since the power can be used to set the scope of the right to reasonable notice of shifts, the Government considers that regulations made using the power would be

of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 2: Shifts: rights to reasonable notice - New section 27BJ(2)(a) Employment Rights Act 1996: Power to specify contracts in scope to cover those with timings of shifts guaranteed

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

143. As explained above, the right to reasonable notice of shifts and changes to these is intended to provide those without, or with limited, certainty of their working hours with more predictability of these, so that they are better able to plan their work, home lives, and finances.

144. Workers on zero hours contracts and arrangements have no predictability of when their shifts will take place, therefore they are one of the key groups that will benefit from this policy. Accordingly, the new sections 27BJ(1)(a) and (3) ensure that workers on zero hours contracts (and arrangements) have a right to reasonable notice of shifts.

145. However, other workers with low guaranteed hours also suffer from limited predictability where the timing of their hours is not guaranteed by their contract or where they are requested to work additional hours to those guaranteed in their contract.

146. The new section 27BJ(2)(a) therefore provides other workers on contracts of a specified description who are guaranteed some work, the timing of (some of) which is guaranteed, with a right to reasonable notice in respect of shifts the timings of which are not guaranteed. It then grants the Secretary of State the power to specify a description of those contracts. This enables the Secretary of State to include workers with guaranteed hours below a threshold within scope of the right.

147. The new section 27BJ(5) provides that the description of contracts in scope may be defined by reference to a maximum payment amount and/or working hours.

Justification for taking the power

148. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, in particular to respond to new avoidance measures or previously unidentified consequences.

149. The Government would like to consult on which contracts beyond zero-hour contracts should be included within scope of the right to reasonable notice of shifts. In particular, consultation would help to ensure that the policy is appropriately targeted at workers who suffer limited predictability of their hours.

150. Whilst the Government considers it likely that the contracts in scope will be specified by reference to the numbers of hours that they guarantee, it is considered appropriate to have the option of specifying the contracts by reference

to a maximum payment amount. For example, it may be considered appropriate to exclude higher earners from the policy as such workers are unlikely to suffer from a lack of predictability in the same way as low earners.

Justification for the procedure

151. Since the power can be used to set the scope of the right to reasonable notice of shifts, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 2: Shifts: rights to reasonable notice - New section 27BJ(4) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

152. Workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

153. New section 27BJ(4) provides that notice given less than a specified period in advance of a shift will be presumed to be unreasonable. The power at new section 27BJ(4) allows the Secretary of State to in regulations determine what that period that is presumed to be unreasonable is.

154. The effect of this will be to require an ET to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

155. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

156. Setting a presumption ensures that the burden is on the employer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for employers and workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

157. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

158. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable.

159. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that the setting of a presumption was not specifically covered in the previous consultation.

Justification for the procedure

160. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 2: Shifts: rights to reasonable notice - New section 27BK(3)(a) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable for cancellations of shifts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

161. As explained above, workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

162. New section 27BK(3) provides that notice given less than a specified period in advance of a cancellation of a shift will also be presumed to be unreasonable. The power at new section 27BK(3)(a) allows the Secretary of State to determine what that period that is presumed to be unreasonable is for notice of cancellation.

163. The effect of this will be to require ETs to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

164. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

165. Setting a presumption ensures that the burden is on the employer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for employers and workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

166. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

167. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable.

168. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that the setting of a presumption was not specifically covered in the previous consultation.

Justification for the procedure

169. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 2: Shifts: rights to reasonable notice - New section 27BK(3)(b) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable for changes to when a shift starts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

170. As explained above, workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

171. New section 27BK(3) provides that notice given less than a specified period in advance of a change to when a shift starts will also be presumed to be unreasonable. The power at new section 27BK(3)(b) allows the Secretary of State to determine what that period that is presumed to be unreasonable is for notice of changes to when a shift starts.

172. The effect of this will be to require ETs to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

173. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

174. Setting a presumption ensures that the burden is on the employer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for employers and workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

175. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

176. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable.

177. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that the setting of a presumption was not specifically covered in the previous consultation.

Justification for the procedure

178. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 2: Shifts: rights to reasonable notice - New section 27BK(3)(c) Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable for other changes to shifts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

179. As explained above, workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

180. New section 27BK(3) provides that notice given less than a specified period in advance of a change of shift will also be presumed to be unreasonable. The power at new section 27BK(3)(c) allows the Secretary of State to determine what that period that is presumed to be unreasonable is for notice of changes to shifts other than changes to when the shift starts. However, notice given on or after the start of a shift is presumed to be unreasonable and therefore the power does not apply in respect of such notices.

181. The effect of this will be to require ETs to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

182. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

183. Setting a presumption ensures that the burden is on the employer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for employers and workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

184. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

185. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable.

186. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that the setting of a presumption was not specifically covered in the previous consultation.

Justification for the procedure

187. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 2: Shifts: rights to reasonable notice - New section 27BL(6)(a) and (b) Employment Rights Act 1996: Power to specify formalities for notices of shifts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

188. This section makes provision to supplement new sections 27BJ (Right to reasonable notice of a shift) and 27BK (Right to reasonable notice of cancelation of or change to a shift).

189. The power at new section 27BL(6) enables the Secretary of State to make provision as to what form these notices should be in, the way it should be provided and when it is deemed to be received.

Justification for taking the power

190. The Government considers it appropriate to specify the formalities for notices, in particular, so that it is clear to the worker and employer whether notice has been given.

191. The Government considers it appropriate to leave this kind of technical detail to secondary legislation. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

192. Taking a power will also allow the policy to be adapted in light of changing employers' practices, technological change, and any new avoidance schemes.

Justification for the procedure

193. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions, including the power at section 80F(5) ERA (Flexible Working).

Clause 2: Shifts: rights to reasonable notice - New section 27BN(2) Employment Rights Act 1996: Power to specify factors to be considered to determine reasonableness

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

194. Workers in scope of the new entitlement will be provided with a right to reasonable notice of (changes to) their shifts.

195. Where a worker considers that they have been provided with notice of (change to) a shift with unreasonable notice, they can present a complaint to an ET under new section 27BN.

196. What constitutes "reasonable" notice will depend on the circumstances and so it will be for an ET to determine whether notice is reasonable in each case.

197. The power at new section 27BN(2) allows the Secretary of State to specify factors that ETs must, amongst other factors, take into account when considering what period of notice is "reasonable".

Justification for taking the power

198. The Government appreciates that having a prescribed period for what constitutes "reasonable" notice is unlikely to work for all scenarios. The Government therefore considers it appropriate to leave the term "reasonable" undefined.

199. In the absence of a definition, the Government considers it appropriate to specify factors that an ET must take into account when determining reasonableness in order to provide, ETs as well as employers and workers, with an indication of what is likely to be reasonable notice. An ET will however still be able to make their own judgement on what is reasonable based on the circumstances of the case.

200. The factors may need to be adapted over time in light of changing employers' practices and experience with the operation of the new measures once implemented. Accordingly, the Government considers it appropriate to specify the factors in regulations.

201. The Government would like to consult to obtain stakeholders views on what factors are appropriate for am ET to take into account, particularly given the novelty of the policy.

Justification for the procedure

202. Since the power only provides for factors to be taken into account by an ET and will not prescribe when an ET should find notice to be unreasonable, the Government considers that the negative procedure would give Parliament the right level of scrutiny.

Clause 2: Shifts: rights to reasonable notice - New section 27BO(2) Employment Rights Act 1996: Power to specify the maximum amount of compensation for unreasonable notice

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

203. Where a worker considers that they have been provided with notice of a (change to) a shift that is unreasonable contrary to new section 27BJ or 27BK, they can present a complaint to an ET under new section 27BN.

204. If an ET finds the complaint to be well-founded, an ET can award the worker compensation to be paid by the employer as it considers appropriate to compensate the worker for financial loss suffered as a result of the unreasonable notice.

205. There will however be a maximum amount that an ET can award.

206. The power at new section 27BO(2) allows the Secretary of State to specify the maximum amount of compensation that an ET can award for loss where notice is unreasonable.

Justification for taking the power

207. The Government considers it appropriate to set a maximum amount of compensation, in particular to provide more certainty so that employers have a greater ability to quantify their potential liability and workers can likewise quantify their potential award.

208. The Government considers that the appropriate maximum amount of compensation is likely to depend on what payment amount is set for short notice cancellation, curtailment or movement using the power at new section 27BP discussed below. As discussed below, the Government wishes to consult on that appropriate payment amount.

209. Further, it is common practice for such technical detail on maximum payment amounts to be included in regulations, in line with the power at, for example, section 80I ERA.

210. Taking a power will also allow the level of the maximum payment to be adapted in light of inflation, wage inflation, changes in the minimum wage, or any other relevant changes.

Justification for the procedure

211. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions on compensation amounts awarded by an ET, including the power at section 80I ERA.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(1) Employment Rights Act 1996: Power to specify the payment amount

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

212. Under new section 27BP(1), an employer will be required to make a payment to a worker (who is in scope) where the employer cancels, curtails or moves a shift at short notice.

213. The amount to be paid will be specified in regulations made by the Secretary of State.

214. The new section 27BZ ERA provides that regulations made under Part 2A ERA may make different provision for different purposes. The new section 27BQ(2) clarifies that regulations under new section 27BP(1) to specify the payment amount may specify different amounts depending on how short the notice given was.

215. New section 27BQ(1) imposes a restriction on the power so that it may not be used to set a payment amount that is higher than the value of the (proportion of the) shift that would have been worked had it not been cancelled, curtailed or moved.

Justification for taking the power

216. Given the novelty of the policy and the scope of this to impact employer behaviour, the Government wishes to retain flexibility to amend its application in future, for example to account for changing employers' practices, new avoidance measures, or changes in inflation or the minimum wage.

217. The Government considers it appropriate to specify different payment amounts depending on how short the notice given was so as to ensure that the payment amount is proportionate.

218. The Government considers that the power is also appropriately restricted by providing that the power may not be used to set a higher payment amount than the value of (the proportion of) the shift that would have been worked but for the cancellation, curtailment or movement.

219. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on

what an appropriate payment would be, in response to which a number of differing views were expressed.

220. The Government would like to consult further on this issue, given the wide range of views, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

221. Since the power can be used to set the amount for payment to be made by employers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(2)(c) Employment Rights Act 1996: Power to specify contracts in scope of the right

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

222. The right to payment for short notice cancellation, curtailment or movement of shifts is intended to encourage employers to improve shift planning so that fewer shifts have to be cancelled, moved or curtailed, and to provide some compensation to workers for income they have lost and expenses they may have incurred. This should in turn give more predictability to workers of their working hours and income.

223. The policy intent is to help workers with low income security. Under the new section 27BP(2)(a) and (b), workers on zero hours contracts (and arrangements) are in scope of the policy as they have no predictability of when their shifts will take place under their contract, or how many shifts they will work, and therefore low income security.

224. Other workers with low guaranteed hours also suffer from limited predictability of their income and hours where the timing of their hours is not guaranteed by their contract or where they are requested to work additional hours not specified in their contract.

225. The new sections 27BP(2)(c) therefore also provides other workers on contracts of a specified description who are guaranteed some work with a right to payment for shifts that are cancelled, curtailed or moved at short notice. It grants the Secretary of State the power to specify a description of those contracts. This enables the Secretary of State to include workers with guaranteed hours below a threshold within scope of the right.

226. New section 27BQ(3) provides that the description of contracts in scope may be defined by reference to a maximum payment amount and/or working hours.

Justification for taking the power

227. Given the novelty of the policy and potential for it to change working practices of employers, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

228. The Government considers it likely that the contracts in scope will be specified by reference to the numbers of hours that they guarantee. However, following consultation, it may be considered appropriate alternatively or additionally to specify the contracts by reference to a maximum payment amount. In particular, higher earners are unlikely to suffer from a lack of predictability in the same way as low earners.

229. The Government wishes to consult on which contracts beyond zero-hour contracts should be included within scope of the payment for short notice cancellation, curtailment and movement. In particular, this would ensure that the policy is appropriately targeted at workers who suffer limited predictability of their hours and income and given the novelty of the policy.

Justification for the procedure

230. Since the power can be used to set the scope of the right to payment for short notice cancellation, movement or curtailment, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(3)(a) Employment Rights Act 1996: Power to specify contracts in scope to cover those with timings of shifts guaranteed

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

231. As set out above, the right to payment for short notice cancellation, curtailment or movement of shifts is intended to encourage employers to improve shift planning so that fewer shifts have to be cancelled, moved and curtailed, and to provide some compensation to workers for income they have lost and expenses they may have incurred. This should in turn give more predictability to workers of their working hours and income.

232. The policy intent is to help workers with low income security. Under the new section 27BP(2)(a) and (b), workers on zero hours contracts (and arrangements) are in scope of the policy as they have no predictability of when their shifts will take place under their contract, or how many shifts they will work, and therefore low income security.

233. Other workers with low guaranteed hours also suffer from limited predictability of their income and hours where the timing of their hours is not guaranteed by their contract or where they are requested to work additional hours not specified in their contract.

234. The new section 27BP(3)(a) therefore also provide other workers on contracts of a specified description who are guaranteed some work, the timing of (some of) which is guaranteed in their contract, with a right to payment for shifts that are cancelled, curtailed or moved at short notice, in respect of shifts the timings of which are not guaranteed. It grants the Secretary of State the power to specify a description of those contracts. This enables the Secretary of State to include workers with guaranteed hours below a threshold within scope of the right.

235. New section 27BQ(3) provides that the description of contracts in scope may be defined by reference to a maximum payment amount and/or working hours.

Justification for taking the power

236. Given the novelty of the policy and potential for it to change working practices of employers, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

237. The Government considers it likely that the contracts in scope will be specified by reference to the numbers of hours that they guarantee. However, following consultation, it may be considered appropriate alternatively or additionally to specify the contracts by reference to a maximum payment amount. In particular, higher earners are unlikely to suffer from a lack of predictability in the same way as low earners.

238. The Government wishes to consult on which contracts beyond zero-hour contracts should be included within scope of the payment for short notice cancellation, curtailment and movement. In particular, this would ensure that the policy is appropriately targeted at workers who suffer limited predictability of their hours and income and given the novelty of the policy.

Justification for the procedure

239. Since the power can be used to set the scope of the right to payment for short notice cancellation, movement or curtailment, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(5) Employment Rights Act 1996: Power to specify a timeframe for payment

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

240. Under new section 27BP, employers will be required to pay a specified amount to (in scope) workers where they cancel, curtail or move a shift at short notice.

241. New section 27BP(5) provides a power permitting the Secretary of State to specify the time period within which the payment should be made.

Justification for taking the power

242. Most workers will have an agreed or established timeframe within which they usually receive payment from their employers. In particular, section 1 ERA requires that employers give workers a written statement of particulars of employment which must specify the intervals at which remuneration is paid.

243. However, some workers in scope of the policy may not yet have begun employment for the employer and received a written statement of particulars.

244. It is therefore considered appropriate to set a timeframe for payment so that workers and employers in all scenarios understand when payment is to be made and to counter potential avoidance methods. The timeframe specified is likely to give precedence to any previous agreements and practice between employers and workers but provide a default timeframe in the absence of such agreements and practice.

245. It is common practice for such technical detail to be included in regulations, for example, timeframes for payments are set out in the Statutory Maternity Pay (General) Regulations 1986.

246. Taking a power also allows for the timing to be changed in line with any potential changing employers' practices in this area, or any new avoidance schemes.

Justification for the procedure

247. The Government considers that the negative procedure would give Parliament the right level of scrutiny, given that the changes will be technical in nature.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(a) Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for cancellations

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

248. Under new section 27BP, employers will be required to pay workers (who are in scope) where they cancel, curtail or move a shift at short notice.

249. The new section 27BP(6)(a) provides that the timeframe that will amount to "short notice" in cases where a shift is cancelled is to be specified by the Secretary of State in regulations. However, new section 27BQ(4) provides that the regulations cannot specify a timeframe of more than seven days.

Justification for taking the power

250. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

251. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on

what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

252. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

253. Since the power can be used to determine in what circumstances employers are required to make a payment to workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(b) Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for movements alone or with curtailments

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

254. As set out above, under new section 27BP, employers will be required to pay workers (who are in scope) where they cancel, curtail or move a shift at short notice.

255. The new section 27BP(6)(b) provides that the timeframe that will amount to "short notice" in cases where a shift is moved or moved and curtailed is to be specified by the Secretary of State in regulations. However, new section 27BQ(4) provides that the regulations cannot specify a timeframe of more than seven days.

Justification for taking the power

256. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

257. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

258. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

259. Since the power can be used to determine in what circumstances employers are required to make a payment to workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(c) Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for curtailments changing the start time

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

260. As set out above, under new section 27BP, employers will be required to pay workers (who are in scope) where they cancel, curtail or move a shift at short notice.

261. The new section 27BP(6)(c) provides that the timeframe that will amount to "short notice" in cases where a shift is curtailed so that the start time of the shift changes is to be specified by the Secretary of State in regulations. However, new section 27BQ(4) provides that the regulations cannot specify a timeframe of more than seven days.

Justification for taking the power

262. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

263. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

264. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

265. Since the power can be used to determine in what circumstances employers are required to make a payment to workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(6)(d) Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for curtailments not changing the start time

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

266. As set out above, under new section 27BP, employers will be required to pay workers (who are in scope) where they cancel, curtail or move a shift at short notice.

267. The new section 27BP(6)(d) provides that the timeframe that will amount to "short notice" in cases where a shift is curtailed with no change to when the shift is to start is to be specified by the Secretary of State in regulations, except in cases where the change is on or after the start of the shift (in which case the notice is short notice and payment should therefore be due). However, new section 27BQ(4) provides that the regulations cannot specify a timeframe of more than seven days.

Justification for taking the power

268. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

269. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

270. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

271. Since the power can be used to determine in what circumstances employers are required to make a payment to workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(7) Employment Rights Act 1996: Power to specify when notices are deemed to be received

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

272. New section 27BP requires an employer to make a payment to a worker each time that the employer cancels, moves, or cuts short a shift at short notice.

273. The power at new section 27BP(7) enables the Secretary of State to make provision as to when notice of the cancellation, movement or curtailment of a shift is to be treated as having been given by an employer to a worker.

Justification for taking the power

274. The Government considers it appropriate to specify when notices are deemed to be received so that it is clear to all parties when notice is given.

275. The Government considers it appropriate to include this kind of technical detail in secondary legislation. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

276. Taking a power will also allow the policy to be adapted in light of changing employers' practices, technological change, and any new avoidance schemes.

Justification for the procedure

277. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions, including the power at section 80F(5) ERA.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BP(9) Employment Rights Act 1996: Power to exclude movement of shifts within a minimum timeframe

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

278. Under new section 27BP, an employer will be required to make a payment to a worker (who is in scope) where the employer cancels, curtails or moves a shift at short notice.

279. The new section 27BP(9) provides that reference to movement of shifts does not include any changes of less than a specified period of time. A power is accordingly conferred on the Secretary of State to specify a minimum amount of time beyond which payment must be made for delaying or bringing forward a shift.

Justification for taking the power

280. Shifts brought forward or delayed can be as disruptive to workers as curtailing or cancelling shifts.

281. However, the Government considers that it is likely to be disproportionate to require employers to have to pay workers for very short delays or earlier commencement of shifts, given that the payment amount could be minimal

compared to the administration needed to record these delays and calculate and make payment.

282. Given the novelty of the policy and potential to impact employer behaviour, the Government wishes to retain flexibility to amend the application of the policy in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

283. The Government would like to consult on what timeframe is appropriate, to obtain views on what would be proportionate.

Justification for the procedure

284. Since the power can be used to determine in what circumstances employers are not required to make a payment to workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BR(1)(c) Employment Rights Act 1996: Power to make exceptions

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

285. Under new section 27BP, an employer will be required to make a payment to a worker (who is in scope) where the employer cancels, curtails or moves a shift at short notice.

286. New section 27BR(1)(c) provides a power to make exceptions to the requirement to make such payments.

Justification for taking the power

287. The Government considers that there are likely to be some limited circumstances in which an employer should not have to pay a worker for short notice cancellation, curtailment or movement.

288. Further, this power provides the Secretary of State with flexibility to react dynamically to changing employers' practices and any new avoidance schemes, thereby maintaining the original policy intent while allowing reasonable exceptions.

289. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on whether certain workers or sectors should be excepted from the requirement to pay.

290. The Government would however like to consult further on this issue, in particular to determine whether there are specific circumstances that are appropriate for exception from the policy, particularly given the novelty of the policy.

Justification for the procedure

291. Since the power can be used to determine circumstances that are out of scope of the right to payment for short notice cancellation, curtailment or movement, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BR(5) Employment Rights Act 1996: Power to specify formalities for notices of exceptions

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

292. As set out in paragraphs 286, new section 27BR(1)(c) provides a power for the Secretary of State to set out in regulations exceptions to the duty on employers to make a payment to workers (who are in scope) for short notice cancellation, curtailment or movement of shifts.

293. Where an employer considers that an exception applies, the employer will be required to explain the reason for the short notice cancellation, curtailment or movement and notify workers of the exception relied upon. This should ensure that workers are made aware that they are not due to receive the payment and also provide them with the information they need to decide whether to challenge the employer on their assertion that an exception applies.

294. The power at new section 27BR(5) enables the Secretary of State to make provision as to what form the notification of the exception and other information should take, the way it should be provided, the time when it must be provided and when it is to be deemed to have been provided.

Justification for taking the power

295. The Government considers it appropriate to specify the formalities for notices, in particular, so that it is clear to the worker and employer whether notice has been given and to prevent some potential avoidance methods.

296. The Government considers it appropriate to include this kind of technical detail in secondary legislation. This aligns with the approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

297. Taking a power will also allow the policy to be adapted in light of changing employers' practices, technological change, and any new avoidance schemes.

Justification for the procedure

298. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions, including the power at section 80F(5) ERA.

Clause 3: Right to payment for cancelled, moved and curtailed shifts - New section 27BU(2) Employment Rights Act 1996: Power to specify a maximum amount of compensation regarding notices of exceptions

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

299. As set out in paragraphs 286, new section 27BR(1)(c) provides a power for the Secretary of State to set out in regulations exceptions to the duty on employers to make a payment to workers (who are in scope) for short notice cancellation, curtailment or movement of shifts.

300. Where an employer considers that an exception applies, employers will be required to notify workers of the exception relied upon and explain the reason for the short notice cancellation or curtailment. This should ensure that workers are made aware that they are not due to receive the payment and also provide them with information they need to decide whether to challenge the employer on their assertion that an exception applies.

301. Where a worker considers that their employer has unreasonably failed to provide them with such a notice or where they consider that the notice refers to no exception, does not contain an explanation or contains an explanation that is inadequate or untrue, they can present a complaint to an ET.

302. If an ET finds the complaint to be well-founded, an ET can order the employer to make a payment to the worker.

303. New section 27BU(2) provides that this payment will be an amount at the discretion of an ET up to a maximum amount specified in regulations by the Secretary of State.

Justification for taking the power

304. The Government considers that the appropriate amount of the maximum payment ordered by an ET is likely to depend on what payment amount is set for short notice cancellation using the power at new section 27BP(1) discussed above. As discussed above, the Government wishes to consult on that appropriate payment amount.

305. Further, it is common practice for technical detail on levels of payments to be included in regulations, similarly to the power at, for example, section 80I ERA.

306. Taking a power will also allow the level of the payment to be adapted in light of inflation, wage inflation, changes in the minimum wage, or any other relevant changes.

Justification for the procedure

307. The Government considers that the draft affirmative procedure would give Parliament the right level of scrutiny as Parliament may have an interest in what compensation can be awarded and therefore this will provide Parliament with sufficient opportunity to scrutinise and debate the policy.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: Right to guaranteed hours – New Paragraph 1(3)(b) in Part 1 of new Schedule A1 to the Employment Rights Act 1996: Power to specify conditions as to number, regularity or otherwise

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

308. An agency worker's guaranteed hours offer must reflect the hours that an agency worker worked for and under the supervision and direction of a hirer during the reference period. The policy intends that only those who work regularly are within scope, excluding those agency workers who are only engaged by a hirer on a very sporadic basis.

309. This power allows the Secretary of State to specify conditions as to regularity, number or otherwise in order to include in scope only agency workers who meet those conditions.

310. This power replicates a corresponding power at Section 27BA(3)(d) (directly engaged workers), for agency workers.

Justification for taking the power

311. In the same way as is set out in relation to the power at Section 27BA(3)(d), this power is necessary to allow the Secretary of State to set out conditions in respect of the hours worked by the agency worker for a hirer during a reference period to ensure that they meet the conditions as to regularity, number or otherwise in line with the policy. This power is needed to refine which agency workers are in scope. It ensures that these conditions can be adapted in response to new evidence emerging around atypical work or in light of evolving working practices. No similar conditions are set out in existing legislation.

312. The conditions are also likely to be technical in nature, as they may make reference to a specific number of hours or frequency of work. The Government considers it appropriate to include such technical definitions in regulations, rather than on the face of the Bill.

313. The Government will look to specify that these conditions define regularity in a manner that ensures that the measure is appropriately targeted at those agency workers who are regularly working for a particular hirer and does not include those agency workers who work for a particular hirer very sporadically.

314. This power may be supplemented by the provisions made under new paragraph 1(9) which would allow provisions to be made when this power is exercised, to take account of time when an agency worker does not work for a specified reason. for example, if they are ill and unfit for work. This power will allow the Secretary of State to specify reasons why an individual may not work during the reference period and outline how the time spent not working due to such reasons should be accounted for, including how this should be taken into account in respect of meeting the condition as to regularity or number of hours or otherwise. The Government considers that it is necessary to account for these circumstances in order to provide clarity for agency workers and hirers around

how such periods of time affect the reference period and the calculation of guaranteed hours to be offered.

Justification for the procedure

315. The Government considers that the affirmative procedure is appropriate because setting out and thereafter possibly amending the definition of regularity could materially affect how many agency workers are in scope of this new right. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: Right to guaranteed hours - New Paragraph 1(5)(b) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the length of the initial reference period

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

316. The initial reference period is the period during which the agency worker must have worked under the supervision and direction of the hirer in order to be considered a qualifying agency worker, along with the other requirements. The initial period will also be the period considered by the hirer when determining how many hours have been worked regularly by the agency worker, and therefore how many hours should be offered as guaranteed hours.

317. This power allows the Secretary of State to define the length of the initial reference period by defining the point at which the initial reference period ends.

318. The initial reference period will also effectively act as a qualifying period, as the worker will only be eligible for this right once they have worked the length of the reference period.

319. This power replicates a corresponding power at section 27BA(5)(b) (directly engaged workers) for agency workers.

Justification for taking the power

320. As set out in relation to the power at section 27BA(5)(b), there is precedent for powers to be taken regarding the qualifying period for different employment rights. For example, section 80F(8) of the Employment Rights Act 1996 allows the Secretary of State to specify the duration of employment required in order for a worker to be eligible to request flexible working.

321. This power is necessary to allow the Secretary of State to make changes to the reference period for this novel right, for example in response to evidence emerging around how agency workers are supplied, around how the new right is working in practice, or in light of evolving working practices.

322. This power may be supplemented by the provisions made under new paragraph 1(9) which would allow provisions to be made when this power is exercised, to take account of time when an agency worker does not work for a specified reason, for example if, during the initial reference period, they are ill and unfit for

work. This power will allow the Secretary of State to specify reasons why an individual may not work during the reference period and outline how the time spent not working due to such reasons should be accounted for, including how this should be taken into account in respect of meeting the condition as to regularity or number of hours or otherwise. The Government considers that it is necessary to account for these circumstances in order to provide clarity for agency workers and hirers around how such periods of time affect the reference period and the calculation of guaranteed hours to be offered.

Justification for the procedure

323. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 1(6) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the length of the subsequent reference period(s)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

324. Following the initial reference period, the subsequent reference period(s) will require hirers to review a qualifying agency worker's worked hours and – if applicable – offer guaranteed hours. This power allows the Secretary of State to define the length and timing of the subsequent reference period(s).

325. This may affect an agency worker who has previously declined an offer of guaranteed hours after the initial reference period, or an agency worker who was not previously in scope of the measure and has since come into scope.

326. This power replicates a corresponding power at section 27BA(6) (directly engaged workers), for agency workers.

Justification for taking the power

327. A power to set the dates and determine the length of subsequent reference period(s) is required as the length of the initial reference period is also being specified in regulations (see new para 1(5)(b)). This power will also give the Secretary of State the ability to set a different length of reference period for subsequent reference period(s) compared to the initial reference period.

328. It may be deemed that a different reference period is appropriate in order to allow subsequent reference period(s) to reflect different times of year. For example, the subsequent reference period(s) might be 6 months or one year long. This may be appropriate to ensure that agency workers with seasonal fluctuations in their work do not repeatedly fall out of scope of the right to guaranteed hours because of where successive reference periods fall. The Government intends to consult on this issue.

329. The initial reference period also effectively acts as a qualifying period. It may therefore be appropriate to have a shorter initial reference period – ensuring that agency workers do not have to wait long to become eligible following the

introduction of this new right – followed by a longer reference period for subsequent offers if relevant (e.g. if the agency worker has refused a guaranteed hours offer after the initial reference period).

330. As with the initial reference period, this power is necessary to allow the Secretary of State to make changes to the reference period for this novel right, for example in response to evidence emerging around the supply of agency workers, around how the new right is working in practice, or in light of evolving working practices.

331. This power may be supplemented by the provisions made under new paragraph 1(9) which would allow provisions to be made when this power is exercised, to take account of time when an agency worker does not work for a specified reason. for example, if, during a reference period, they are ill and unfit for work. This power will allow the Secretary of State to specify reasons why an individual may not work during the subsequent reference period and outline how the time spent not working due to such reasons should be accounted for, including how this should be taken into account in respect of meeting the condition as to regularity or number of hours or otherwise. The Government considers that it is necessary to account for these circumstances in order to provide clarity for agency workers and hirers around how such periods of time affect the reference period and the calculation of guaranteed hours to be offered.

Justification for the procedure

332. The Government considers that the affirmative resolution procedure is appropriate because the length of the subsequent reference period(s) could materially affect how many agency workers are eligible for offers of guaranteed hours, and the nature of these offers. For example, the length of the subsequent reference period could materially affect how many agency workers with seasonal variations in their work will be in scope. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 1(10) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to determine categories of agency workers excluded from scope

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

333. This power will allow the Secretary of State to define categories of agency workers who are excluded from the scope of the right to guaranteed hours.

334. This power replicates a corresponding power at section 27BA(11) (directly engaged workers), for agency workers.

Justification for taking the power

335. Much as with the power at section 27BA(11), taking this power will provide flexibility to exclude specific groups of agency workers from this measure in future. This is a novel right applied in a unique, tripartite relationship between agency workers, agencies and hirers. It may be necessary for the Secretary of State to refine the scope of the right over time, in order to react to changing

business practices and respond to circumstances where it becomes evident that it is appropriate to exclude certain agency workers from scope.

336. For example, it may transpire that severe adverse unintended consequences would result from the application of the new right to a certain type of agency worker with an unusual combination of characteristics, and that the only effective approach to address this problem is to exclude them from scope.

Justification for the procedure

337. The Government considers that the affirmative procedure is appropriate because the use of the power to exclude could materially affect how many agency workers are eligible for a guaranteed hours contract. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(2) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the conditions for an offer to meet to be classed as a guaranteed hours offer

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

338. This power allows the Secretary of State to provide that an offer is a guaranteed hours offer, only if it meets the conditions referred to at new paragraph 2(3). The conditions will define how hours should be guaranteed in the offer made to a qualifying agency worker, i.e. the days of the week, times on those days, or working pattern. This is because guaranteeing a certain number of hours per week may not work for all agency workers with variable hours.

339. This power replicates a corresponding power at section 27BB(2) for directly engaged workers.

Justification for taking the power

340. In the same way as is set out for the power at section 27BB(2), this discretionary power will allow the Secretary of State to prescribe that a guaranteed hours offer must satisfy the condition set out at paragraph 2(3), which relates to how hours should be guaranteed in the offer made. For example, the power could be used in response to new evidence emerging around agency work, or in light of evolving working practices (such as the use of annualised hours or shift patterns that do not map neatly on to calendar weeks).

341. There are also interactions between this power and the powers around calculation of guaranteed hours – i.e. the policy around how guaranteed hours are calculated may determine the policy for how those hours should be guaranteed. It therefore follows that the detail around both how guaranteed hours are calculated and over what period of time should be defined in regulations. Therefore, any change made to the calculation method may be reflected in the period over which hours may be guaranteed (and vice versa).

342. The Government also considers that aspects of how hours are guaranteed is a technical point, which is therefore more appropriate to be addressed in regulations, rather than included on the face of the Bill.

Justification for the procedure

343. The Government considers that the affirmative procedure is appropriate because the period over which hours must be guaranteed could make a material difference to the types of working patterns which end hirers are required to offer to agency workers. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(5) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to determine how many hours should be included in a guaranteed hours offer and, where applicable, how to determine whether an offer as to whether an offer reflects when hours were worked

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

344. This power replicates a corresponding power at section 27BB(54) (directly engaged workers) for agency workers.

345. As the power at section 27BB(54), this power allows the Secretary of State to set out in regulations how a hirer should determine how many hours should be included in the offer of guaranteed hours, and if regulations are made under new para 2(2), then how to determine whether an offer reflects when the hours were worked.

Justification for taking the power

346. Taking this power will allow the Secretary of State to set out in detail how it is to be determined whether an offer of guaranteed hours reflects the hours worked for the hirer during the reference period. The Government does not consider that it is appropriate to set out this level of technical detail in primary legislation – a significant degree of detail will need to be included to advise hirers of the specific calculations they should carry out to arrive at an appropriate number of guaranteed hours.

347. The provisions as to how this is determined may also need to be adapted over time in light of changing hirers' practices and evidence around hirers' and agency workers' experience with the operation of this novel measure once implemented.

Justification for the procedure

348. The Government considers that the affirmative procedure is appropriate because the manner in which guaranteed hours should be calculated could materially affect the number of hours that hirers are required to offer and that individual agency workers are guaranteed. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(7)(c) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to define 'temporary need'

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

349. This power allows the Secretary of State to define a 'temporary need'. A definition of temporary need is required as a hirer may only offer an eligible agency worker a guaranteed hours arrangement on a fixed term basis if a) the agency worker is engaged only to perform a specific task, or b) the agency worker is engaged only until the occurrence or failure of occurrence of an event, or c) the agency worker is engaged to fulfil a 'temporary need'. This is to prevent a hirer offering a qualifying agency worker a temporary guaranteed hours arrangement where there is no justification for the arrangement to be temporary.

350. This power replicates a corresponding power at section 27BB(9)(c) (directly engaged workers) for agency workers.

Justification for taking the power

351. Agency workers are often engaged on a temporary basis. The Bill provides powers for the Secretary of State to define a temporary need, which is neither defined in relation to a specific task nor to the occurrence of an event. This narrow power allows the Secretary of State to specify additional circumstances in which a work need may be reasonably expected to come to an end (and therefore a temporary work need exists).

352. This is a novel right, and the term 'temporary need' has not previously been defined. This power will allow the Secretary of State to further provide circumstances where hirers may offer limited-term contracts, to react to changing hirers' practices and respond to circumstances where hirers identify genuine temporary work needs that are not covered by a specific task nor the occurrence of an event.

Justification for the procedure

353. The Government considers that the affirmative procedure is appropriate because the definition of temporary need will give rise to specific grounds for hirers to offer guaranteed hours for a limited term only. It could materially affect the way hirers run their organisations and forecast work needs. It could also materially affect the term of guaranteed hours offers received by individual agency workers. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(8) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set out further details regarding the process of hirers offering a guaranteed hours arrangement

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

354. This power allows the Secretary of State to set out further details regarding the process of hirers offering a guaranteed hours arrangement, including how soon after the end of the reference period a hirer must offer the new contract and in what form the offer must be made, and to specify which information be given along with the offer.

355. The Government considers that the point at which a guaranteed hours arrangement must have been offered should be outlined, to give hirers and agency workers certainty over the point at which the offer must have been made (and therefore the point at which agency workers may take a case to an ET as their hirer has failed to offer guaranteed hours). It is also relevant as this is the last day before the commencement of the response period and therefore needs to be specified, if no offer is made before that time.

356. The Government considers that the form in which the offer should be made should also be outlined, to ensure that hirers and agency workers are clear on when an offer has been made; as well as the information which must accompany the offer.

357. This power replicates a corresponding power at section 27BB(10) (directly engaged workers) for agency workers.

Justification for taking the power

358. This power will allow the Secretary of State to set out detail about the timeline for guaranteed hours to be offered and to specify which information must be given by the hirer in relation to the offer. The Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include very specific details around the point in time at which a guaranteed hours arrangement should be offered and the form in which the offer is made. The Government envisages that hirers will be required to make the offer of guaranteed hours in writing.

359. In addition, this is a novel right. Flexibility may be required to make changes to how soon the hirer must offer a new contract / terms and conditions, depending on how this new right operates in practice.

360. There is precedent for similar powers to be taken around the form of a notice / application. Section 80F(5)(a) of the ERA (flexible working) allows regulations to be made setting out the form in which a flexible working request must be made.

Justification for the procedure

361. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 2(9) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to define when an offer of guaranteed hours should be treated as made

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

362. This power allows the Secretary of State to define when an offer of guaranteed hours should be treated as made.

363. This power replicates a corresponding power at section 27BB(11) (directly engaged workers) for agency workers.

Justification for taking the power

364. The Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include specific details around the point in time at which a guaranteed hours offer is treated as having been made.

365. As powers are being taken to allow the form in which an application must be made to be defined, it follows that the point at which an offer is treated as made should also be defined in regulations.

366. Section 80F(5)(b) of the ERA (flexible working) allows regulations to be made to define when a flexible working application is to be taken as made.

Justification for the procedure

367. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 4(6) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to define specific circumstances in which hirers would be exempt from offering agency workers guaranteed hours.

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

368. This power allows the Secretary of State to define specific circumstances in which hirers are exempt from offering agency workers guaranteed hours and the circumstances in which a guaranteed hours offer which has been made is to be treated as having been withdrawn.

Justification for taking the power

369. This power replicates a corresponding power at section 27BD(6) (directly engaged workers) for agency workers.

370. This power will allow the Secretary of State to list the circumstances, if any, in which hirers may be exempt from offering agency workers guaranteed hours. If these circumstances apply, any guaranteed hours offer which has already been made will be treated as withdrawn. It will allow changes to be made to those circumstances if required.

371. This power is necessary to allow the Secretary of State to react dynamically to changing hirers' practices and avoidance schemes that may arise, thereby maintaining the original policy intent while allowing reasonable exemptions. Hirers could be exempted from the requirement to offer a guaranteed hours contract in very specific circumstances where the measure would otherwise have very significant adverse impacts even where hirers and agency workers act with good intentions, and there is no other acceptable way to mitigate the risks.

372. The Government also considers that consultation on any potential exemptions will be required, to determine which specific circumstances may justify a potential exemption.

Justification for the procedure

373. The Government considers that the affirmative procedure is appropriate because the definition of the exemptions could materially affect how many agency workers are eligible for guaranteed hours. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours – New Paragraph 4(10) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the form and manner of hirer notices where the duty to make a guaranteed hours offer does not apply or no longer applies and when such notice is to be treated as having been given

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

374. New paragraphs 4(7) and 4(8) require hirers to give a notice to qualifying agency workers where the hirer's duty to make a guaranteed hours offer does not apply, or where an offer already made is treated as having been withdrawn, either by virtue of a relevant termination under 4(2) or by virtue of regulations made under 4(6).

375. The power at new paragraph 4(10) allows the Secretary of State to make regulations which set out the form and manner in which these notices must be given, and when a notice is treated as having been given.

Justification for taking the power

376. This power replicates a corresponding power at section 27BD(10) (directly engaged workers) for agency workers.

377. Taking this power will allow the Secretary of State to set out in detail the form and manner of a notice given under new paras 4(7) and 4(8), which must be given to a qualifying agency worker where the hirer's duty to make a guaranteed hours offer does not apply or no longer applies by virtue of the provisions of new para 4(2) or of regulations made under 4(6). It will also set out the details around when such

notice is to be treated as having been given. The Government does not consider that it is appropriate to set out this level of technical detail in primary legislation.

378. It is standard practice for such technical detail to be set out in regulations. The regulations will need to include specific details around the form and manner of that notice and when it is treated as having been given.

379. This is a discrete power – the substantive requirements on the hirer to provide this notice are outlined on the face of the Bill.

Justification for the procedure

380. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 4(11) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the length of the response period

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

381. After a guaranteed hours offer is made by a hirer to an agency worker, the agency worker must accept or decline the offer during the response period. The response period begins on the day after the day on which the offer is made by the hirer.

382. This power allows the Secretary of State to specify the day on which the response period ends. It therefore allows the Secretary of State to define the length of this response period.

383. The Government considers that the timing and length of the response period should be defined in order that it is clear to both agency workers and hirers when a response should be received (and therefore at what point it is to be taken that an agency worker has not responded in time).

384. This power replicates a corresponding power at section 27BD(12) (directly engaged workers) for agency workers.

Justification for taking the power

385. This power will allow the Secretary of State to set out details about the timeline for an offer of guaranteed hours to be responded to. The Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include very specific details around the point in time at which a guaranteed hours arrangement should be either accepted or declined.

386. In addition, this is a novel right. Flexibility may be required to make changes to how soon an agency worker must accept or decline an offer of guaranteed hours, depending on how the Government finds that this new right operates in practice.

Justification for the procedure

387. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 5(5) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the form and manner of the notice by which an agency worker to accepts or rejects a guaranteed hours contract

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

388. Under this measure, an agency worker may accept the guaranteed hours offer or – if they wish – reject the offer of guaranteed hours and remain on their existing arrangement.

389. This power allows the Secretary of State to set out the details of the required form and manner of the agency worker's notice accepting or rejecting their hirer's offer of a guaranteed hours contract, as well as when it is to be treated as having been given.

390. This power replicates a corresponding power at section 27BE(8) (directly engaged workers) for agency workers.

Justification for power

391. This power will allow the Secretary of State to set out practical details as to the form and manner of an agency worker's notice – i.e. the agency worker's acceptance or rejection of the guaranteed hours offer - and when that notice will be treated as having been given. It will allow the Secretary of State to outline the process which an agency worker must follow to accept or reject the offer of a guaranteed hours contract. The Government considers it necessary to define explicitly how an agency worker should accept or reject an offer, in order that it is clear to both an agency worker and hirer when an offer has been accepted or rejected. The Government anticipates that an agency worker may be required to accept or reject an offer from their hirer in writing.

392. It is standard practice for such technical detail to be set out in regulations. The regulations will need to include specific details around the point in time by which the agency worker must have accepted or rejected the offer of a guaranteed hours arrangement, and in what format they should do so.

393. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, which provides a power for the Secretary of State to define the form of an employee's application for flexible working.

394. The substantive right to accept or reject the offer is included in primary legislation. This power is limited to allowing the Secretary of State to define the form and manner of the notice by which the offer should be accepted or rejected by the agency worker, along with when that notice is treated as having been given.

Justification for the procedure

395. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to guaranteed hours - New Paragraph 6(1) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to specify the information which the agency must provide to an agency worker about their rights

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

396. New paragraph 6 imposes a duty on the agency that has a worker's contract or an arrangement with an agency worker to take reasonable steps to ensure that agency workers who it is reasonable to consider will qualify for a guaranteed hours offer from a hirer are aware of certain information about their rights to a guaranteed hours offer. The duty applies both within the initial information period and on an ongoing basis thereafter where it is reasonable to consider that an agency worker may qualify for a guaranteed hours offer from a hirer.

397. This power in paragraph 6(1) allows the Secretary of State to specify in regulations the information which the agency must provide to an agency worker about their rights.

398. This power replicates a corresponding power at section 27BF(1) (directly engaged workers) for agency workers.

Justification for this power

399. The information provided to agency workers (as specified in regulations) would allow them to make informed decisions about their working hours during the reference period with the knowledge of their potential right to a guaranteed hours offer. By including this power in regulations, the Secretary of State will have the flexibility in regulations to make changes to the information that must be provided to agency workers. In particular, changes may be required if regulations are made in the future under the other powers in Schedule A1 which necessitate changes to the required information.

400. In addition, the Government considers that such technical details are appropriate to include in regulations, rather than in primary legislation. The regulations will need to include specific details around which information the agency must take reasonable steps to ensure agency workers are aware of. The nature of this information will likely be contingent on other regulations which set other details of the right to guaranteed hours. It would therefore not be accurate to outline on the face of the Bill the information which must be provided to agency workers.

Justification for this procedure

401. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: Right to guaranteed hours - New Paragraph 10(4)(a) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the maximum employment tribunal award (number of weeks' pay)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

402. This power allows the Secretary of State to specify the maximum number of weeks' pay which can be awarded to an agency worker by an ET, where an agency worker has made a successful claim against either a hirer or an agency before an ET on the grounds set out in the relevant subparagraphs (namely paragraphs 7(1), (2), (3) and (7) or paragraph 8(5).

403. If an ET finds that the complaint is well-founded, it can award the agency worker compensation to be paid by the hirer or agency (depending on who is the respondent in the case). This compensation would compensate the agency worker for any financial loss suffered as a result of the above circumstances occurring. There will be a maximum amount that an ET can award as set out in regulations.

404. This power replicates a corresponding power at section 27BI(4)(a) (directly engaged workers) for agency workers.

Justification for taking the power

405. Taking this power allows the Secretary of State to set in regulations the maximum number of weeks' pay which is the maximum amount which can be awarded by an ET for a well-founded complaint as mentioned above.

406. The Government considers that it is appropriate to set a maximum amount of compensation to provide more certainty to hirers, agencies and agency workers. Hirers and agencies will be able to quantify their potential liability where an agency worker makes a successful claim to an ET. Agency workers will be able to quantify the award they may receive, if their claim is successful.

407. This will also ensure that the new right remains in line with the awards made in relation to other rights. If the awards for other employment rights are amended, or if different awards are applied for new rights in the future, it may be necessary to amend the award for this right accordingly to ensure that a consistent approach to enforcement is taken.

408. It also follows the precedent set for existing employment rights – for example in existing section 80I of the Employment Rights Act 1996 (Flexible Working).

409. Taking this power will also allow the maximum level of payment to be adapted in light of inflation, changes to the minimum wage, or any other relevant changes in the wider economic context.

Justification for the procedure

410. The Government considers that the negative procedure is appropriate due to the discrete issue covered by these regulations.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency Workers: Right to guaranteed hours - New Paragraph 10(4)(b) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to set the maximum amount of compensation which may be awarded by an ET

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

411. This power allows the Secretary of State to specify the maximum amount which can be awarded to an agency worker by an ET, where an agency worker has made a successful claim against either a hirer or an agency before an ET on the grounds set out in the subparagraph (namely paragraphs 7(4) or (5) or 8(1) or (2).

412. If an ET finds that the complaint is well-founded, it can award the agency worker compensation to be paid by the hirer or agency (depending on who is the respondent in the case). This compensation would compensate the agency worker for any financial loss suffered as a result of the above circumstances occurring. There will be a maximum amount that an ET can award as set out in regulations.

413. This power replicates a corresponding power at section 27BI(4)(b) (directly engaged workers) for agency workers.

Justification for taking the power

414. Taking this power allows the Secretary of State to set in regulations the maximum amount of compensation which may be awarded by an ET where a well-founded case is taken on the grounds detailed above.

415. In the majority of cases an ET may make an award up to a maximum, defined by a specified number of weeks' pay. However, it would not be appropriate to set the maximum level of compensation in this manner where an agency or a hirer limits the hours they provide to an agency worker, or provide hours in a certain way to result in no guaranteed hours offer or a reduced offer. This is because – in these instances – the agency worker may have worked no hours, and therefore their weekly pay cannot be calculated or cannot be meaningfully used to set a maximum level of compensation. As such, where an ET case is taken on these grounds, it is appropriate for the maximum level of compensation which may be awarded to be set at a specified sum.

416. The Government considers that it is appropriate to set a maximum amount of compensation to provide more certainty to hirers, agencies and agency workers. Hirers and agencies will be able to quantify their potential liability where an agency worker makes a successful claim to an ET. Agency workers will be able to quantify the award they may receive, if their claim is successful.

417. This will also ensure that the new right remains in line with the awards made in relation to other rights. If the awards for other employment rights are amended, or if different awards are applied for new rights in the future, it may be necessary to amend the award for this right accordingly to ensure that a consistent approach to enforcement is taken.

418. Taking this power will also allow the maximum level of payment to be adapted in light of inflation, changes to the minimum wage, or any other relevant changes in the wider economic context.

Justification for the procedure

419. The Government considers that the negative procedure is appropriate due to the discrete issue covered by these regulations. The changes will be technical in nature and the level of compensation will likely follow the maximum permitted amount in relation to the other claims and / or the maximum statutory cap applying to week's pay in the ERA. The procedure is also consistent with the procedure for other powers to make technical provisions on compensation amounts awarded by an ET, within these provisions.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Agency workers: right to guaranteed hours – New Paragraph 11(1) in Part 1 of Schedule A1 to the Employment Rights Act 1996: Power to change the effect of Part 1 of Schedule A1 (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

420. As per part 1 of Schedule A1, the duty to offer guaranteed hours is a duty on the hirer.

421. However, under the power at paragraph 11(1) regulations may be made that – for agency workers of a specified description – place the responsibility for offering guaranteed hours instead on an agency or another person involved in the supply or payment of that agency worker. Paragraph 11(2) clarifies that regulations under the power at paragraph 11(1) may make consequential provision, including provision amending acts of Parliament, the Scottish Parliament and Senedd Cymru.

Justification for taking the power

422. Given the unique and complex nature of agency worker relationships, which vary in different parts of the economy, this power is required to allow the Government flexibility to determine specific cases in which the responsibility to offer guaranteed hours should not sit with the hirer.

423. The right to guaranteed hours is a novel policy, including its application to agency workers. While the Government is clear that the responsibility to offer guaranteed hours should sit with the hirer by default, there may be specific circumstances in which it would not be appropriate for a hirer to make a guaranteed hours offer to a particular type of agency worker. There may also be circumstances in which an agency - or another person involved in the supply or payment of a particular type of agency worker – may be better suited to providing a guaranteed hours offer.

424. Taking this power was informed by the range of responses to the Government consultation on applying zero hours contracts measures to agency workers. Consultation responses made clear that the relationships between workers, agencies, end hirers, and other entities in supply chains can be complex, and

greatly vary across sectors meaning that additional flexibility is needed in legislation to cater for different circumstances.

425. Taking this power therefore gives the Government the ability to make specific provision in these circumstances, mitigating any adverse impacts which could arise from the hirer being required to offer guaranteed hours in these cases. The power is a Henry VIII power, and this is necessary to permit the regulation-making power conferred by paragraph 11(1) to be exercised by amending the Act (including modifying Part 1 of Schedule A1).

Justification for the procedure

426. The Government considers that the affirmative procedure is appropriate, because the way in which this power is used could have a material effect on the respective responsibilities of hirers, agencies and others, in specified cases and, as Henry VIII power, it may be used to amend primary legislation. Using the affirmative procedure ensures that both Houses of Parliament will have the opportunity to debate this matter.

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 12(3) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to define an 'excluded shift'

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

427. The right to reasonable notice of shifts and changes to these is intended to provide those workers without, or with limited, certainty of their working hours with more predictability of these, so that they are better able to plan their work, home lives, and finances.

428. Agency workers may experience unpredictability and insecurity of hours and income, similar to workers on zero hours contracts and arrangements, which is why they are included in scope of the new right to guaranteed hours and the right to reasonable notice of shifts and changes to these. However, it may be appropriate to exclude certain agency workers from scope, for example where they do not experience unpredictability and insecurity of hours and income.

429. This power has a similar effect to the power at section 27BJ (directly engaged workers), which defines those workers in scope of the right to reasonable notice of shifts as those workers whose contract is of a specified description. This power allows the Secretary of State to determine what shifts are "excluded shifts" and therefore not in scope of the right.

Justification for taking the power

430. As with the similar power for directly engaged workers, it may be considered appropriate to not include shifts which attract a higher wage from the right to reasonable notice of shifts. This is because workers undertaking such shifts are less likely to suffer from a lack of predictability in the same way as lower earners. Paragraph 12(4) provides that description of shifts may be defined by reference to a maximum payment amount and/or working hours as in new section 27BJ(5).

431. The Government expects that the power will be used for example to exclude shifts which correspond to the day and time of a shift provided for by a worker's contract (i.e. the hours of which are guaranteed to the agency worker) from the right to payment for cancellation, movement or curtailment of a shift.

432. It may also be appropriate to exclude shifts which are undertaken by agency workers in other specific circumstances.

433. Defining excluded shifts in regulations will give the Government the flexibility to amend the definition of excluded shifts in the future, for example to respond to avoidance measures or unintended consequences.

Justification for the procedure

434. Since the power can be used to set the scope of the right to reasonable notice of shifts, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraphs 13(2) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify the timeframe within which notice is presumed unreasonable

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

435. Agency workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

436. New paragraph 13(2) provides that notice of a shift given less than a specified period in advance of a shift will be presumed to be unreasonable. The power at new paragraph 13(2) allows the Secretary of State to determine in regulations what that period is.

437. The effect of this will be to require an ET to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

438. This power replicates a corresponding power at section 27BJ(4) and section 27BK(3) (directly engaged workers) for agency workers.

Justification for taking the power

439. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. What constitutes reasonable notice for agency workers may not be the same as reasonable notice for directly engaged workers. The Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

440. Setting a presumption ensures that the burden is on the agency or hirer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for hirers, agencies and agency workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

441. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

442. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable, but it did not cover agency workers specifically.

443. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that neither the setting of a presumption nor the circumstances of agency workers were specifically covered in the previous consultation.

Justification for the procedure

444. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 14(3)(a) in Part 2 of Schedule A1 to the Employment Rights Act 1996

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

445. As explained above, agency workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

446. New paragraph 14(3)(a) provides that notice given less than a specified period in advance of a cancellation of a shift will also be presumed to be unreasonable. The power allows the Secretary of State to determine what that period that is presumed to be unreasonable is for notice of cancellation. The power replicates new section 27BK(3)(a) for directly engaged workers.

447. The effect of this will be to require ETs to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

448. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

449. Setting a presumption ensures that the burden is on the agency or hirer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for agencies, hirers, and agency workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

450. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

451. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable but it did not cover agency workers specifically.

452. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that neither the setting of a presumption nor the circumstances of agency workers were specifically covered in the previous consultation.

Justification for the procedure

453. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 14(3)(b) in Part 2 of Schedule A1 to the Employment Rights Act 1996 Power to specify the timeframe within which notice is presumed unreasonable for changes to when a shift starts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

454. As explained above, agency workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

455. New paragraph 14(3)(b) provides that notice given less than a specified period in advance of a change to when a shift starts will also be presumed to be unreasonable. The power, which replicates the power at new section 27BK(3)(b), allows the Secretary of State to determine what that period that is presumed to be unreasonable is for notice of changes to when a shift starts.

456. The effect of this will be to require ETs to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

457. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

458. Setting a presumption ensures that the burden is on the agency and hirer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for agencies, hirers and agency workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

459. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

460. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable but it did not cover agency workers specifically.

461. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that neither the setting of a presumption nor the circumstances of agency workers were specifically covered in the previous consultation.

Justification for the procedure

462. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - New Paragraph 14(3)(c) in Part 2 of Schedule A1 to the Employment Rights Act 1996 Power to specify the timeframe within which notice is presumed unreasonable for other changes to shifts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

463. As explained above, workers in scope of the new entitlement will be provided with a right to reasonable notice of shifts, and changes to shifts.

464. The power at new paragraph 14(3)(c), which replicates the power at section 27BK(3)(c) allows the Secretary of State to determine what that period that is presumed to be unreasonable is for notice of changes to shifts other than changes to when the shift starts. However, notice given on or after the start of a shift is presumed to be unreasonable and therefore the power does not apply in respect of such notices.

465. The effect of this will be to require ETs to find that notice is unreasonable where it is given within less than the specified period, unless it is proven otherwise. What is reasonable will depend on the circumstances and it would ultimately be for an ET to determine whether notice is reasonable in each case.

Justification for taking the power

466. The Government appreciates that having a set period for what constitutes "reasonable" notice is unlikely to work for all scenarios. Therefore, the Government considers it appropriate to set a presumption for what constitutes reasonable notice, but to leave the term undefined in legislation.

467. Setting a presumption ensures that the burden is on the agency and hirer to show that notice is reasonable in situations where notice is likely to be unreasonable. It also helps to set expectations for agencies, hirers and agency workers as to what reasonable notice is likely to be. However, ETs will still be able to make their own judgement on what is reasonable based on the circumstances of the case.

468. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future, if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

469. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views, in particular, on what period of notice was likely to be reasonable but it did not cover agency workers specifically.

470. The Government would like to consult further on this issue given the wide range of views expressed, the time that has passed since the consultation closed, the novelty of the policy and that neither the setting of a presumption nor the circumstances of agency workers were specifically covered in the previous consultation.

Justification for the procedure

471. Since the power can be used to prescribe a legal presumption, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice - New Paragraph 15(4) of Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify a person not liable for breach of the duties to give reasonable notice

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

472. This power allows the Secretary of State to provide, in relation to an agency worker and a shift, that the work-finding agency is solely responsible for a breach of paragraph 13 or 14 (and accordingly is solely liable for the breach) where the hirer is a person of a specified description.

Justification for taking the power

473. It is right that in a majority of cases, both the agency and the hirer should be responsible for providing reasonable notice of shift, and cancellation of or change of a shift. But the Government that this delegated power is necessary to give effect to the policy and to have the flexibility to respond appropriately to circumstances that relate to its implementation.

474. It may be for instance that some hirers who are individuals, not engaged in economic activity but rather hiring agency workers for their own benefit, should not be liable. For instance, this could be the case with vulnerable individuals who receive care or procure care from agencies, where instead the agency might be in a better position to hold liability for any breaches.

475. Given the novelty of the policy, the Government sees the need for flexibility to amend its application in future, as it becomes clear in what circumstances it may be necessary to protect hirers from liability in this way, or where it is otherwise appropriate for agencies to hold liability for breaches.

Justification for the procedure

476. Since the power can be used to modify, in appropriate circumstances, the category of persons who are responsible for giving reasonable notice, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice - New Paragraph 16(4)(a) and (b) of Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify formalities for notices of shifts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

477. Under new paragraphs 13 and 14, the hirer or agency is required to give an agency worker reasonable notice of shifts, and reasonable notice of cancellation or changes to shifts. Paragraph 15 also provides that a hirer is not responsible for

a breach of new paragraphs 13 and 14 where the hirer gave appropriate notice of the cancellation or changes to shifts to the agency (i.e. that notice enabled the agency to give reasonable notice themselves).

478. The power at new paragraph 16(4)(a) and (b) enables the Secretary of State to make provision as to what form these notices should take, the way they should be provided and when notice is deemed to be received.

479. This power replicates a corresponding power at section 27BL(6) (directly engaged workers) for agency workers.

Justification for taking the power

480. The Government considers it appropriate to specify the formalities for notices, in particular, so that it is clear to the agency worker, as well as hirer and agency whether that notice has been given and when it is treated as having been given.

481. The Government considers it appropriate to leave this kind of technical detail to secondary legislation. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

482. Taking a power will also allow the policy to be adapted in light of changing employment practices, technological change, and any new avoidance schemes.

Justification for the procedure

483. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions, including the power at section 80F(5) ERA (Flexible Working).

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice – New Paragraph 18(2) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify factors to be considered to determine reasonableness

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

484. Agency workers in scope of the new entitlement will be provided with a right to reasonable notice of (changes to) their shifts.

485. Where an agency worker considers that they have been provided with notice of (change to) a shift with unreasonable notice, they can present a complaint to an ET under new paragraph 18.

486. What constitutes “reasonable” notice will depend on the circumstances and so it will be for an ET to determine whether notice is reasonable in each case.

487. The power at new paragraph 18(2) allows the Secretary of State to specify factors that ETs must, amongst other factors, take into account when considering what

period of notice is “reasonable”. This power replicates a corresponding power at section 27BN(2).

Justification for taking the power

488. The Government appreciates that having a prescribed period for what constitutes “reasonable” notice is unlikely to work for all scenarios. What constitutes reasonable notice for agency workers may not be the same as reasonable notice for directly engaged workers. The Government therefore considers it appropriate to leave the term “reasonable” undefined.

489. In the absence of a definition, the Government considers it appropriate to specify factors that ETs must take into account when determining reasonableness in order to provide ETs, as well as hirers, agencies and agency workers, with an indication of what is likely to be reasonable notice. ETs will however still be able to make their own judgement on what is reasonable based on the circumstances of the case.

490. The factors may need to be adapted over time in light of changing employment practices and experience with the operation of the new measures once implemented. Accordingly, the Government considers it appropriate to specify the factors in regulations.

491. The Government would like to consult to obtain stakeholders views on what factors are appropriate for ETs to take into account, particularly given the novelty of the policy.

Justification for the procedure

492. Since the power only provides for factors to be taken into account by ETs and will not prescribe when ETs should find notice to be unreasonable, the Government considers that the negative procedure would give Parliament the right level of scrutiny.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Shifts: rights to reasonable notice – New Paragraph 19(2) in Part 2 of Schedule A1 to the Employment Rights Act 1996: Power to specify the maximum amount of compensation for unreasonable notice

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

493. Where an agency worker considers that they have been provided with notice of a (change to) a shift that is unreasonable, they can present a complaint to an ET under paragraph 18.

494. If an ET finds the complaint to be well-founded, an ET can award the agency worker compensation to be paid by the agency or hirer as it considers appropriate to compensate the agency worker for financial loss suffered as a result of the unreasonable notice.

495. There will however be a maximum amount that an ET can award. The power at new paragraph 19(2) allows the Secretary of State to specify the maximum

amount of compensation that ETs can award for loss where notice is unreasonable.

496. This power replicates a corresponding power at section 27BO(2) (directly engaged workers) for agency workers.

Justification for taking the power

497. The Government considers it appropriate to set a maximum amount of compensation, in particular to provide more certainty so that hirers and agencies have a greater ability to quantify their potential liability and agency workers can likewise quantify their potential award.

498. The Government considers that the appropriate maximum amount of compensation is likely to depend on what payment amount is set for short notice cancellation, curtailment or movement using the power at paragraph 21, discussed below.

499. Further, it is common practice for such technical detail on maximum payment amounts to be included in regulations, in line with the power at, for example, section 80I ERA.

500. Taking a power will also allow the level of the maximum payment to be adapted in light of inflation, wage inflation, changes in the minimum wage, or any other relevant changes.

Justification for the procedure

501. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions on compensation amounts awarded by an ET, including the power at section 80I ERA.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts – New Paragraph 21(1) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify the payment amount

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

502. Under new paragraph 21, an agency will be required to make a payment to an agency worker (who is in scope) each time there is a cancellation, movement or curtailment at short notice .

503. New paragraph 21(1) provides that the amount to be paid will be specified in regulations made by the Secretary of State.

504. The new paragraph 22(2) clarifies that regulations under new paragraph 21(1) to specify the payment amount may specify different amounts depending on how short the notice given was.

505. New paragraph 22(1) imposes a restriction on the power under new paragraph 21 so that it may not be used to set a payment amount that is higher than the value of the (proportion of the) shift that would have been worked had it not been cancelled, curtailed or moved.

506. This power replicates a corresponding power at section 27BP(1) (directly engaged workers) for agency workers.

Justification for taking the power

507. Given the novelty of the policy and the scope of this to impact hirer and agency behaviour, the Government wishes to retain flexibility to amend its application in future, for example to account for changing employment practices, new avoidance measures, or changes in inflation or the minimum wage.

508. The Government considers it appropriate to specify different payment amounts depending on how short the notice given was so as to ensure that the payment amount is proportionate.

509. The Government considers that the power is also appropriately restricted by providing that the power may not be used to set a higher payment amount than the value of (the proportion of) the shift that would have been worked but for the cancellation, curtailment or movement.

510. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate payment would be, in response to which a number of differing views were expressed.

511. The Government would like to consult further on this issue, given the wide range of views, the time that has passed since the consultation closed, the novelty of the policy and that agency workers were not specifically covered in the previous consultation.

Justification for the procedure

512. Since the power can be used to set the amount for payment to be made by the agency, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts – New Paragraph 21(2) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify a timeframe for payment

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

513. Under new paragraph 21, the agency will be required to pay a specified amount to agency workers (who are in scope) where the agency or hirer cancels, curtails or moves a shift at short notice.

514. New paragraph 21(2) provides a power permitting the Secretary of State to specify the time period within which the payment should be made.

515. This power replicates a corresponding power at section 27BP(5) (directly engaged workers) for agency workers.

Justification for taking the power

516. Most agency workers will have an agreed or established timeframe within which they usually receive payment. In particular, section 1 ERA requires that employers give workers a written statement of particulars of employment which must specify the intervals at which remuneration is paid.

517. However, some agencies workers in scope of the policy may not yet have begun employment for the agency and received a written statement of particulars.

518. It is therefore considered appropriate to set a timeframe for payment so that agency workers and agencies in all scenarios understand when payment is to be made and to counter potential avoidance methods. The timeframe specified is likely to give precedence to any previous agreements and practice between agencies and agency workers but provide a default timeframe in the absence of such agreements and practice.

519. It is common practice for such technical detail to be included in regulations, for example, timeframes for payments are set out in the Statutory Maternity Pay (General) Regulations 1986.

520. Taking a power also allows for the timing to be changed in line with any potential changing employment practices in this area, or any new avoidance schemes.

Justification for the procedure

521. The Government considers that the negative procedure would give Parliament the right level of scrutiny, given that the changes will be technical in nature.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(a) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for cancellations

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

522. Under new paragraph 21, the work-finding agency will be required to pay agency workers (who are in scope) where the agency or hirer cancels, curtails or moves a shift at short notice.

523. The new paragraph 21(3)(a) provides that the timeframe that will amount to "short notice" in cases where a shift is cancelled, is to be specified by the Secretary of State in regulations. However, new paragraph 22(3) provides that the regulations cannot specify a timeframe of more than seven days.

524. This power replicates a corresponding power at section 27BP(6)(a) (directly engaged workers) for agency workers.

Justification for taking the power

525. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

526. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

527. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

528. Since the power can be used to determine in what circumstances agencies are required to make a payment to agency workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(b) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for movement alone or with curtailments

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Justification for taking the power

529. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

530. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

531. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

532. Since the power can be used to determine in what circumstances agencies are required to make a payment to agency workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(c) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for curtailment changing the start time

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

533. Under new paragraph 21, the agency will be required to pay agency workers (who are in scope) where the agency or hirer cancels, curtails or moves a shift at short notice.

534. The new paragraph 21(3)(c) provides that the timeframe that will amount to "short notice" in cases where a shift is curtailed so that the start time of the shift changes is to be specified by the Secretary of State in regulations. However, new section 22(3) provides that the regulations cannot specify a timeframe of more than seven days.

Justification for taking the power

535. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employers' practices are identified, particularly to respond to potential avoidance measures.

536. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

537. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

538. Since the power can be used to determine in what circumstances employers are required to make a payment to workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(3)(d) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify what timeframe constitutes "short notice" for curtailment not changing the start time

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

539. Under new paragraph 21, the agency will be required to pay agency workers (who are in scope) where the agency or hirer cancels, curtails or moves a shift at short notice.

540. The new paragraph 21(3)(d) provides that the timeframe that will amount to "short notice" in cases where a shift is curtailed with no change to when the shift is to start is to be specified by the Secretary of State in regulations, except in cases where the change is on or after the start of the shift (in which case the notice is short notice and payment should therefore be due). However, new paragraph 22(3) provides that the regulations cannot specify a timeframe of more than seven days.

541. This power replicates a corresponding power at section 27BP(6)(d) (directly engaged workers) for agency workers.

Justification for taking the power

542. Given the novelty of the policy, the Government wishes to retain flexibility to amend its application in future if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

543. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on what an appropriate timeframe for short notice would be, in response to which a number of differing views were expressed.

544. The Government would like to consult further on this issue alongside consulting on what payment amount is appropriate, given the wish to ensure that the payment amount is proportionate to the notice given, the wide range of views that were previously expressed, the time that has passed since the consultation closed and the novelty of the policy.

Justification for the procedure

545. Since the power can be used to determine in what circumstances agencies are required to make a payment to agency workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(4) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify when notices are deemed to be received

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

546. New paragraph 21 requires an agency to make a payment to an agency worker each time that the agency or the hirer cancels, moves, or cuts short a shift at short notice.

547. The power at new paragraph 21(4) enables the Secretary of State to make provision as to when notice of the cancellation, movement or curtailment of a shift is to be treated as having been given to an agency worker.

548. This power replicates a corresponding power at section 27BP(7) (directly engaged workers) for agency workers.

Justification for taking the power

549. The Government considers it appropriate to specify when notices are deemed to be received so that it is clear to all parties when notice is given.

550. The Government considers it appropriate to include this kind of technical detail in secondary legislation. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

551. Taking a power will also allow the policy to be adapted in light of changing employment practices, technological change, and any new avoidance schemes.

Justification for the procedure

552. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions, including the power at section 80F(5) ERA.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 21(5) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to exclude movement of shifts within a minimum timeframe

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

553. Under new paragraph 21, an agency will be required to make a payment to an agency worker (who is in scope) where the hirer or the agency cancels, curtails or moves a shift at short notice.

554. The new paragraph 21(5) provides that reference to movement of shifts does not include any changes of less than a specified period of time. A power is accordingly conferred on the Secretary of State to specify a minimum amount of time beyond which payment must be made for delaying or bringing forward a shift.

555. This power replicates a corresponding power at section 27BP(9) (directly engaged workers) for agency workers.

Justification for taking the power

556. Shifts brought forward or delayed can be as disruptive to workers as curtailing or cancelling shifts.

557. However, the Government considers that it is likely to be disproportionate to require agencies to have to pay agency workers for very short delays or earlier commencement of shifts, given that the payment amount could be minimal compared to the administration needed to record these delays and calculate and make payment.

558. Given the novelty of the policy and potential to impact the recruitment sector, the Government wishes to retain flexibility to amend the application of the policy in future if previously unidentified consequences or changes in employment practices are identified, particularly to respond to potential avoidance measures.

559. The Government would like to consult on what timeframe is appropriate, to obtain views on what would be proportionate.

Justification for the procedure

560. Since the power can be used to determine in what circumstances agencies are not required to make a payment to agency workers, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers – Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 23(1)(c) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to make exceptions

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

561. Under new paragraph 21, an agency will be required to make a payment to an agency worker (who is in scope of the right to payment) where the agency or the hirer cancels, curtails or moves a shift at short notice.

562. New paragraph 23(1(c) provides a power to make exceptions to the requirement to make such payments.

563. This power replicates a corresponding power at section 27BR(1)(c) (directly engaged workers) for agency workers.

Justification for taking the power

564. The Government considers that there are likely to be some limited circumstances in which an agency should not have to pay an agency worker for short notice cancellation, curtailment or movement.

565. Further, this power provides the Secretary of State with flexibility to react dynamically to changing employment practices and any new avoidance schemes, thereby maintaining the original policy intent while allowing reasonable exceptions.

566. A consultation was undertaken in 2019 to seek views on the issue of paying zero hours workers for cancelled or curtailed shifts. That consultation sought views on whether certain workers or sectors should be excepted from the requirement to pay.

567. The Government would however like to consult further on this issue, in particular to determine whether there are specific circumstances that are appropriate for exception from the policy, particularly given the novelty of the policy.

Justification for the procedure

568. Since the power can be used to determine circumstances that are out of scope of the right to payment for short notice cancellation, curtailment or movement, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate

Clause 4: Agency Workers – Schedule 1: Agency Workers: New Paragraph 23(2) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to define an 'excluded shift'

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

569. The right to payment for short notice cancellation, curtailment or movement of shifts is intended to encourage agencies and hirers to improve shift planning so that fewer shifts have to be cancelled, and to provide some compensation to agency workers for income they have lost and expenses they may have incurred. This should in turn give more predictability to agency workers of their working hours and income.

570. However, it may be appropriate to exclude certain agency workers from scope, for example where they do not experience unpredictability and insecurity of hours and income.

571. This power replicates a corresponding power at section 27BP(2)(c) (directly engaged workers) for agency workers, which defines those workers in scope of the right to payment for shifts cancelled, moved or curtailed at short notice. This power allows the Secretary of State to determine what shifts are "excluded shifts" and therefore not in scope of the right.

Justification for taking the power

572. As with the similar power for directly engaged workers, it may be considered appropriate to not to include shifts which attract a higher wage from the right to reasonable notice of shifts. This is because workers undertaking such shifts are less likely to suffer from a lack of predictability in the same way as lower earners. Paragraph 23(3) provides that description of shifts may be defined by reference to a maximum payment amount and/or working hours as in new section 27BQ(3).

573. The Government expects that the power will be used for example to exclude shifts which correspond to the day and time of a shift provided for by a worker's contract (i.e. the hours of which are guaranteed to the agency worker) from the right to payment for cancellation, movement or curtailment of a shift.

574. It may also be appropriate to exclude shifts which are undertaken by agency workers in other specific circumstances.

575. Defining excluded shifts in regulations will give the Government the flexibility to amend the definition of excluded shifts in the future, for example to respond to avoidance measures or unintended consequences.

Justification for the procedure

576. Since the power can be used to set the scope of the right to payment for short notice cancellation or curtailment, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 23(7) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify formalities for notices of exceptions

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

577. As explained above, new paragraph 23(1) (c) provides a power to make exceptions to the duty on agencies to make a payment to agency workers (who are in scope) for the short notice cancellation or curtailment of shifts.

578. Where an agency considers that an exception applies, the agency will be required to explain the reason for the short notice cancellation, curtailment or movement and notify agency workers of the exception relied upon. This should ensure that agency workers are made aware that they are not due to receive the payment and also provide them with the information they need to decide whether to challenge the agency on their assertion that an exception applies.

579. The power at new paragraph 23(7) enables the Secretary of State to make provision as to what form the notification of the exception and other information should take, the way it should be provided, the time when it must be provided and when it is to be deemed to have been provided.

580. This power replicates a corresponding power at section 27BR(5) (directly engaged workers) for agency workers.

Justification for taking the power

581. The Government considers it appropriate to specify the formalities for notices, in particular, so that it is clear to the agency worker and agency whether notice has been given and to prevent some potential avoidance methods.

582. The Government considers it appropriate to include this kind of technical detail in secondary legislation. This aligns with the approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

583. Taking a power will also allow the policy to be adapted in light of changing employment practices, technological change, and any new avoidance schemes.

Justification for the procedure

584. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions, including the power at section 80F(5) ERA.

Clause 4: Agency Workers - Schedule 1: Agency Workers – Right to payment for cancelled, moved and curtailed shifts – New Paragraph 25(9) of Part 3 of Schedule A1 of the Employment Rights Act 1996: Power to specify hirers not liable for breach of requirements regarding notices

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

585. Paragraph 25(7) provides for a hirer to be added as a party to ET proceedings in situations where an agency worker presents a complaint to an ET that the agency has given them a notice that a short notice cancellation payment is not required, in purported compliance with paragraph 23(4), and the notice refers to the wrong provision of the regulations or contains an explanation that is inadequate or untrue, and further the agency claims that the hirer provided it with information for the purposes of the notice that was wrong, inadequate, or untrue. This power allows the Secretary of State to provide that hirers of a specified description are not to be added as a party to ET proceedings, as paragraph 25(7) otherwise allows.

Justification for taking the power

586. It is right that in the majority of cases where hirers have provided information for the purposes of a notice in purported compliance with paragraph 23(4) that was wrong, inadequate, or untrue, they should be added to proceedings with the possibility of the hirer being ordered to pay compensation in full or in part instead of the agency. But the Government considers that this delegated power is necessary to give effect to the policy while having flexibility to respond appropriately to circumstances that relate to its implementation.

587. It may be for instance that some hirers, such as individuals not engaged in economic activity, but rather hiring agency workers for their own benefit, should not be liable. For instance, this could be the case with vulnerable individuals who receive care or procure care from agencies, where instead the agency might be in a better position to hold liability for any breaches.

588. Given the novelty of the policy, the Government requires flexibility to amend its application in future, as it becomes clear in what circumstances it may be necessary to exempt hirers from liability in this way, or where it is otherwise appropriate for agencies to be liable for breaches.

Justification for the procedure

589. Since the power can be used to modify, in appropriate circumstances, the category of persons who are liable for breaches of providing adequate information for the purposes of paragraph 23(4), the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 4: Agency Workers - Schedule 1: Agency Workers - Right to payment for cancelled, moved and curtailed shifts - New Paragraph 26(2)(b) in Part 3 of Schedule A1 to the Employment Rights Act 1996: Power to specify a maximum amount of compensation for untrue, inadequate or missing notices of exceptions

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

590. As explained above, new paragraph 23(1)(c) provides a power to make exceptions to the duty on agencies to make a payment to agency workers (who are in scope) for short notice cancellation, curtailment or movement of shifts.

591. Where an agency considers that an exception applies, agencies will be required pursuant to paragraph 23(4) to notify agency workers of the exception relied upon and explain the reason for the short notice cancellation or curtailment. This should ensure that agency workers are made aware that they are not due to receive the payment and also provide them with information they need to decide whether to challenge the agency on their assertion that an exception applies.

592. Where an agency worker considers that their agency has unreasonably failed to provide them with such a notice or where they consider that the notice is inadequate or untrue, they can present a complaint to an ET pursuant to paragraph 25.

593. If an ET finds the complaint to be well-founded, an ET can order the agency or the end-hirer to make a payment to the agency worker.

594. New paragraph 26(2)(b) provides that this payment will be an amount at the discretion of an ET up to a maximum amount specified in regulations by the Secretary of State.

595. This power replicates a corresponding power at section 27BU(2) (directly engaged workers) for agency workers.

Justification for taking the power

596. The Government considers that the draft affirmative procedure would give Parliament the right level of scrutiny as Parliament may have an interest in what compensation can be awarded and therefore this will provide Parliament with sufficient opportunity to scrutinise and debate the policy

597. Further, it is common practice for technical detail on levels of payments to be included in regulations, similarly to the power at, for example, section 80I ERA.

598. Taking a power will also allow the level of the payment to be adapted in light of inflation, wage inflation, changes in the minimum wage, or any other relevant changes.

Justification for the procedure

599. The Government considers that the negative procedure would give Parliament the right level of scrutiny. The changes will be technical in nature and the procedure is consistent with the procedure for other powers to make technical provisions on awards by an ET, including the power at section 80I ERA.

Clause 4: Agency Workers - Schedule 1: Agency Workers – Right to payment for cancelled, moved and curtailed shifts – New Paragraph 27(2) of Part 3 of Schedule A1 of the Employment Rights Act 1996: Power to specify hirers from whom short notice payments cannot be recovered

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Draft affirmative

Context and purpose

600. This power allows the Secretary of State to provide that agencies will not be able to recover the payment (in full or in part) for shifts cancelled, moved, or curtailed at short notice from hirers of a specified description, as they otherwise could under the recovery provision in new paragraph 27.

Justification for taking the power

601. It is right that in the majority of cases where an agency has a made a cancellation payment to an agency worker in relation to a shift that the agency worker was to be, or was, supplied to work by virtue of a pre-existing arrangement involving the work-finding agency and the hirer, the work-finding agency should be entitled to recover from the hirer the proportion of the payment (up to the full amount of it) that reflects the hirer's responsibility for the shift having been cancelled.

602. But the Government considers that this delegated power is necessary to give effect to the policy while having the flexibility to respond appropriately to circumstances that relate to its implementation.

603. It may be for instance that some types of hirers, for example individuals, not engaged in economic activity but rather hiring agency workers for their own

benefit, should not be liable. For instance, this could be the case with vulnerable individuals who receive care or procure care from agencies, where instead the agency might be in a better position to hold liability for any breaches.

604. Given the novelty of the policy, the Government requires flexibility to amend its application in future, as it becomes clear in what circumstances it may be necessary to exempt hirers from liability in this way, or where it is otherwise considered appropriate for agencies be liable for breaches.

Justification for the procedure

605. Since the power can be used to modify, in appropriate circumstances, the category of persons whom agencies can recover cancellation costs from, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 5: Allowing for opt-out through collective bargaining – New section 27BZ(1) Employment Rights Act 1996: Power to make further provision in relation to opting-out through collective agreements

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

606. New sections 27BW and 27BX ERA allows for the rights and duties in Chapters 2, 3, 4 and 4A (including Schedule A1) of Part 2A ERA to be opted out of by way of collective agreement where relevant terms of the collective agreement are incorporated into a worker's contract and other conditions are met.

607. Further provision is made concerning this at new section 27BY ERA, including to allow guaranteed hours offers under new section 27BA ERA to be withdrawn where the terms of a collective agreement are incorporated into a worker's contract before a worker has responded to the offer and concerning the effect of such terms ceasing to be incorporated on the reference periods in 27BA ERA.

608. The power at new section 27BZ(1) ERA allows for further provision to be made for the purposes of new sections 27BW and 27BX ERA.

609. In particular, the power allows for provision to be made about the treatment of rights or duties where terms are or cease to be incorporated and to specify the form and manner in which notices of withdrawal of an offer should be made and when these are deemed to be given.

Justification for taking the power

610. The Government considers that further provision may be needed to ensure that the new sections 27BW and 27BX ERA apply appropriately.

611. Making provision around the effect where terms from a collective agreement become or cease to be incorporated essentially amounts to making transitional provision. Such technical detail is appropriate for secondary legislation, as is common practice.

612. The Government also considers it appropriate to specify the formalities for notices, in particular, so that it is clear whether withdrawal of an offer has been effective.

613. The Government considers it appropriate to leave this kind of technical detail to secondary legislation. This aligns with approaches in similar legislation, for example, the power at section 80F(5) ERA, concerning flexible working applications.

614. Further, it is relatively rare to allow for employment rights to be opted out of so the power will enable the policy to be adapted in light of unforeseen changing employers' practices and any new avoidance schemes, should this be necessary to protect workers.

Justification for the procedure

615. Since the power can be used to make further provision, which could specify at what point the rights in Chapters 2, 3, 4 and 4A (including Schedule A1) of Part 2A ERA apply, the Government considers that regulations made using the power would be of particular interest to Parliament. The Government therefore proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 9(5): Right to request flexible working - Section 80G(1E) Employment Rights Act 1996: Right to request flexible working – Power to determine steps for an employer to comply

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose.

616. Section 80F of the ERA provides a right for qualifying employees to apply to their employer for a change in their terms and conditions of employment in relation to their working hours, the times when they are required to work and the place of work (as between home and place of business) and any such other aspect of his terms and conditions as the Secretary of State may specify in regulations. Qualifying employees are those who meet two conditions (i) they must not be agency workers (unless they are employed agency workers returning from unpaid parental leave), and they must meet any conditions specified in regulations as to the duration of their employment.

617. Section 80G ERA sets out the obligations on an employer in response to a request made under section 80F. The application must be dealt with in a reasonable manner, shall not be refused unless the employee has been consulted about the application (section 80G(1)(aza)), and the employer must notify the employee of the decision made within a decision period. The application may only be refused where one of the grounds set out in section 80G(1)(b) apply.

618. This clause inserts a new subsection (1E) into section 80G which allows the Secretary of State to specify the steps which an employer must take in order to comply with the requirement to consult before rejecting an application for flexible working.

619. Regulations made under this power will not fundamentally alter the statutory right to request framework. The intention is to ensure that the consultation required by section 80G subsection (1)(aza) of the ERA is an effective one, which explores any feasible alternatives, before an employer decides that it is not possible to reasonably accommodate a flexible working request. This will help make flexible working the default as it will encourage more constructive conversations between employers and employees about potential alternative flexible working arrangements where the approach requested is not feasible.

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

620. Setting out the process in regulations will allow more flexibility if, in future, there are technology or other changes which necessitate its amendment.

621. Taking powers to codify this sort of process in regulations is consistent with the existing employment rights framework. Employment law typically leaves the codification of this sort of process to secondary legislation, for instance, the process for managing the postponement of Carer's Leave, which is provided for in regulations made under section 80J and the Government believe the same approach is justified here.

622. A full consultation with employers and other groups will help to ensure that any regulations introduced are well founded, proportionate and that the consultation process between employers and employees becomes a genuine one and not one which encourages a "tick-box" approach.

623. The intention is for the regulations to strike the right balance between an employer and employee interests. They will need to support employees and employers to reach agreement on what flexible working arrangements might be possible so that requests are only refused where it is reasonable on business grounds. It is therefore important to take account of a range of views and to develop the detail of the approach following full consultation with business, trade unions and third sector stakeholders.

<u>Justification for the procedure</u>

624. The Government considers that this is appropriate due to the discrete issue covered by these regulations.

<u>Clause 11: Statutory sick pay in Great Britain: lower earnings limit etc - Section 157 Social Security Contributions and Benefits Act 1992: Power to amend the percentage rate</u>

Power conferred on: Secretary of State
Power exercised by: Order
Parliamentary Procedure: Existing Draft affirmative

<u>Context and Purpose</u>

625. Under the existing legislation Statutory Sick Pay (SSP) is payable at a flat weekly rate (currently £118.75 per week from April 2025) to employees who meet the eligibility criteria, critically that they earn at or above the Lower Earnings Limit (LEL, £125 per week from April 2025). There is an existing power for the flat weekly rate to be amended by secondary legislation using the affirmative procedure. This power is used to facilitate the annual uprating exercise.

626. The changes to primary legislation as part of the Employment Rights Bill will alter the rate of SSP, such that it is set as the lower of (a) the flat weekly rate or (b) 80% of the employee's normal weekly earnings ('the percentage rate'). This change is to ensure that, following the removal of the LEL as an entitlement condition, employees who receive SSP are always better off working than on sick leave.

627. Section 157(2) of the Social Security Contributions and Benefits Act 1992 allows the Secretary of State, by order, to substitute a different provision as to the weekly rate(s) of SSP. This power is subject to the affirmative procedure. The Employment Rights Bill will not explicitly extend or amend this power. However, this existing Henry VIII power will now apply to both the flat rate and the percentage rate.

Justification for taking the power

628. No new power is being taken but the application of the existing power to enable the Secretary of State to amend, by order and subject to the affirmative procedure, the rate of SSP will in effect be expanded.

629. The Secretary of State will have the ability to use this power to amend the percentage rate by secondary legislation. This will (a) allow the rate to be amended if it proves that the chosen percentage figure does not achieve the intended effect; or (b) if the weekly rate changes in such a way as to mean that the percentage figure no longer has the intended effect. The power allows flexibility for the percentage rate to adapt to changing circumstances, in the same way as is the case for the flat weekly rate.

630. Such flexibility is an important mechanism for this measure, as it allows for the Government to be responsive to future changes, for example, to changes to the employment or sickness absence rates, and to the wider labour market, or in the event of a public health emergency. This is a common approach taken in other aspects of employment rights.

Justification for the procedure

631. The power already exists and is subject to the affirmative procedure. This remains appropriate as this power allows for the rate at which SSP is payable to be substituted. The affirmative resolution procedure ensures that both Houses of Parliament have the opportunity to debate the matter.

Clause 13: Statutory Sick Pay in Northern Ireland: lower earnings limit etc – Section 153 Social Security Contributions and Benefits (Northern Ireland) Act 1992 – Power to amend the percentage rate

Power conferred on: Department for Communities Northern Ireland
Power exercised by: Order
Parliamentary procedure: Existing Confirmatory Procedure (Northern Ireland Assembly)

Context and Purpose

632. This clause makes the same provision as at clause 11, but in respect of Northern Ireland. Statutory Sick Pay is a transferred (devolved) matter in Northern Ireland,

however, it is subject to the principle of parity as set out in section 87 of the Northern Ireland Act 1998.

633. Section 153(2) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 allows the Department for Communities, by order, to substitute a different provision as to the weekly rate(s) of SSP. This power is subject to the confirmatory procedure. The Employment Rights Bill will not explicitly extend or amend this power. However, this existing Henry VIII power will now apply to both the flat rate and the percentage rate.

Justification for taking the power

634. No new power is being taken. However, mirroring the position for clause 11, there is an existing power to enable the Department for Communities to amend, by order and subject to the confirmatory procedure, the rate(s) of SSP.

635. This power will apply to both the existing flat rate and the new percentage rate and hence its effect will be expanded. This will (a) allow the rate to be amended if it proves that the chosen percentage figure does not achieve the intended effect; or (b) if the weekly rate changes in such a way as to mean that the percentage figure no longer has the intended effect. The power allows flexibility for the percentage rate to adapt to changing circumstances, in the same way as is the case for the flat weekly rate.

636. Such flexibility is an important mechanism for this measure, as it allows for the Northern Ireland Department to be responsive to future changes, for example, to changes to the employment or sickness absence rates, and to the wider labour market, or in the event of a public health emergency. This is a common approach taken in other aspects of employment rights.

Justification for the procedure

637. The power already exists and is subject to the confirmatory procedure. This remains appropriate as this power allows for the rate at which SSP is payable to be substituted. The confirmatory procedure ensures that the Northern Ireland Assembly has the opportunity to debate the matter.

Clause 18(3), (4) and (10): Bereavement leave - Section 80EA Employment Rights Act 1996 - Bereavement leave – Power to extend Parental Bereavement Leave to other bereaved persons

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

638. This clause amends section 80EA of the ERA, which currently provides for parental bereavement leave, to place a duty on the Secretary of State to make regulations entitling an employee who is bereaved to be absent from work on leave. The extended powers will cover a wider set of relationships than parental bereavement leave, which applies to the death of a child under the age of 18.

639. The amended section 80EA will require the regulations to specify conditions on the relationship the employee must have with the person who has died to benefit

from the leave entitlement. It will also require that regulations set out how long the bereavement leave is for (which must be at least one week in cases where the deceased is not a child under the age of 18), as well as when it can be taken. The regulations must establish the period in which the leave must be taken, which should be at least 56 days after the person's death. Where more than one person dies, provision can be made so the employee is entitled to leave in respect of each deceased person.

640. Provision can also be made for preserving the employee's rights during and after taking the leave, to make special provision for redundancy and dismissal, and supplemental provisions.

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

641. Taking powers to set out the details of the leave entitlement through secondary legislation is consistent with the existing family leave framework, including the leave entitlements provided for in Part 8 of the ERA.

642. This approach enables the Government to consult with those that may use and are impacted by the new leave entitlement before it comes into force, ensuring a wide range of views are considered in its development. It also enables the Government to update the leave entitlement over time as other legislation and society changes.

643. Whilst there is one specific delegated power to introduce bereavement leave, the clause also necessarily amends other delegated powers in the ERA to provide for them to cover the extended bereavement leave (subsections (4) and (10)), to provide protection for employees who take their leave entitlement. For example, the clause amends section 47C of the ERA so that regulations may provide that when the entitlement is in force, those who take it do not suffer detriment (i.e. unfavourable treatment) from their employer, as a result of taking bereavement leave.

<u>Justification for the procedure</u>

644. Regulations made under this section will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the need to ensure consistency with the existing approach for delegated powers for introducing family leave entitlements.

645. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the extent of the new leave entitlement as set out in the regulations.

<u>Clause 21(2): Sexual harassment: power to make provision about "reasonable steps - New section 40B Equality Act 2010: Power to specify "reasonable steps"</u>

Power conferred on: Minister of the Crown
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

<u>Context and Purpose</u>

646. This power allows the Minister to make regulations to specify steps that are to be regarded as "reasonable" for the purpose of determining whether an employer

has taken, or failed to take, all reasonable steps to prevent sexual harassment (in relation to sections 40, 40A and 109 of the Equality Act 2010).

647. The regulations will set out a non-exhaustive list of obligations that are to be regarded as reasonable steps an employer must take in order to prevent workplace sexual harassment. Employers, to which the specific duties apply, must take these specific steps while also taking all other steps that are reasonable in the particular circumstances. The regulations may also require an employer to have regard to specified matters when taking those steps.

Justification for taking the power

648. The power in Clause 21 is necessary to ensure that specific requirements for employers to prevent sexual harassment are clear and can remain in step with the developing evidence base and policy considerations. This is a complicated area in which best practice is evolving over time and flexibility is needed to ensure requirements remain up to date with changing labour market conditions.

649. Taking a power to set out specific obligations through secondary legislation is an approach consistent with other positive duties in the Equality Act 2010. It will allow changes where necessary in the future without the need for further primary legislation. Precedent for this delegation can be found in section 153 of the Equality Act 2010, which enables a Minister of the Crown by regulations to impose specific duties on a public authority. This power is also for the purpose of enabling better performance by the authority of the duty imposed by section 149(1) as evidence develops and particular circumstances evolve.

650. The steps that may be specified in regulations include, among others—
- carrying out assessments of a specified description;
- publishing plans or policies of a specified description;
- steps relating to the reporting of sexual harassment;
- steps relating to the handling of complaints.

Justification for the procedure

651. Regulations made under Clause 21 will be subject to the affirmative procedure. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and the requirements they may place on employers. The affirmative procedure will ensure that Parliament has the opportunity to debate the matters as they are set out.

Clause 23: Right not to be unfairly dismissed: removal of qualifying period, etc - Schedule 3, Paragraph 3, New section 98ZZA(1) Employment Rights Act 1996: Power to make provision about fair dismissal during a statutory probationary period (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

652. Currently under section 94 of the ERA, an employee has the right not to be unfairly dismissed. The right to make a claim for unfair dismissal is, however, generally speaking only available to employees who have completed two years of

continuous service by the date on which their dismissal takes effect. This qualifying period is set by section 108 of the ERA. There are circumstances listed in section 108(3)-(5) when the qualification period will not apply and the dismissal will be automatically unfair.

653. Under section 98 of the ERA, a dismissal will not be found to be unfair if the employer can show that the principle reason for the dismissal was one of the five potentially fair reasons set out, and the employer acted reasonably in treating that reason as sufficient to justify the dismissal. The dismissal must be both procedurally and substantially fair. The five potentially fair reasons under section 98(2) ERA are:
    a. Capability or qualifications;
    b. Conduct;
    c. Redundancy;
    d. Statutory restriction;
    e. Some other substantial reason (SOSR).

654. Once the employer has established a potentially fair reason for dismissal, an ET must determine if the employer acted reasonably in dismissing the employee for that reason. An ET will consider: i) whether the employer followed a fair procedure; and ii) whether they acted reasonably in treating the reason as sufficient reason for the dismissal. An ET has to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

655. The statutory ACAS Code sets out the expectations falling on employers when considering the process to follow in relation to dismissals on the grounds of conduct or capability.

656. The Bill makes various changes in relation to unfair dismissal. In Schedule 3 paragraph 1, the qualifying period is removed so that the employee will no longer have to have accrued two years' service in order to bring a claim for unfair dismissal. Schedule 3 paragraph 3 inserts new subsection 98ZZA into the ERA. New subsection 98ZZA(4) introduces into the ERA the concept of a statutory 'probation period', referred to in the Bill as "the initial period of employment". This is a period, to be specified by the Secretary of State in regulations, which will allow the employer to assess their new employee.

657. Schedule 3 paragraph 3 inserts new subsection 98ZZA(1) into the ERA. Section 98ZZA(1), read with subsections (2) to (5), allows the Secretary of State to specify circumstances in which dismissals of employees are to be considered 'fair' if they occur during this statutory 'probation period' and the dismissal is on one of the grounds specified in new section 98ZZA(3). Those grounds are:

    a. Capability or qualifications;
    b. Conduct;
    c. Statutory restriction;
    d. Some other substantial reason relating to the employee.

658. The effect of subsection (3) is to constrain the power to these grounds so as to apply only to dismissals related to the employee's suitability.

659. The purpose of the power is to enable a different basis for fair dismissal to be established in these cases which is less onerous on employers, enabling them to use the ‘probation period’ to assess new employees’ capability and conduct, while maintaining requirements of fairness that employees will still be able to enforce by bringing claims for unfair dismissal in this period. The power also enables the Secretary of State to stipulate which reasons for dismissal are deemed to ‘relate to the employee’ for the purposes of dismissals made for ‘some other substantial reason’: the purpose of this is to clarify with further precision the restriction of the power to only those dismissals which relate to employees’ performance and suitability.

Justification for taking the power

660. This delegated power is necessary to be able to continue to balance the twin aims of reducing demands on employers during the statutory probation period and imposing requirements which are clear enough to enable effective enforcement of the right not to be unfairly dismissed, in the constantly changing circumstances of the economy and the labour market. The right not to be unfairly dismissed is one of the oldest individual statutory employment rights and, since first enacted in 1971, it has always been subject to a qualifying period of some duration, during which it has been possible for an employer to dismiss an employee without having to be in a position to demonstrate that it was fair to do so. There has therefore been no concept of a statutory probation period to date.

661. Given the novelty of the policy and potential for it to change working practices of employers, the Government believes it is necessary to retain flexibility to amend the requirements on employers for dismissals in these circumstances, taking account of unexpected consequences or changes in employers’ practices, particularly to respond to potential avoidance measures; changing attitudes towards work (e.g. expectations of longevity in specific employment and approaches towards assessment during probationary periods); and also potentially to take account of developments in the case law on unfair dismissal.

Justification for the procedure

662. Regulations made will be subject to the affirmative resolution procedure. The requirements that employers must meet for dismissals to be considered fair, when related to employees’ performance and suitability and taking place during a statutory probation period, will have a significant impact on employment relations for all newly hired employees in England, Scotland and Wales. The Government proposes that the significance of the impact on employment relations of these reforms means that sufficient time for parliamentary scrutiny and debate should be provided.

Clause 23: Right not to be unfairly dismissed: removal of qualifying period, etc - Schedule 3, Paragraph 3, New section 98ZZA(4) Employment Rights Act 1996: Power to make provision for a statutory probationary period

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

663. This power (in new subsection (4) of section 98ZZA) allows the Secretary of State to specify the length of the statutory probation period for all employees. The power also enables the Secretary of State to specify how the probation period is to be calculated. This can be used to set out when periods of service do or do not count towards the period. For example, this could be used to make provision for the way in which absence from work (e.g. on family related leave or sick leave) should be treated. It is also made clear, in new subsection (5)(a), that the power may be used to set out when periods of employment which are not continuous should be treated as though they are continuous.

664. Currently probationary periods are contractual in nature and are determined by individual employers' employment terms and conditions. The Government's intention in the Bill is to create a statutory probation period to operate alongside contractual probation. During the statutory period, the basis for fair dismissals of employees will be different so that the expectations on employers can be less onerous.

Justification for taking the power

665. Taking this power allows the Secretary of State to specify the duration and calculation of the statutory probation period. It is common for such technical detail to be included in regulations, rather than in primary legislation. It will also allow the statutory probation period to be adapted in light of future changes in employment practices, employment contracts, the use of probation periods by employers, or any other relevant changes.

666. The power to specify how the statutory probation period should be calculated will be particularly valuable as a way to learn from and adapt to any unexpected changes in behaviour or unintended adverse consequences that arise from the introduction of the statutory probation period.

Justification for the procedure

667. Regulations made will be subject to the affirmative resolution procedure. The duration and calculation of the statutory probation period will have a significant impact on employment relations for all newly hired employees in England, Scotland and Wales. The Government proposes that such regulations be subject to the draft affirmative procedure to provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 23: Right not to be unfairly dismissed: removal of qualifying period etc. Schedule 3, Paragraph 4, amendment to section 15 Enterprise and Regulatory Reform Act 2013: Power to increase or decrease limit of compensatory award (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose:

668. Schedule 3, paragraph 4 (amending an existing delegated power at section 15 of the *Enterprise and Regulatory Reform Act 2013*) allows the Secretary of State the power to set a different maximum level of compensation award at an ET from the one that normally applies to successful claims of unfair dismissal. This will apply where a dismissal meets the conditions in new section 98ZZA ERA, as inserted

by paragraph 3 – that is, that the dismissal was during the statutory probation period and was for one of the potentially fair reasons set out at paragraphs (a), (b) or (d) of Section 98(2) ERA – but did not meet the rest of the requirements for a legal test for a 'fair' dismissal.

Justification for taking the power:

669. Section 15 of the Enterprise and Regulatory Reform Act 2013 allows the Secretary of State to specify the maximum amount of any compensatory award available where an ET finds that an employee has been unfairly dismissed. This power is amended by paragraph 4 of Schedule 3 to the Bill so that the Secretary of State can specify a different maximum compensatory award where the dismissal met the conditions in new section 98ZZA(2) and (4) ERA. The amended power retains the existing approach of allowing the specific amount of the maximum award to be set in regulations.

670. The restrictions at sections 15(4)(a) and 15(5) of the Enterprise and Regulatory Reform Act 2013 are disapplied to the new aspect of the power. This is because the intention is that when an employee is dismissed for reasons of performance or suitability for the role during the statutory probation period, the employer should not face the full potential liabilities of unfair dismissal remedies. For that reason, the same minimum levels do not apply to the setting of a maximum award in these conditions. On the other hand, the new aspect of the power is narrower than the existing power in that section 15(3) does not apply. The Government sees no need for the maximum award in these circumstances to be varied for different types of employer, so the same maximum award will apply to all employers.

671. The flexibility to vary the maximum compensatory award where the provisions of new section 98ZZA apply will be particularly valuable in future as a way to learn from and adapt to any unexpected changes in behaviour by employees or employers or unintended adverse consequences that arise from the introduction of the new provisions relating to dismissal during the statutory probation period and a modified compensatory award cap.

Justification for the procedure:

672. Regulations made will be subject to the affirmative resolution procedure, as already applies to the power at section 15(8) of the Enterprise and Regulatory Reform Act 2013. This is appropriate since the compensatory award will have a potentially significant impact on employers defending ET claims as well as claimants bringing complaints. The draft affirmative procedure will provide Parliament with sufficient opportunity for scrutiny and debate.

Clause 24(4) and (6): Dismissal during pregnancy - Sections 49D and 49E Part 5B Employment Rights Act 1996 - Dismissal during pregnancy – Power to regulate dismissal during pregnancy (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

673. This clause amends Part 5B of the ERA to include a power allowing the Secretary of State to make regulations to extend protection from dismissal to periods during or after a protected period of pregnancy. Currently, section 49D confers powers on the Secretary of State to make regulations about redundancy dismissals during or after a "protected period of pregnancy". The existing power is therefore not sufficiently broad to allow provision to be made about dismissal for non-redundancy reasons during or after the protected period.

674. This clause amends section 49D ERA to insert a new power which allows the Secretary of State to make regulations covering dismissal (for reasons other than redundancy) during "a protected period of pregnancy". It also enables provision to be made to extend protection to a period after the end of pregnancy.

675. This clause also adds new section 49E into Part 5B ERA, to set out various specific matters which may be included in regulations dealing with either redundancy or non-redundancy dismissals in section 49D.

676. This includes the ability for the regulations to set out specifics about notice periods, evidence to be produced, record keeping and other procedures to be followed by both employer and employee in respect of the enhanced dismissal protections during and after the protected period of pregnancy. It also enables regulations to make provision for cases where an employee has parallel statutory and non-statutory rights to protections against dismissal; to modify the rules on how the calculation of a "week's pay" works in Part 14 ERA in relation to women who are absent from work during a protected pregnancy period; and to make different provision for different cases or circumstances.

677. New section 49E(f) allows regulations made under section 49D to apply, modify or exclude an enactment, in circumstances and under conditions to be specified, in relation to a person entitled to enhanced dismissal protections during or after the protected period of pregnancy (Henry VIII power).

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

678. Taking a power to set the details of the policy out through secondary legislation is consistent with the existing redundancy protection framework for pregnant women/new mothers at section 49D.

679. As this new provision will be a more general power covering dismissals - and not limited to just redundancy, which is one reason (out of five) to dismiss someone fairly – the Government will consult with key stakeholders on the details of the protection against dismissal during and after the protected pregnancy period.

680. Part 5B is part of a suite of powers given to the Secretary of State in the ERA to make provision for appropriate protections for parents, including for those exercising entitlements to the various forms of family related leave in Part 8 of that Act.

681. Taking this power not only follows the approach already taken in Part 5B and Part 8 of the Act, but it also gives flexibility for the regulations to keep step with developments in other areas of legislation and society.

682. Section 49E (a) to (c) allows regulations to set out specific detail on notice periods, evidence, procedures and to stipulate what the consequences are of failures to adhere to these matters.

683. Section 49E(d) allows the regulations to make provision for the situation where an employee has a non-statutory right corresponding to the statutory right under section 49D. The equivalent powers in Part 8 ERA have previously been used to provide that, in that situation, the employee cannot exercise the two rights separately but is taken to be exercising a composite right, with the option of choosing to take advantage of whichever of the two rights is more favourable to the individual in any particular respect. Regulations under Part 8 have also ensured that, where an employee is exercising a composite right in this way, the provisions of the Act governing the exercise of the statutory right apply to the exercise of that composite right, and that those provisions are regarded as modified to the extent necessary for that to be effective. Section 49E(f), which is a Henry VIII power, mirrors the existing provisions in Part 8 which permit such provision to be made, by allowing regulations to apply, modify or exclude an enactment in prescribed circumstances and subject to prescribed conditions.

684. Section 49E(e) allows the regulations to modify the way in which the rules setting out how to calculate a “week’s pay” for various purposes in the ERA (found in Chapter 2 of Part 14) apply to a woman who is absent from work during or after a protected period of pregnancy. This is a Henry VIII power, as it permits the modification of provisions enacted in primary legislation.

685. Section 49E(g) allows the regulations to make different provision for different cases or circumstances.

686. These supplementary provisions mirror those contained in ERA Part 8 establishing other family leave entitlements, such as maternity, paternity, adoption, shared parental leave and parental bereavement leave. They ensure that the regulations can make provision which is consistent with the familiar way in which those rights operate currently, and with whatever provision will be made pursuant to the changes made by Clause 23 of the Bill.

<u>Justification for the procedure</u>

687. The existing powers under section 49D of the ERA are already subject to the affirmative resolution procedure, and the new power to make regulations will be subject to the same procedure. The Government considers that this is appropriate due to the level of protection that may be provided by the regulations and to ensure that the Parliamentary approach is consistent with other regulations which give effect to similar existing provisions.

688. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the level of pregnancy related protection from dismissal provided for in the regulations.

Clause 25: Dismissal following period of statutory family leave - Sections 74(2), 75C(1)(b), 75J(1)(b), 80D(1A)(b) and (3)(b) and 80EH Part 8 Employment Rights Act 1996: Power to regulate dismissal during periods of statutory family leave

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

689. This clause makes amendments to Part 8 of the ERA. These will allow the Secretary of State to make regulations to extend protection from dismissal for employees to a period after they have taken certain statutory family leave entitlements.

690. This clause amends sections 74(2), 75C(1)(b), 75J(1)(b), 80D(1A)(b) and (3)(b) and 80EH, so regulations can make provision about dismissal following maternity leave, adoption leave, shared parental leave, the form of paternity leave available to bereaved parents and neonatal care leave. The existing powers apply only during periods of relevant leave and are therefore not sufficiently broad to allow for regulation of dismissal in the period after return from leave.

691. Consequently, Henry VIII powers that already exist for making provision about dismissal during periods of those forms of statutory family-related leave captured in the previous paragraph will be extended to cover dismissal after returning to work following one of these family-related leaves. (See paragraphs 683 and 684 above which explain the reasons for those powers).

Justification for taking the power

692. Taking powers to provide, in secondary legislation, for protection from dismissal for employees after they have taken relevant statutory family leave is consistent with the existing family leave legislative framework. The Government will consult with key stakeholders on the details of the protection against dismissal, which may include the length of protection and the circumstances in which it will be fair to dismiss a pregnant woman or new mother, to ensure that the ensuing regulations provide appropriate protection while balancing the need for employers/business to be able to dismiss where genuine and serious issues exist. The consultation will also explore extending the enhanced dismissal protections out to those taking other types of family leave, as outlined above.

693. The existing Henry VIII powers (described in paragraphs 683, 684 and 687 above) are extended by virtue of these amendments so that they also apply to the exercise of the new power to make provision for dismissal after return from leave.

Justification for the procedure

694. Regulations made under the existing powers (sections 74, 75C 75J, 80EH, 80D) are subject to the affirmative resolution procedure. The affirmative procedure will continue to apply once Clause 25 has amended those provisions. The Government considers that this is appropriate due to the need to ensure consistency with the existing approach.

695. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the level of protection against dismissal provided for in the regulations.

Clause 26(3): Dismissal for failing to agree to variation of contract, etc, - New section 104I(5)(e) Employment Rights Act 1996: Power to specify factors to be considered when determining fairness of a dismissal for variation of contract of employment

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

696. Employers may sometimes need to consider proposing changes to employees' contracts of employment. If employees do not agree to some or all of the contractual changes proposed by the employer, the employer may dismiss employees, before either offering to re-engage them, or offering to engage other employees, in substantively the same roles, in order to effect the changes. This is referred to as "fire and rehire".

697. Currently employers can use fire and rehire where they have a sound business reason for seeking to change a contract of employment. This may include responding to economic changes, changing working practices or harmonising terms and conditions. The previous government developed a Code of Practice on fire and rehire, but did not change primary legislation.

698. This clause will restrict employers' ability to use fire and rehire. It will do this by amending the law on unfair dismissal so that, where employees are dismissed for failing to agree to a change in their terms and conditions or where an employer dismisses an employee to replace or re-engage them on varied contractual terms, those dismissals will be treated as automatically unfair unless the employer can show they fall within a narrow exception for financial difficulties.

699. To come within this exception, the employer must show the reason for the variation was to eliminate, prevent or significantly reduce financial difficulties which at the time of the dismissal were affecting, or were likely to in the immediate future to affect, their ability to carry on the business as a going concern or otherwise carry out the activities constituting the business, and the employer could not reasonably have avoided the need to make the changes.

700. If an employer can demonstrate that it meets this financial difficulties exception, the dismissal will not be automatically unfair, but an ET will still have to assess whether the dismissal was fair in all the circumstances. The clause also provides that, when an ET is determining if the dismissal is fair or unfair, they must consider the factors which are set out within the clause. The clause gives the Secretary of State the power to make regulations adding additional factors that an ET must consider.

Justification for taking the power

701. As explained above, the clause already sets out some (non-exhaustive) factors that an ET must consider. These include any consultation the employer has carried out about the variation of the contract with the employee, any consultation

with a recognised independent trade union or other employee representative body, and anything offered to the employee by the employer in return for agreeing to the variation. These factors are considered non-controversial and widely accepted as part of a fair process in dismissal and re-engagement.

702. Taking a power for the Secretary of State to make regulations which add additional factors which must be considered when assessing whether a dismissal is fair will provide flexibility to add further factors in response to changing employer practices in fire and rehire or following case law from ETs. The Government intends to consult before making regulations under this power.

Justification for the procedure

703. Regulations made will be subject to the affirmative resolution procedure. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and the impact this will have on the considerations of an ET in a fire and re-hire case. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Part 2- Other matters relating to employment

Clause 27(5): Collective redundancy: extended application of requirements - New section 195A Trade Union and Labour Relation (Consolidation) Act 1992: Power to specify provision for inclusion in relevant outsourcing contracts

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft Affirmative

Context and Purpose

704. Currently section 188 of the Trade Union and Labour Relation (Consolidation) Act 1992 (TULRCA) provides that employers must undertake collective consultation only when they are proposing to dismiss 20 or more employees as redundant at one establishment, within a period of 90 days or less. Section 193(1) of TULRCA requires employers to notify the Secretary of State in writing whenever they are proposing 20 or more redundancies at one establishment, and sets out the time periods of when this notification should occur.

705. This clause amends TULRCA 1992 to add a requirement that collective redundancy consultation and notification will also be required whenever an employer is proposing to make redundant a specified threshold number of employees across its organisation. The level of this threshold number and its operation will be set out in secondary legislation, under a new section 195A of TULRCA. This clause also restructures some relevant provisions of TULRCA to ensure clarity and consistency.

Justification for taking the power

706. The Government will take a power to set the threshold number of employees for which collective redundancy obligations will apply. This power gives the Government the ability to set, in regulations, the threshold that must be met in order to trigger the existing consultation and notification obligations. Providing for this in secondary legislation means that power can be adjusted where necessary to ensure that it has been set at the right level to enable meaningful opportunities for collective redundancy consultation.

707. The Government intends to set a threshold at a level that will be triggered when significant redundancies are made across an organisation that could be meaningfully influenced by collective consultation, and thereby limit unconnected consultations. The aim will be to ensure the threshold will not place disproportionate burdens on business and strike a balance between the interests of both employers and employees.

708. Taking this power will allow for this threshold to be set at an appropriate level with the benefit of evidence taken from a wide range of interested stakeholders through consultation. The power will also allow the Government to react more quickly to changes in business practices that might mean the threshold needs to be adjusted in future. The power will not allow for the threshold for this new trigger to be set below 20 employees, which is the number of proposed redundancies at one establishment that is required to trigger the current obligations for collective consultation and notification

709. New section 195A of TULRCA makes clear regulations may (among other things), provide that the threshold is set by reference to a percentage of an employer's

employees, a fixed number, or a number that is the highest or lowest of two or more numbers, or determined in another way specified in the regulations.

710. If the threshold is set by reference to a percentage of the employer's employees, new section 195A specifies that the regulations may make provision for determining how many employees an employer has, including provision about the time by reference to which that determination is to be made, and provision excluding employees of a specified description from being taken into account in that determination. Section 195A also allows the regulations to make different provisions for different purposes, for example, to set different thresholds in relation to different descriptions of employer. This could be used, for example, to set different thresholds for employers of different sizes.

711. The Government believes that the affirmative procedure is the most appropriate. This will give greater scrutiny to Parliament to ensure that the thresholds the Government sets are appropriate and justified.

Clause 27(3A): Collective redundancy: extended application of requirements - amendments to section 197 Trade Union and Labour Relation (Consolidation) Act 1992: Power to amend collective redundancy requirements

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft Affirmative

Context and Purpose

712. Currently, section 197 TULRCA provides that the Government may amend section 188(2) and section 193(2) of TULRCA, which set out the minimum periods for collective redundancy consultation and notification. This is a Henry VIII power as it allows the Secretary of State to amend primary legislation. This means that the Secretary of State currently has the power to make regulations which amend both the minimum consultation period for 100 or more employees (currently, 45 days), and the minimum notification period which applies to 100 or more employees (also 45 days). However, whilst s197 currently allows the Secretary of State to amend the minimum notification period which applies to 20-99 redundancies (currently set at 30 days), there is no equivalent power to amend the minimum notification period for 20-99 redundancies (also currently set at 30 days).

713. The Government is amending the existing Henry VIII power in section 197 so that to enable amending the following provisions by statutory instrument:
   a. Section 188(2) - This amendment seeks to fix an existing incorrect cross-reference in section 197 of TULRCA. Section 197(1)(a) TULRCA provides the Secretary of State may amend the requirements as to collective redundancy consultation in section 188(2) by secondary legislation. This reference is incorrect, due to an error made by subsequent amending legislation, and should refer to section 188(1A). This will not change the law, which can already be interpreted to refer to the correct cross-reference, but it will improve the clarity and accessibility of the law and put the position beyond doubt.
   b. Section 193(2A)(b) - This amounts to an extension of the existing Henry VIII power, as this change means that the Government will

have the power to amend the notification period which applies when 20-99 redundancies are being proposed (currently, 30 days).

Justification for taking the power

714. As mentioned above, the Government already has the ability to amend the relevant notification periods contained in section 193(1) via statutory instrument when an employer is proposing 100 or more redundancies at one establishment. This power is being revised to reflect the restructuring of section 193 made by Clause 27, and to ensure that, should the Government choose to amend the time periods for consultation contained in section 188, it is also able to amend the time periods to notify the Secretary of State contained in section 193, thereby avoiding a disparity between the two requirements for employers. This power will allow the Secretary of State to revise the time periods for updating the Secretary of State in situations where an employer is proposing either 20-99 redundancies, or 100 or more redundancies. Section 197 already provides that regulations may not reduce the relevant periods to less than 30 days, and clause 27 will not change this.

Justification for the procedure

715. Regulations made under section 197 must be made under the affirmative procedure. The clause will not change that position, so any regulations made under section 197 must continue to be made under the affirmative procedure. The government considers that this is appropriate given that this power allows the Secretary of State to make amendments to time periods which are set out in primary legislation.

Clause 30(2): Public sector outsourcing: Protection of workers – New section 83C (1), (2) and (3) Procurement Act 2023: Power to specify provision for inclusion in relevant outsourcing contracts.

Power conferred on: A Minister of the Crown, Welsh Ministers and Scottish Ministers
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft Affirmative

Context and Purpose

716. This clause amends the Procurement Act 2023 to insert a new Part 5A. Within that Part, new section 83C(1) provides a power for a Minister of the Crown, Welsh Ministers or Scottish Ministers (an “appropriate authority” as defined in new section 83A(2) for the purposes of Part 5A) to make regulations specifying provision to be included in a “relevant outsourcing contract” (defined in new section 83B) for the purpose of ensuring that workers transferring from the employment of a contracting authority to the employment of a supplier or a sub-contractor in order to work on a relevant outsourcing contract are treated no less favourably following that transfer, and that other workers of the supplier or a sub-contractor are treated no less favourably than those transferring workers.

717. The power is intended to allow Ministers to address the emergence of a two-tier workforce as a result of the outsourcing of functions of public bodies. This arises where, as part of an outsourcing contract, public sector employees are transferred to a private sector employer. Where that happens, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) will generally ensure that those former public sector employees continue to enjoy the same terms and conditions they had under their public sector contracts. Private sector employees

working on the same contract may not, however, benefit from comparable terms and conditions, resulting in a two-tier workforce. This has a negative impact on the quality and fulfilment of public service contracts as it leads to reduced staff morale, increased turnover and the driving down of wages.

718. The power will be used to make regulations ensuring that public bodies take steps to ensure this situation does not emerge, in circumstances where it can reasonably be avoided. The regulations would apply where a contracting authority, as defined in the Procurement Act 2023, enters into a contract regulated by that Act for the purpose of contracting out or outsourcing a service or function. This could include, for example, contracting out the delivery of a public service or of back-office functions, such as facilities management.

719. Regulations made under subsection (1) of new section 83C must be for the purpose of ensuring that workers transferring from public sector to private sector employment under a relevant outsourcing contract are treated no less favourably following that transfer, and that specified other workers of the supplier or a sub-contractor are treated no less favourably than those transferring workers. Both limbs of the power allow for regulations to specify the workers to which they apply: the Government expect regulations to deal with workers who are transferring from the public sector and whose terms and conditions are not protected by application of TUPE, and workers of the supplier or a sub-contractor working on the contract in question. One example of how this may be done is via model contract clauses set out in the regulations. Subsection (3) allows regulations to specify provision tailored to particular sub-sets of contracts (for example, according to value or sector) and to set out exemptions for those situations where it is recognised that compliance with the regulations, or any aspect of them, would not be possible or reasonable.

720. Subsection (2) of new section 83C provides that where the Minister of the Crown, Welsh Ministers or Scottish Ministers have in regulations specified provision to be included in contracts, a contracting authority must take all reasonable steps to ensure their inclusion in that contract and, where they are so included, to secure their implementation. This will include implementation in sub-contracts.

Justification for taking the power

721. The very wide variety of outsourcing contracts means that action to prevent the emergence of two-tier workforces must be targeted and tailored to the relevant circumstances in order to be effective, and it may be appropriate for that action to vary over time, for example to take account of changes in employment law and practice. The regulations are likely to contain significant levels of technical detail, in particular where they specify model contract clauses, and are likely to make different provision for different cases. Consultation with interested parties will also be important to the development of workable and effective regulations.

722. The power is limited in that it is only exercisable in relation to contracts for services regulated by the Procurement Act 2023, and only where these involve the transfer of staff from a public sector organisation to a private sector organisation. It is only exercisable for the purposes of ensuring that transferring workers are treated no less favourably following the transfer, and that other workers of the supplier are treated no less favourably than the transferring

workers and therefore a Minister exercising the power must be able to demonstrate that the regulations will have this effect.

Justification for the procedure

723. The regulations will contain the detailed content of the obligations to be placed on contracting authorities and as such the affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Clause 30(2) Public sector outsourcing: Protection of workers - New section 83F Procurement Act 2023: Power of Scottish Ministers to amend this Part (Henry VIII)

Power conferred on: Scottish Ministers
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

724. New section 83F provides Scottish Ministers with a power to modify new sections 83A, 83B and 83E of the Procurement Act 2023 if such consequential amendments are necessary following any changes to Scottish procurement legislation.

Justification for taking the power

725. The Scottish Government determines how devolved Scottish procurement is governed and legislates on it. It is essential that Scottish Ministers can make necessary consequential amendments to the new Part 5A in-line with updates or modifications to Scottish legislation on devolved Scottish procurement. Any regulations made using this power will be limited to devolved Scottish procurement. Necessary consequential amendments to legislation are technical amendments which should not be controversial.

Justification for the procedure

726. Following the implementation of the Employment Rights Bill, section 122(10) of the Procurement Act 2023 will provide that regulations being made under section 83F of the new Part 5A will be subject to the affirmative procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate these matters.

Clause 31: Equality action plans - New section 78A(1) Equality Act 2010 - Equality Action Plans: Power to set out the requirement to publish an equality action plan

Power conferred on: Minister of the Crown
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

727. Since 2017 employers with 250 or more employees in Great Britain have been required to publish specific gender pay gap data on an annual basis. This provision will enable Ministers to require employers to develop and publish action plans detailing the steps they are taking to improve equality alongside those figures.

728. This clause will provide a Minister of the Crown with the power to make regulations requiring private and voluntary sector employers in Great Britain, and specific public sector employers, with at least 250 employees, to publish an action plan alongside the disclosure of gender pay gap data required by regulations under section 78 of the Equality Act 2010 (in respect of private and voluntary sector employers), and regulations made under by s.153 and 154 of the Equality Act 2010 (in respect of public authorities and certain cross-border public authorities).

729. The regulations may specify, among other things: the required content of a plan; when the plan should be published and how frequently; the form and manner in which plans should be published; whether a person is required to approve or sign off on the plan before publication.

Justification for taking the power

730. This power is necessary because flexibility is needed when setting the exact requirements for gender pay gap and menopause action plans, and it would not be appropriate to include this detail on the face of the Bill. It follows the existing approach under section 78 Equality Act 2010, which creates a delegated power enabling regulations to require employers to publish information relating to the gender pay gap (and under sections 153(1) and 154(2), which enable regulations to impose specific duties on certain public authorities and cross-border public authorities – by which obligations relating to the disclosure of gender pay gap data have been imposed on them). This new power is needed, so that regulations may also make provision in relation to action plans.

731. Flexibility is also required to specify the requirements in the regulations in order to properly consider the evolving needs of stakeholders. However, we have taken steps to ensure the power is as narrow as possible, specifying the intended nature of the plans (as far as it will cover matters related to gender equality) as well as detailing what the regulations may contain.

Justification for the procedure

732. It is considered that the affirmative resolution procedure for secondary legislation made under this power will ensure appropriate levels of scrutiny for the specific regulations and mirror the fact that the affirmative procedure is also required for regulations made under sections 78 of the Equality Act 2010 (requirement for employers to publish information about the gender pay gap) and sections 153 and 154(2) (powers to impose specific duties). The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 32: Provision of information relating to outsourced workers - Sections 78(3A), 153(1A) and 154(3A) Equality Act 2010 - Outsourced workers: Power to set out requirement for employers to provide information relating to outs

Power conferred on: Minister of the Crown
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

733. Since 2017 employers with 250 or more employees working in Great Britain have been required to publish specific gender pay gap data about their own workforce on an annual basis. This provision will enable Ministers to require employers to provide information about the service providers that they contract with for outsourced services alongside those figures.

734. This clause will provide a Minister of the Crown with the power to make regulations requiring private and voluntary sector employers, with at least 250 employees working in Great Britain, to provide information about the service providers that they contract with for outsourced services alongside the publication of gender pay gap data required by section 78 of the Equality Act 2010.

735. Section 78 already provides that regulations made under it can prescribe descriptions of information that must be published. The amendment made by the Bill clarifies that such information can relate to the identity of providers of outsourced services.

736. The clause replicates the same power in relation to public bodies listed in Part 1 of Schedule 19 of the Equality Act 2010 and Part 4 of Schedule 19 of the Equality Act 2010, by amending sections 153 and 154 of the Equality Act 2010 (power to impose specific duties, and, power to impose specific duties: cross-border authorities).

Justification for taking the power

737. This power is necessary because it amends the existing regulation-making powers under section 78 Equality Act 2010 (requiring employers to publish information about the gender pay gap) and sections 153 and 154 Equality Act 2010 (power to impose specific duties, and power to impose specific duties: cross-border authorities). It therefore fits appropriately into the existing framework of a delegated power and would arguably create inconsistency if included as a requirement on the face of the Bill. These new powers are needed (by way of amendments to the existing regulation-making powers under section 78, section 153, and section 154), so that regulations made under these sections may also make provision about information relating to outsourced service providers.

Justification for the procedure

738. The affirmative resolution procedure for secondary legislation made under this power is considered appropriate, because it is consistent with the existing regulation-making powers under section 78, section 153, and section 154 which use the affirmative resolution procedure. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 34: Extension of regulation of employment businesses – New section 13(3) Employment Agencies Act 1973: Extension of power to regulate employment businesses (and employment agencies)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

739. Section 5 of the Employment Agencies Act 1973 (EAA 1973) confers on the Secretary of State the power to make regulations to secure the proper conduct of employment agencies and employment businesses.

740. This clause expands the definition of "employment business" within the EAA 1973 (section 13(3)) to cover other types of business that participate in arrangements under which persons are supplied by their employer to work for other persons. This includes so-called umbrella companies, which sometimes employ individuals on behalf of employment businesses (often referred to as recruitment agencies) who are then supplied to end clients. In so doing, it broadens the scope of the existing power at section 5 of the EAA 1973.

Justification for taking the power

741. This is an existing power. The broadened scope will allow for the bespoke regulation of so-called umbrella companies, which currently fall outside the scope of state enforcement. It is appropriate that umbrella companies – which often act as an additional intermediary in the relationship between an employment business, a worker and an end hirer – are subject to regulation and enforcement in a similar manner to employment businesses (as currently defined).

742. The broadening of the scope of the power follows a consultation undertaken by the previous Government in 2023. Responses to consultation confirmed the need for regulation of umbrella companies since non-compliance with employment law by some umbrella companies is detrimental to the interests of those who work through them.

Justification for the procedure

743. This is an existing power. The draft affirmative resolution procedure will ensure that any proposed change is subject to the scrutiny, debate and approval of both Houses of Parliament before the regulations are made and changes come into effect.

744. Under section 12(2) of the EAA 1973, before regulations using this power are made, consultation must be carried out with such bodies as appear to the Secretary of State to be representative of the interests concerned.

Part 3 - Pay and Conditions in Particular Sectors

Clause 35: Pay and conditions of school support staff in England – Schedule 4, Paragraph 1 – New section 148B(2) Education Act 2002: Power to determine matters within the SSSNB's remit

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

745. This clause introduces schedule 4, which establishes the School Support Staff Negotiating Body (SSSNB), which will have a remit for negotiating the pay and terms and conditions of employment of school support staff in England. It will also advise the Secretary of State on the training and career progression of school support staff in England. This power enables the Secretary of State to provide in regulations that a payment or entitlement or matter is or is not to be treated as remuneration or related to the terms and conditions, training or career progression of school support staff (as relevant). Prescribed matters will therefore fall within or outside of the remit of the School Support Staff Negotiating Body.

Justification for taking the power

746. This power is necessary in order to allow the Secretary of State to determine the question of whether a particular matter relating to school support staff falls within or without the SSSNB's remit. This level of detail is not appropriate for primary legislation. This power provides the Secretary of State with the flexibility needed to address these issues as they arise.

747. The same power was taken in the 2009 legislation establishing the SSSNB (see s.228 Apprenticeships, Skills, Children and Learning Act 2009). The Secretary of State also has a very similar power to determine whether a matter falls within the remit of the School Teachers Review Body through secondary legislation in s.123(4) Education Act 2002.

Justification for the procedure

748. It is considered that the negative procedure for secondary legislation made under this power is appropriate because the regulations will be technical and highly specific to this part of the education workforce and may need to be used repeatedly. The power in s.123(4) Education Act 2002 is also subject to the negative procedure, as was the power in s.228 Apprenticeships, Skills, Children and Learning Act 2009.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148C(3)(b)(ii) Education Act 2002: Power to specify the meaning of "school support staff

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and purpose

749. This power allows the Secretary of State to make regulations specifying that persons who are employed by the proprietor of an Academy to carry out particular

kinds of work (as specified in the regulations) are ''school support staff'' for the purposes of Part 8A Education Act 2002.

Justification for taking the power

750. The power will allow the Secretary of State to include those academy staff who do not work "wholly at" one or more academies within the school support staff statutory framework. For example, members of central staff teams working in offsite offices or staff who deliver some services in maintained schools or other non-academy locations. The government holds limited information about the types of roles carried out by staff in the academy sector and the Government intends to consult on which staff should and should not fall within the SSSNB's remit. The power will also allow the Secretary of State to amend the scope of the statutory framework to include additional persons working in academies in future as required.

Justification for the procedure

751. Regulations made under this power would make detailed technical provision concerning persons working in particular roles within the education workforce. Further, the Government will consult on those persons who should come within the SSSNB's remit prior to the regulations being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148C(4)(b) Education Act 2002: Power to prescribe in regulations persons who are not within the SSSNB's remit

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

752. The power allows the Secretary of State to prescribe in regulations persons who are not within the SSSNB's remit.

Justification for taking the power

753. The Bill excludes staff employed as qualified teachers in schools from the SSSNB's remit. However, schools, particularly academies, also employ other staff such as unqualified teachers or executive leaders whose terms and conditions will not be determined by the SSSNB and this secondary legislation will allow these further categories of staff from the SSSNB's remit to be excluded should this be appropriate.

754. The Government intends to consult on the detailed implementation of this policy which will inform the categories of staff excluded through this power.

755. The same power was taken in s.240(3)(b) Apprenticeships, Skills, Children and Learning Act 2009.

Justification for the procedure

756. The regulations will make detailed technical provision concerning persons working in particular roles within the education workforce and the exclusion of persons from the SSSNB's remit will be subject to consultation prior to the regulations

being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure.

757. The same procedure applied to the power in s.240(3)(b) Apprenticeships, Skills, Children and Learning Act 2009.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148H(2)(a) Education Act 2002 – Power to make regulations to ratify agreements submitted by the SSSNB

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

758. This power enables the Secretary of State to make regulations that ratify agreements reached by the SSSNB, in full or in part, with the effect of imposing terms and conditions in the contracts of employment of school support staff. These will override any existing inconsistent terms in either the contracts of employment of school support staff or the funding agreements of academy schools.

Justification for taking the power

759. This power is required to implement changes to support staff terms and conditions as and when they are agreed by the SSSNB and will be used on a regular basis. The powers cannot be used to reduce remuneration or alter a person's terms and conditions for the worse retrospectively.

760. A similar power was contained in s. 231(2)(a) Apprenticeships, Skills, Children and Learning Act 2009. The Secretary of State also has a similar power to impose changes to the terms and conditions of school teachers through secondary legislation in s.122 Education Act 2002.

Justification for the procedure

761. The regulations will make detailed technical provision and their content will have been subject to detailed negotiation prior to being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure. The power in s.122 Education Act 2002 is also subject to the negative procedure, as was that in s.231(2)(a) Apprenticeships, Skills, Children and Learning Act 2009.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148J(2)(a) Education Act 2002: Power to make regulations that ratify agreements reached by the SSSNB following reconsideration of a matter

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

762. This power enables the Secretary of State to make regulations that ratify agreements reached by the SSSNB following reconsideration of a matter, in full or in part, with the effect of imposing terms and conditions in the contracts of employment of school support staff. These will override any existing inconsistent

terms in either the contracts of employment of school support staff or the funding agreements of academy schools.

Justification for taking the power

763. This power is required to implement changes to support staff terms and conditions as and when they are agreed by the SSSNB and will be used on a regular basis. The power cannot be used to reduce remuneration or alter a person's terms and conditions for the worse retrospectively.

764. A similar power was contained in s. 233(2)(a) Apprenticeships, Skills, Children and Learning Act 2009. The Secretary of State also has a similar power to impose changes to the terms and conditions of school teachers through secondary legislation in s.122 Education Act 2002.

Justification for the procedure

765. The regulations will make detailed technical provision and their content will have been subject to detailed negotiation prior to being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure. The power in s.122 Education Act 2002 is also subject to the negative procedure, as was that in s.233(2)(a) Apprenticeships, Skills, Children and Learning Act 2009.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148J(2)(c) Education Act 2002 – Power to require prescribed people to have regard to agreements of the SSSNB in exercising prescribed functions

Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

766. This power enables the Secretary of State to make regulations requiring prescribed people to have regard to agreements of the SSSNB in exercising prescribed functions.

Justification for taking the power

767. There are a range of bodies within the school system beyond support staff and their employers on whose functions the SSSNB's activity will have a bearing and where it may be desirable to require them to take account of agreements reached by the SSSNB in exercising those functions. This power allows the flexibility needed to ensure that the regulations apply only where necessary and can be used effectively even where there are changes to the various bodies within the education sector.

768. The same power was taken in s. 233(2)(c) of the Apprenticeships, Skills, Children and Learning Act 2009.

Justification for the procedure

769. The regulations will make detailed technical provision concerning persons with specific functions within the education workforce. Further, the agreements to which they relate will have been subject to detailed negotiation prior to the regulations being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure.

770. The power in s.233(2)(c) of the Apprenticeships, Skills, Children and Learning Act 2009 was also subject to the negative procedure.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148J(2)(d) Education Act 2002 – Power to make regulations that make provision in relation to a matter that has been referred to the SSSNB other than in the terms of the SSSNB agreement

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

771. This power enables the Secretary of State to make regulations that make provision in relation to a matter that has been referred to the SSSNB other than in the terms of the SSSNB agreement in circumstances where: there is an urgent need to do so, the SSSNB has already been asked to reconsider their initial agreement and the agreement submitted by the SSSNB does not properly address the matter referred to them or is not practicable, or the SSSNB have failed to have regard to specified factors.

772. New section 148N(2) Education Act 2002 provides that the regulations must either require prescribed persons to have regard to them in exercising prescribed functions or have the effect of imposing terms and conditions in the contracts of employment of school support staff. These will override any existing inconsistent terms in either the contracts of employment of school support staff or the funding agreements of academy schools.

Justification for taking the power

773. This power is necessary to allow the Secretary of State to take action to address an urgent need in relation to school support staff in circumstances in which the agreement reached by the SSSNB does not address the issue, or is not practicable, or fails to take into account factors specified by the Secretary of State.

774. As above, there are a range of bodies within the school system beyond support staff and their employers on whose functions the SSSNB's activity will have a bearing and where there may be a need for the Secretary of State to exercise the power to require them to take account of regulations made in this area. Where the Secretary of State instead chooses to impose terms and conditions of employment in support staff contracts through regulations to address such a need, the regulations cannot be used to reduce remuneration or alter a person's terms and conditions for the worse retrospectively.

775. The same power was taken in s. 233(2)(d) of the Apprenticeships, Skills, Children and Learning Act 2009.

Justification for the procedure

776. The regulations will make detailed technical provision and their content will have been subject to detailed consideration through the SSSNB framework prior to being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure.

777. As above, the Secretary of State's power to impose changes to the terms and conditions of school teachers in s.122 Education Act 2002 is also subject to the negative procedure, as was the power in s.233(2)(d) Apprenticeships, Skills, Children and Learning Act 2009.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 1 – New section 148K(2)(b) & (4)(b) Education Act 2002: Power to make regulations that make provision in relation to a matter that has been referred to the SSSNB other than in the terms of the SSSNB agreement in circumstances where there is an urgent need to do so

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

778. These powers enable the Secretary of State to make regulations that make provision in relation to a matter that has been referred to the SSSNB other than in the terms of the SSSNB agreement in circumstances where there is an urgent need to do so and (i) the SSSNB is unable to reach agreement or (ii) the SSSNB has failed to reach agreement in the time period specified by the Secretary of State.

779. The regulations made must either require prescribed persons to have regard to them in exercising prescribed functions or have the effect of imposing terms and conditions in the contracts of employment of school support staff. These will override any existing inconsistent terms in either the contracts of employment of school support staff or the funding agreements of academy schools.

780. The Secretary of State must consult the SSSNB before exercising this power.

Justification for taking the power

781. These powers are necessary to allow the Secretary of State to take action to address an urgent need in relation to school support staff in circumstances where the SSSNB cannot reach agreement or does not reach agreement in time.

782. There are a range of bodies within the school system beyond support staff and their employers on whose functions the SSSNB's activity will have a bearing and where there may be a need for them to take account of regulations made by the Secretary of State in this area. The power to require specific people to have regard to the regulations in exercising specific functions allows the flexibility needed to ensure that the regulations apply only where necessary and can be used effectively even where there are changes to the various bodies within the education sector.

783. Where the Secretary of State instead chooses to impose terms and conditions of employment in support staff contracts through regulations to address such a need, the regulations cannot be used to reduce remuneration or alter a person's terms and conditions for the worse retrospectively.

784. The same powers were taken in s. 234(2)(b) and (4)(b) Apprenticeships, Skills, Children and Learning Act 2009.

Justification for the procedure

785. The regulations will make detailed technical provision and will have been the subject of consultation with the SSSNB prior to being laid before Parliament. It is therefore considered appropriate that they adopt the negative procedure.

786. The powers in s.234(2)(b) and (4)(b) Apprenticeships, Skills, Children and Learning Act 2009 were also subject to the negative procedure.

Clause 35: Pay and conditions of school support staff in England – Schedule 4 – paragraph 2 – New Schedule 12A – Paragraph 1(2) Education Act 2002: Power to prescribe in regulations the school support staff organisation and employer organisation representative members of the SSSNB.

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

787. This power allows the Secretary of State to prescribe in regulations the school support staff organisation and employer organisation representative members of the SSSNB.

Justification for taking the power

788. Naming the membership of the SSSNB through secondary legislation allows changes to be made to that membership more easily (e.g. to take account of changes of name / mergers / changes in the TU representation landscape). If the membership was named in primary legislation, we would require primary legislation (or a Henry VIII power) to make any amendments to that membership.

789. The same power was taken in schedule 15, para 1(2) Apprenticeships, Skills, Children and Learning Act 2009.

Justification for the procedure

790. Ensuring appropriate membership of the body requires technical knowledge of the education sector and the Secretary of State will consult the Trades Union Congress prior to prescribing school support staff organisation members of the SSSNB in these regulations. It is therefore considered appropriate that they adopt the negative procedure.

791. The same procedure applied to the power in schedule 15, para 1(2) Apprenticeships, Skills, Children and Learning Act 2009.

Clause 36: Power to establish Social Care Negotiating Body: Power to establish the Adult Social Care Negotiating Body in England and the Social Care Negotiating Bodies in Scotland and Wales

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

792. This clause confers a power on the Secretary of State to establish the Adult Social Care Negotiating Body for England; the Welsh Ministers to establish the

Social Care Negotiating Body for Wales; and the Scottish Ministers to establish the Social Care Negotiating Body for Scotland. These Ministers are referred to as the 'appropriate authorities'. Exercise of this power by the Welsh Ministers and the Scottish Ministers, and other powers conferred on them within this Chapter, requires the agreement of the Secretary of State.

Justification for taking the power

793. This power enables the appropriate authorities to engage with interested parties to refine specific details of how the Bodies will be constituted and operate before they set up their respective negotiating bodies. This will be the first body of its kind in a complex and essential sector, meaning that engagement with a wide range of stakeholders is needed before establishment to ensure that the detailed policy is able to work effectively for different groups of people in different areas. The powers in the following clauses are required so appropriate authorities can make changes as lessons are learned and as the sector itself changes.

Justification for the procedure

794. The Government considers it appropriate that Parliament, the Senedd Cymru and the Scottish Parliament have the opportunity to debate and formally approve the regulations by way of an affirmative procedure, in order to ensure it has sufficient oversight and scrutiny of the creation of a new public body and important accompanying provision relating to appointments and decision making processes. These aspects are fundamental to the workings and processes of the Body, and it is appropriate that there is effective scrutiny.

Clause 37: Membership, procedure etc of Negotiating Body Power: Power to make provision in regulations for the operation of the Adult Social Care Negotiating Body in England and the Social Care Negotiating Bodies in Scotland and Wales (Henry VIII)

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

795. This clause confers a power on the Secretary of State, the Scottish Ministers and the Welsh Ministers to make provision in regulations for the operation of the Negotiating Body they have established under clause 36 above.

796. Provision may be made about matters such as the appointments of members (and termination of those appointments), decision making, payment of fees and expenses, staff and facilities, records, and reporting requirements. Clause 37(5) also includes a Henry VIII power to make amendments to any enactment, but this is limited to amendments that are in consequence of establishing the Body.

Justification for taking the power

797. This power enables the appropriate authorities to ensure that the specific design of the Negotiating Body in question is optimised for its specific context and can be adjusted as circumstances require. Once these Bodies are established and have started carrying out their functions, the power will provide appropriate flexibility to update the regulations based on the learning which will arise from practical implementation. It is likely that certain operational aspects (for example, how often

the Body is to meet and what decision-making processes are to be adopted) may need to change as the Body's priorities and remit shift.

Justification for the procedure

798. The Government considers it appropriate that Parliament, the Senedd Cymru and the Scottish Parliament have the opportunity to debate and formally approve the regulations by way of an affirmative procedure, in order to ensure they have sufficient oversight and scrutiny. The Body's constitution and decision-making process are fundamental to the purpose and functioning of the Negotiating Body, so it is appropriate for legislators to have this oversight.

Clause 38(1): Matters within Negotiating Body's remit: Power to amend the Body's remit

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

799. The remit of a Negotiating Body includes all matters relating to remuneration and terms and conditions in respect of relevant social care workers or relevant social care workers of a specified description. This clause allows appropriate authorities to add specified matters relating to employment to the remit, and references to social care workers 'of a specified description' allow appropriate authorities to narrow a Body's remit to more limited categories of social care workers.

Justification for taking the power

800. The clause sets the scope for a Body's remit and in turn the matters and groups of workers which may be subject to negotiation. Taking this power ensures that a broad range of terms and conditions might be included in scope of the negotiations, which is suitable given the diversity of the sector particularly across the different jurisdictions. This will allow appropriate authorities to respond quickly to changing circumstances in a highly complex sector; it will also help to ensure that the agreements reached are compatible with broader policy goals.

801. Significant involvement from sector stakeholders is required to understand the variety of roles carried out by staff in the social care sector and further consultation is anticipated in order to scope out which roles could fall within the remit of each Body. This will allow appropriate authorities to respond quickly to changing circumstances in a highly complex sector; it will also help to ensure that the agreements reached are compatible with broader policy goals.

Justification for the procedure

802. The Government considers it appropriate that Parliament, the Senedd Cymru and the Scottish Parliament have the opportunity to debate and formally approve the regulations by way of an affirmative procedure. This ensures appropriate scrutiny concerning the remit of any new public bodies, which is necessary given the impact it will have on the sector as a whole. As such, legislatures should have the opportunity to debate which aspects of the sector are included in the remit.

Clause 40: Consideration of matters by Negotiating Body: Power to make regulations regarding the Body's negotiations

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

803. To enable appropriate authorities to make regulations regarding the consideration by a Negotiating Body of matters within its remit. The regulations can make provision about the matters that may or must be considered by a Body, including requiring a Body to consider matters referred to it by the appropriate authority. Appropriate authorities may also regulate to prescribe conditions that any agreement must meet, including in relation to funding, among others. Regulations may also require Negotiating Body members to provide the Negotiating Body with information for the purpose of considering a matter.

Justification for taking the power

804. The Government considers this power necessary to allow for sufficient flexibility on how a Body should consider matters within its remit and factors to which they may or must have regard, as well as allowing appropriate authorities to ensure that agreements respond to specific concerns or broader policy objectives. These concerns and policy objectives may be different in each jurisdiction and are also likely to evolve as the sector changes. As such, it is more appropriate that these matters are contained in secondary legislation, given that they might need to be amended more frequently.

805. The power to require information-sharing will also be crucial for enabling the smooth functioning of the Body's negotiation process. Since sectoral stakeholders will form part of the Body itself it is essential that the regulations are duly informed by what these parties consider will be a practical and effective negotiation process. The Government will consult with sectoral stakeholders in England regarding the design of these regulations to allow for a greater understanding of the consideration that could be carried out by the Adult Social Care Negotiating Body for England in relation to matters within its remit.

Justification for the procedure

806. The Government considers it appropriate that Parliament, Senedd Cymru and the Scottish Parliament have the opportunity to formally approve the regulations by way of an affirmative procedure, in order to have appropriate oversight of how any new Body will consider matters. This enhanced scrutiny is also appropriate as subsection (2)(d) of this clause allows regulations to impose duties on the members of a Negotiating Body in relation to information-sharing.

Clauses 41(1) and (2): Reconsideration by Negotiating Body: Power to make provision for the appropriate authority to refer agreements back to the Body for reconsideration

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

807. To enable appropriate authorities to establish a process whereby an agreement submitted by a Body may be referred back to the Body for reconsideration. The clause also includes a power to make provision about what happens when an agreement is referred back to the Body. This could require the Body to reconsider specific aspects of the agreement, including factors it must have regard to when doing so and conditions that any revised agreement needs to meet. The power also allows the appropriate authority to make provision for information-sharing obligations that members of a Body may be subject to for the purposes of enabling the Body to reconsider the agreement.

Justification for taking the power

808. The Government considers this power necessary as it enables regulations to set out the circumstances in which the appropriate authorities might send an agreement back for reconsideration and allows the appropriate authorities to design a process through which the Body can reconsider an agreement that has been submitted to the appropriate authorities for ratification. Similar to the power taken above at clause 40(1), since sectoral stakeholders will form part of the Body itself it is essential that the regulations are duly informed by what these parties consider will be a practical and effective negotiation process.

Justification for the procedure

809. The Government considers it appropriate that Parliament, Senedd Cymru and the Scottish Parliament have the opportunity to formally approve the regulations by way of an affirmative procedure, to have scrutiny of the process by which the appropriate authorities can refer agreements back to the Body for further reconsideration. This enhanced scrutiny is also appropriate as subsection (3)(d) of this clause allows regulations to impose duties on the members of the Negotiating Body in relation to information-sharing.

Clause 42(1): Failure to reach an agreement: Power to make provision about cases where the Body is unable to reach agreement, including dispute resolution

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

810. To enable appropriate authorities to make regulations setting out provision for situations where a Negotiating Body has failed to reach agreement. This may include methods for dispute resolution in such a situation, conferring functions on appropriate authorities or other persons specified in regulations, and requiring the

Body to act in accordance with decisions by the appropriate authority or other persons specified in regulations.

Justification for taking the power

811. The Government considers this power necessary in order to create flexibility to address disputes under a range of circumstances in which a Negotiating Body might fail to come to an agreement. Different provision might be required where there are disputes over procedural matters as compared to substantive matters (for example, mediation might be more appropriate where there is a disagreement about a minor procedural matter) and different approaches may be justified when a Body is first established compared to when its procedures are mature. Further, different bodies in different jurisdictions might be used as part of the dispute resolution process, and setting this out in regulations means that there is no need to amend primary legislation if, for example, another body becomes more suitable or there are name changes.

Justification for the procedure

812. The Government considers it appropriate for Parliament, the Senedd Cymru and the Scottish Parliament to have the opportunity to consider and scrutinise regulations making provision for where the Body is unable to reach agreement. This is so they can scrutinise the process by which the appropriate authority or other persons may be required to address disputes that arise during negotiations.

Clause 43(2): Power to ratify agreements: Power to give effect to the Negotiating Body's agreements

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Negative

Context and Purpose

813. This power enables the appropriate authority to make regulations ratifying an agreement reached by a Negotiating Body (in full or in part). Clause 44 explains that the effect of ratification is that the detail set out in the agreement will take effect as terms and conditions of the relevant social care worker's employment. If the agreement relates to remuneration, the social care worker will have to be paid in accordance with that agreement. Any existing terms or conditions in the social care worker's contract that are inconsistent with the terms of a ratified agreement will cease to have effect. Under clause 49(1), ratifying regulations made under this clause can have retrospective effect.

Justification for taking the power

814. Regulations under this power will give effect to each agreement, meaning there needs to be a power which can be exercised each time the negotiation process is concluded, and an appropriate agreement has been reached. The appropriate authority can also regulate to implement the agreement in part, which may be necessary depending on a range of factors appropriate at the time of ratifying the agreement, such as potential financial implications.

815. As noted above, the regulations ratifying the agreement can have retrospective effect. However, the formal retrospective effect of the regulations is limited under

clause 49(2). Clause 49(2) prevents the creation of retrospective regulations that could reduce remuneration for workers, or that alter the conditions of employment to the worker's detriment, in respect of a period wholly or partly before the day on which regulations under clause 43 are made. Formal retrospection is necessary to account for a scenario where, for example, the conclusion of negotiations has been delayed or there is a delay in parliamentary timetables which means that ratifying regulations were not made until after the agreement was due to take effect. There is a precedent for regulations having a similar retrospective effect in relation to teachers' pay and conditions of employment (section 123(3) of the Education Act 2002).

Justification for the procedure

816. The Government considers it appropriate for this power to be subject to the negative procedure as the agreement to be ratified will be proposed by the Negotiating Body and will have been the subject to detailed negotiation. Having the agreement be subject to full debate would be excessive given legislatures will have had scrutiny of the creation of the Body and its makeup of relevant representatives of the sector. Section 122 of the Education Act 2002 (in relation to the terms and conditions of teachers) is a similar power and is subject to the negative procedure, as was section 231(2)(a) of the Apprenticeships, Skills, Children and Learning Act 2009 (in relation to the ratification of SSSNB agreements).

Clauses 45(1) and (2): Powers of appropriate authority to deal with matters: Power to make provision in cases where the Negotiating Body is unable to reach an agreement

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

817. The purpose of this provision is to allow the appropriate authority to make provision about a matter where the Negotiating Body has failed to come to an agreement, and where any other specified conditions are met. Similar to ratifying regulations made under clause 43, terms and conditions set out in these regulations made under clause 45 will take effect as terms and conditions of the relevant social care worker's employment. If the regulations relate to remuneration, the social care worker will have to be paid in accordance with that regulation.

818. They can also have retrospective effect and are subject to the same limitations set out above (and as described at clause 49(2)). The circumstances in which the appropriate authority can decide to make provision about a matter that the Body has not been able to reach an agreement on will be addressed in regulations.

Justification for taking the power

819. These powers are necessary to allow the appropriate authority to take action where a Negotiating Body has failed to come to an agreement in circumstances that will be specified in legislation, such as when an urgent need arises to resolve a matter on which a Negotiating Body is unable to reach agreement. This power ensures that there is a potential solution to such impasses and should therefore

disincentivise parties from rejecting all offers, thereby smoothing the negotiating process.

Justification for the procedure

820. In contrast to the procedure outlined above in relation to clause 43, the regulations created by the appropriate authority under clause 45 will not necessarily have been the product of detailed negotiation by a Negotiating Body. As such, the Government considers it appropriate for legislatures to have oversight in circumstances where the appropriate authority imposes provision on the sector which has the power to override existing terms of employment contracts. The affirmative resolution procedure will ensure that legislatures have the opportunity to debate the matters.

Clause 46: Guidance and codes of practice: Power to make provision about issuing codes of practice and guidance

Power conferred on: Secretary of State, the Scottish Ministers and the Welsh Ministers
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

821. This provision allows the appropriate authority to make regulations about the issuing of guidance and codes of practice in relation to an agreement submitted under clause 40 or 41 or regulations made under clause 45 as well as to make provision about the consequences of non-compliance with either guidance or codes of practice.

Justification for taking the power

822. These powers allow for sufficient flexibility for the appropriate authority to create codes of practice or guidance related to agreements submitted by a Negotiating Body in accordance with regulations under clause 40 or 41, or regulations made under clause 45. This may cover elements that are not typically included in employment contracts, for instance, in relation to the development of career opportunities within the sector. Such matters might not be imposed into contracts but should be encouraged nonetheless via codes of practice and guidance, thereby supporting the inherent objective behind establishing a Negotiating Body – to improve the overall working conditions of those in the sector (not limited to addressing remuneration).

823. There are also a range of bodies within the social care system beyond workers and their employers on whose functions any negotiating body's agreements will have a bearing and where there may be a need for them to take account of regulations made by the appropriate authority in this area. The power to impose specific duties on bodies that can be set out in secondary legislation provides flexibility to ensure that these duties apply even where there are changes to bodies within the social care sector.

Justification for the procedure

824. The Government considers it appropriate that Parliament, Senedd Cymru and the Scottish Parliament have the opportunity to appropriately scrutinise instances where additional guidance and codes of practice may be placed on a statutory

footing, especially as breaches of these codes may give rise to consequences for employers. The affirmative resolution procedure will ensure they have the opportunity to debate the duties that the regulations impose on persons in relation to provisions of these codes and guidance and importantly, the consequences that may follow, including in relation to ET awards, if a person fails to comply with those duties.

Clause 47: Duty of employers to keep records: Power to impose record keeping requirements on employers

Power conferred on: Secretary of State
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

825. This clause enables the Secretary of State to make regulations imposing record-keeping requirements on relevant employers. The regulations will specify the records that must be kept, how long they must be kept and any other requirements in relation to how they must be kept. Under subsection (2) the regulations may provide for certain sections of the National Minimum Wage Act 1998 to be applied, with or without modifications, to the records an employer is required to keep under subsection (1). The sections of the National Minimum Wage Act 1998 include provision for workers' rights to access records, for complaints to be made to an ET where an employer fails to allow that access and extension of time limits to facilitate early conciliation. The regulations can also make provision to restrict the contracting-out of these obligations.

Justification for taking the power

826. While the Government notes the nature of the power and the imposition of additional duties on employers, it considers it necessary and appropriate for workers to have access to records to ensure enforcement of ratified agreements reached by the Negotiating Bodies, and regulations made under clause 45. Including this power ensures that individual workers can access relevant records that will enable them to more effectively enforce their contractual rights.

827. This power is appropriate as it allows for sufficient flexibility regarding record keeping obligations, which may need to be amended and supplemented depending on the details of the agreement reached and which terms in any agreement are most apt for record-keeping duties to apply. Precedent exists for setting out record-keeping requirements in secondary legislation, rather than through primary legislation, for example under section 9 of the National Minimum Wage Act 1998.

Justification for the procedure

828. The Government considers it appropriate that Parliament has the opportunity to appropriately scrutinise instances where the Secretary of State has imposed additional record keeping requirements on employers for the purposes of ensuring the provisions contained in regulations under clause 45 and agreements ratified under clause 43 are appropriately enforced.

Clause 51: Status of agreements, etc: Power to provide that agreements reached by the Negotiating Body are not collective agreements under the Trade Union and Labour Relations (Consolidation) Act 1992

Power conferred on: Secretary of State
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

829. This power enables the Secretary of State to make regulations to provide that the negotiations conducted by the Negotiating Body and the agreement it reaches are not to be regarded as collective bargaining or a collective agreement under the TULRCA.

Justification for taking the power

830. The Government considers this power necessary to ensure that the negotiations conducted by the Negotiating Body and the agreement it reaches are not to be regarded as collective bargaining or a collective agreement under TULRCA. The agreement reached by the Negotiating Body will be put on a legislative footing through ratifying regulations made by the appropriate authority, the effect of which will be that provisions in an agreement take effect as terms and conditions of employment contracts, and as such it would not be appropriate for the agreement to also be subject to the provisions of TULRCA. This clause will ensure that it is not necessary to take a wide power to make any further legislative provision to deal with any conflicting interaction with TULRCA.

Justification for the procedure

831. The Government considers it appropriate for Parliament to have the opportunity to consider and scrutinise regulations making provision that the negotiations of, and the agreements reached by, the Negotiating Bodies should not be regarded as collective bargaining or a collective agreement under TULRCA.

Clause 53: Schedule 5 – Paragraph 9 – New section 4A Seafarers' Wages Act 2023 – Power to specify remuneration regulations

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

832. This power enables the Secretary of State to make regulations specifying remuneration requirements that operators of relevant services of a specified description must declare adherence to. Statutory declarations are the mechanism through which adherence to the requirements will be enforced (and are, subject to some minor details, set out on the face of the Bill at new sections 4B and 4C). The new remuneration requirements may relate to work outside of the United Kingdom territorial waters, and may relate to work on all or only part of the service.

833. Remuneration requirements could be supplementary to or in replacement of the existing requirement under the Seafarers' Wages Act 2023 for operators to declare that they pay non-qualifying seafarers a national minimum wage equivalent (see new section 4A(6)).

834. This power could, for example, be used to specify in regulations that relevant services going between the United Kingdom and another specified country must pay their seafarers a minimum specified rate per hour. Alternatively, it could specify that certain services must pay their seafarers a minimum specified rate per hour for at least half of their time working on the service.

Justification for taking the power

835. The maximum scope for "relevant services" (see new Part 1 – paragraphs 2 and 3 of Schedule 5 to the Bill and paragraph 9 of Schedule 5, new section 4B(1)) potentially in scope of remuneration regulations is already set out on the face of the clauses. The maximum scope is the same as that originally contained in the Seafarers' Wages Act 2023. This scope may be changed by regulations although only to increase the number of visits required in order for a service to be in scope (which would reduce the number of services in scope). Remuneration regulations would therefore be limited to increasing the scope requirement (if applicable) specifying which "relevant services" (subject to that maximum) they would apply to, which work on those services they would apply to and the relevant remuneration rate.

836. The Government considers this power necessary to ensure sufficient flexibility in specifying remuneration requirements, so that remuneration policy for international ferry services frequently entering the United Kingdom can align with international agreements regarding pay for seafarers on those services. For example, where a neighbouring country shares services with the United Kingdom and agrees that a minimum wage for seafarers on those services is appropriate, remuneration regulations can reflect those agreements. It is also appropriate that there be opportunity for consultation with relevant stakeholders when such requirements are set.

Justification for the procedure

837. The overarching policy (empowering harbour authorities to request remuneration declarations) is set out on the face of the Bill at new sections 4B and 4C. The existing enforcement provisions in the Seafarers' Wages 2023 will apply in relation to remuneration requirements imposed by the regulations. The negative procedure is therefore considered appropriate for the remuneration regulations power, which enables specification of the details described above. The negative procedure is in line with the procedure used for regulations made under the original Seafarers' Wages Act 2023.

Clause 53: Schedule 5 – Paragraph 9 – New section 4B(1)(b) Seafarers' Wages Act 2023 – Power to specify the number of occasions a service must call at a UK port for a harbour authority to request a remuneration declaration

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

838. New Section 4B makes it a requirement for a harbour authority to request a declaration (called a remuneration declaration) from an operator of a service where it has reasonable grounds to believe that a ship providing a service which safe working regulations apply will enter, or has entered its harbour on at least the number of occasions specified in subsection (1) during a relevant year.

839. The number of occasions specified in subsection (1) is 120 or such higher number of occasions as specified in remuneration declarations.

Justification for taking the power

840. As with new section 4F(1)(b), the regulation making power in subsection (1)(b) will provide flexibility to change the services in scope by increasing the number of visits required in order for a service to be in scope.

Justification for the procedure

841. Whilst regulations under subsection (1)(b) can change the services in scope, they can only do so any reference to the number of visits required in order for a service to be in scope, and by increasing this number. Given that this power is subject to these limitations, the exercise of the power is unlikely to be controversial or of particular interest to Parliament and therefore the negative procedure is considered appropriate.

Clause 53: Schedule 5 – Paragraph 9 – New section 4B(2) Seafarers' Wages Act 2023 – Power to specify the time period within which a harbour authority must request a renumeration declaration.

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

842. New Section 4B makes it a requirement for a harbour authority to request a declaration (known as a remuneration declaration) from an operator where it has reasonable grounds to believe that a ship providing a service to which remuneration regulations apply will enter, or has entered its harbour on at least 120 occasions during a relevant year (or such higher number of occasions as specified in remuneration regulations, per subsection (1)(b)). The harbour authority must request a remuneration declaration within such period as is determined by regulations under subsection (2).

Justification for taking the power

843. The substantive duty for harbour authorities to request remuneration declarations is on the face of the Bill. The subsection (2) power is limited in scope to providing for the procedural detail outlined above. It is considered appropriate for this to be left to secondary legislation. The regulation-making power provides flexibility to specify the relevant time period and to make changes to it if it becomes clear that this is necessary once the Bill has come into force and the policy has been operational for a time.

Justification for the procedure

844. Regulations under this power will simply set out the procedural timing requirement regarding the period within which harbour authorities must comply with their substantive duty to request remuneration declarations under the Bill. Such procedural detail is unlikely to be controversial or of particular interest to Parliament and therefore the negative procedure is considered appropriate.

Clause 53: Schedule 5 – Paragraph 9 – New section 4D Seafarers' Wages Act 2023: Movement of existing powers to specify the national minimum wage equivalent rate

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

845. New Section 4D contains powers in relation to specifying the national minimum wage equivalent rate.

Justification for taking the power

These are not new powers but are already contained within the Seafarers' Wages Act 2023 (see sections 4(6) - (9)). They have simply been moved to new section 4D to fit with the other amendments made by Schedule 5 to the Seafarers' Wages Act 2023.

Justification for the procedure

These are not new powers and are already contained within the Seafarers' Wages Act 2023 (see sections 4(6) - (9)), and they are subject to the negative procedure.

Clause 53: Schedule 5 – Paragraph 10 – New section 4E Seafarers' Wages Act 2023: Power to specify safe working requirements

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

846. This power enables the Secretary of State to make regulations specifying safe working requirements that operators of relevant services of a specified description must declare adherence to. Statutory declarations are the mechanism through which adherence to the requirements will be enforced (and are, subject to some minor details, set out on the face of the Bill at New Sections 4F and 4G).

847. The safe working requirements may relate to work outside of the United Kingdom territorial waters (see new section 4G(7)). The requirements set out in regulations must be of the kind contemplated by subsections (2)-(5), namely; maximum periods of work and minimum periods of rest, management of seafarer fatigue through fatigue management plans and training relating to safety.

Justification for taking the power

848. The maximum scope for "relevant services" (see new Part 1 – paragraphs 2 and 3 of Schedule 5 to the Bill and paragraph 10 of Schedule 5, new section 4F(1)) potentially in scope of the safe working regulations is already set out on the face of the clauses. The maximum scope is the same as that originally contained in the Seafarers' Wages Act 2023. Safe working regulations would therefore be limited to specifying which "relevant services" (subject to that maximum) they would apply to and the safe working requirements that would apply to them.

849. The Government considers this power necessary to ensure that safe working requirements can be amended and updated in accordance with international

recommendations and new evidence as to fatigue risks. It is also necessary to ensure adequate opportunity for consultation with relevant stakeholders so that requirements are workable. Changes to requirements may be necessary as technology and working environments develop.

Justification for the procedure

850. The overarching policy (empowering harbour authorities to request safe working declarations) is set out on the face of the Bill at new sections 4F and 4G. The negative procedure is considered appropriate for specifying the safe working requirements themselves, as this provides flexibility to specify and update the detail of these requirements, subject to the constraints set out in the clauses, in line with best practice and/or international standards. The negative procedure is in line with the procedure used for regulations made under the original Seafarers' Wages Act 2023.

Clause 53: Schedule 5 – Paragraph 10 – New section 4F(1)(b) Seafarers' Wages Act 2023 – Power to specify the number of occasions a service must call at a UK port for a harbour authority to request a safe working declaration

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

851. New section 4F makes it a requirement for a harbour authority to request a declaration (called a safe working declaration) from an operator of a service where it has reasonable grounds to believe that a ship providing a service to which safe working regulations apply will enter, or has entered its harbour on the number of 120 occasions during a relevant year specified in subsection (1).The number of occasions specified in subsection (1) is 120 or such higher number of occasions as specified in safe working regulations.

Justification for taking the power

852. As with new section 4B(1), the regulation making power in subsection (1) will provide flexibility to change the services in scope by increasing the number of visits required in order for a service to be in scope.

Justification for the procedure

853. Whilst regulations under subsection (1) can change the services in scope, they can only do so by reference to the number of visits required in order for a service to be in scope, and by increasing this number. Given that the power is subject to these limitations, the exercise of the power is unlikely to be controversial or of particular interest to Parliament and therefore the negative procedure is considered appropriate.

Clause 53: Schedule 5 – Paragraph 10 – New section 4F(2) Seafarers' Wages Act 2023 – Power to specify the time period within which a harbour authority must request a safe working declaration

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

854. New Section 4F makes it a requirement for a harbour authority to request a declaration (known as a safe working declaration) from an operator where it has reasonable grounds to believe that a ship providing a service to which safe working regulations apply will enter, or has entered its harbour on at least 120 occasions during a relevant year (or such higher number of occasions as specified in safe working regulations, per subsection (1)(b)). The harbour authority must request a safe working declaration within such period as is determined by regulations under subsection (2).

855. New section 4F provides that the harbour authority must request a safe working declaration from the operator of a service in scope, within a period which is to be set out in regulations.

Justification for taking the power

856. As with new section 4B(2), this regulation-making power in subsection (2) will provide flexibility to specify the relevant time period and to make changes to it if it becomes clear that this is necessary once the Bill has come into force and the policy has been operational for a time.

Justification for the procedure

857. Regulations under the power in subsection (2) will simply set out the procedural timing requirement regarding the period within which harbour authorities must comply with their substantive duty to request safe working declarations under the Bill. Such procedural detail is unlikely to be controversial or of particular interest to Parliament and therefore the negative procedure is considered appropriate.

Clause 53: Schedule 5 – Paragraph 21 – New section 16A Seafarers' Wages Act 2023: Power to provide for the form and manner and time period for declarations

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

858. This power enables the Secretary of State to make provision for the form and manner and time period for provision of declarations under the Seafarers' (Wages and Working Conditions) Act 2023 (equivalence, remuneration and safe working declarations). It also enables for the combining of declarations into one form, but provides that this would not then require an operator to provide a declaration which it has not been requested to provide by the harbour authority.

Justification for taking the power

859. This provision is slightly amended from what was formerly section 3(5) of the Seafarers' Wages Act 2023 to reflect the fact that the Act will now allow for more than one type of declaration. The form of declarations and the manner in which they are provided are procedural matters that will include administrative detail on what should appear on the face of the declaration and how and when this should be provided to a harbour authority.

Justification for the procedure

860. The power to make regulations under this clause is subject to the negative procedure. This is considered appropriate as such regulations will simply set out

the procedural and administrative detail specified above. The existing, related power in section 3(5) of the Seafarers' Wages Act 2023 is also subject to the negative procedure.

Clause 54: International agreements relating to maritime employment – New section 84A(1) of the Merchant Shipping Act 1995: Power to make regulations to give effect in UK law to the Maritime Labour Convention and the Work in Fishing Convention

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

861. This power enables the Secretary of State to make regulations to give effect in UK law to the Maritime Labour Convention and the Work in Fishing Convention. New section 84B provides details of what such regulations may do in support of this purpose.

Justification for taking the power

862. The power to make regulations to implement the conventions mentioned above was previously contained within section 2(2) of the European Communities Act 1972. With the repeal of that Act following the UK's exit from the European Union, the Government considers this power necessary to ensure that is able to continue to implement revisions to the conventions or to make revisions to how existing provisions have been implemented.

Justification for the procedure

863. The power to make regulations under this clause is subject to the negative procedure. This is considered appropriate as the scope of the power is delineated by the conventions to which it refers and those conventions have already been ratified and by the UK and effect has already been given to them in UK law.

Clause 54: International agreements relating to maritime employment – New section 84A(2) - (4) of the Merchant Shipping Act 1995: Power to make regulations to give effect in UK law to an international agreement that has been ratified by the United Kingdom, or to amendments to such an agreement, so far as the agreement relates to maritime employment.

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative the first time used in respect of a particular agreement, subsequent use in respect of that agreement will be subject to the negative procedure

Context and Purpose

864. This power enables the Secretary of State to make regulations to give effect in UK law to an international agreement that has been ratified by the United Kingdom, or to amendments to such an agreement, so far as the agreement relates to maritime employment. New section 84(4) provides that a provision relates to maritime employment if it relates to the terms and conditions of employment or engagement, or working conditions, of masters or seamen.

865. New section 84B provides details of what such regulations may do in support of this purpose, including by way of enforcement. Section 84B provides that regulations may specify that a contravention of the regulations is a criminal offence; the punishments that may be imposed under the regulations include imprisonment, but a custodial sentence can only be imposed on indictment and is subject to a maximum term of two years. Section 84B also provides a power to detain a ship in respect of which a contravention of the regulations is suspected. In addition to enforcement matters, section 84B also provides that regulations can make provision in relation to the keeping of documents and records and the issuing of certificates, and can provide for the granting of exemptions.

Justification for taking the power

866. The power in section 2(2) of the European Communities Act 1972 was previously used to implement maritime conventions. With the repeal of that Act following the UK's exit from the European Union, the Government considers this power necessary to ensure that is able to continue to implement such conventions, or revisions to them, the full details of which cannot be known at the present time.

Justification for the procedure

867. The power to make regulations under this clause is subject to the affirmative procedure the first time it is used in respect of a particular agreement. Subsequent uses of the power in respect of that agreement are subject to the negative procedure. This approach is considered appropriate as it provides Parliament with a greater degree of scrutiny the first time regulations are made in respect of a particular agreement. The negative procedure is considered appropriate for subsequent uses of the power as Parliament will already have had an opportunity to consider the scope of the agreement and subsequent regulations are anticipated to be narrower in scope than the first such regulations.

Part 4 – Trade Unions and Industrial Action, Etc

Clause 55(2): Right to statement of trade union rights, New section 136A(2)(b), Trade Union and Labour Relations (Consolidation) Act 1992 (Right to statement of trade union rights): Power to require that the statement to inform workers of their right to join a trade union is also given to the worker at other prescribed times

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

868. This clause introduces a new duty for employers to inform new workers of their right to join a trade union by providing a written statement containing such information, at the same time as the employer gives the worker a statement under section 1 of the ERA (statement of employment particulars). The power allows the Secretary of State to require that the statement is also given to the worker at other prescribed times. The purpose of the power is to ensure that workers are reminded of their right to join a trade union and the benefits that a union can offer.

Justification for taking the power

869. This will enable the frequency with which workers are to be reminded of their right to join a trade union to be provided in secondary legislation, and so it can be updated if necessary. It will also allow Government to amend the frequency at which updates to workers are provided, depending on emerging evidence of what is the most suitable time period in practice.

Justification for the procedure

870. The Government considers that the negative procedure is appropriate given the limited scope of the power, and that the provision is technical in nature.

Clause 55(2): Right to statement of trade union rights, New section 136A(3)(a)(b), and (c), and (4) and (6) Trade Union and Labour Relations (Consolidation) Act 1992 (Right to statement of trade union rights): Power to make provision as to what information the statement of trade union right should include and what form it should take

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

871. This power in subsection (3) allows the Secretary of State to make provision in relation to the statement that informs the worker of their right to join a trade union; what information the statement is to include, the form in which it is to be provided and the manner. Subsection (4) provides that the information prescribed under the power in subsection (3) may include that the worker has rights conferred by Part 3 of the 1992 Act, which covers rights in relation to trade union membership and activities. Subsection (6) has the effect that the powers under section 136A include the power to make different provision for different purposes.

Justification for taking the power

872. The power under section 136A cannot amend primary legislation, however the power enables the procedural detail in relation to the statement, including the detail of the content, to be provided in secondary legislation, which will also enable it to be updated as appropriate. The right to join a trade union is not a matter which is provided for in a single consolidated legislative provision, but rather across a range of different rights and protections, mostly in TULRCA. The way that these are presented to individual workers in a straightforward and informative way is properly a matter for detailed consideration and secondary legislation, which will be made without the substance of the obligation on employers being significantly affected. It is also possible that changes to the content and procedure for the statement might be required in future, to take account of changes in the law and in practical matters such as the most appropriate means of communication. Taking a secondary power enables the Government to respond quickly and flexibly to such changes.

Justification for the procedure

873. The Government considers that this is appropriate due to the technical nature of the matters that fall within the scope of the power. Section 7 of the ERA that the Secretary of State may provide for further matters to be included within the particulars provided to workers about their terms and conditions under section 1 ERA, and may include such provisions amending that section as appear to the Secretary of State to be expedient. Orders made under section 7 are subject to the negative procedure. A similar approach to procedure is taken here. The negative procedure is justified because the secondary legislation cannot affect the fundamental nature of the employer's obligation, which is limited to a relatively simple provision of information to its staff.

Clause 55(5) Right to statement of trade union rights, section 286 Trade Union and Labour Relations (Consolidation) Act 1992: Extension of existing power to exempt certain classes of employees from the requirements of section 136A without the need for further primary legislation

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

874. Section 286 of TULRCA provides the Secretary of State with a power to make regulations to provide that certain provisions of the Act either do not apply to certain persons or employment classes as may be prescribed or do apply to those classes which are prescribed.

875. Clause 55(5) amends section 286 TULRCA to include the new section 136A (right to statement of trade union rights) within the list of provisions that the Secretary of State may amend through secondary legislation. This means that regulations can be made to vary, limit or exempt certain classes of employees from the requirements of section 136A without the need for further primary legislation.

876. Section 286 already grants the Secretary of State Henry VIII powers to make regulations affecting certain aspects of trade union rights, redundancy procedures and industrial actions. By adding section 136A to this list, clause 55(5) ensures that future adjustments to the new employer duty can be made without requiring

further primary legislation, and that there can be a flexible and more responsive approach to the employment rights.

Justification for taking the Power

877. Extending this power is necessary to ensure that the new duty remains workable and proportionate. The specific details of how and when employers must inform employees of their right to join a trade union will be set out in secondary legislation, following consultation. This approach will give the Government the flexibility in applying the duty to inform workers of their right to join a trade union, and to allow exemptions where necessary, such as for national roles, or in response to practical economic or legal challenges, all the while maintaining parliamentary oversight.

Justification for the Procedure

878. The Government considers that this is the appropriate procedure given the importance of the rights involved. The draft affirmative resolution procedure will ensure that any proposed change is subject to the scrutiny, debate and approval of both Houses of Parliament before it comes into effect.

Clause 56: Right of trade unions to access workplaces, New section 70ZB(3)(a) to (c), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe terms covering aspects of trade unions' requests to access workplaces

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

879. The overall policy objective is to make it easier for unions to gain physical entry to workplaces, and communicate with workers other than by means of physical entry, to assist individual union members and to help unions to recruit and organise. This could be with a view to the eventual aim of securing a collective bargaining agreement with the employer. This framework is enforced by the Central Arbitration Committee (CAC).

880. This power enables the Secretary of State to prescribe terms covering the following aspects of the access request made by the trade union to the employer:
- the form that the trade union’s request for access must take;
- the information that such a notification should include;
- the manner in which the notification is sent.

Justification for taking the power

881. The level of detail being provided makes secondary legislation appropriate and will also enable the technical aspects of the access request to be updated as necessary. There will be a consultation on the form the trade union’s request for access must take, the information that should be included and the manner in which the notification is to be sent.

Justification for the procedure

882. The Government considers that the negative procedure is appropriate due to the technical level of detail that may be set out in the regulations and is consistent with existing provisions.

Clause 56: Right of trade unions to access workplaces, New section 70ZB(5)(a) to (c), Trade Union and Labour Relations (Consolidation) Act 19922: Power to prescribe terms covering aspects of trade unions' requests to access workplaces

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

883. This power enables the Secretary of State to prescribe terms covering the following aspects of the response notice provided by the employer to the trade union in response to the access request made by the trade union:
    - the form that the response notice must take;
    - the information that the response should include;
    - the manner in which the response is sent.

Justification for taking the power

884. The level of detail being provided in secondary legislation is at the level of administrative detail more appropriate for delegated legislation. This will also enable the technical aspects of the access request to be updated as necessary following consultation, and to be adjusted in the future.

Justification for the procedure

885. The Government considers that the negative procedure is appropriate due to the technical level of detail that may be set out in the regulations and is consistent with existing provisions.

Clause 56: Right of trade unions to access workplaces, New section 70ZC(a), Trade Union and Labour Relations (Consolidation) Act 1992 – Response period and negotiation period: Power to set the time period for responding to a trade unions' requests to access workplaces

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

886. This power enables the Secretary of State to set in regulations the time period, starting on the day on which the access request was given by the trade union, by which the employer should respond to the trade union's access request.

Justification for taking the power

887. The level of detail being provided in secondary legislation is appropriate and will enable the relevant periods to be adjusted if necessary in the future, but with appropriate Parliamentary oversight. The Government will consult on the detail.

Justification for the procedure

888. The Government considers that the affirmative procedure is appropriate given the importance of the length of the period to the overall process. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate that important issue.

Clause 56: Right of trade unions to access workplaces, New section 70ZC(b), Trade Union and Labour Relations (Consolidation) Act 1992 – Response period and negotiation period: Power to prescribe the time period, starting on the day the response notice was given, by which the employer and trade union should complete negotiations on the terms of access

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

889. Section 70ZC gives a power to prescribe the time period, starting on the day the response notice was given, by which the employer and trade union should complete negotiations on the terms of access.

Justification for taking the power

890. The level of detail being provided in secondary legislation is at the level of administrative detail more appropriate for delegated legislation. It will enable the relevant periods to be adjusted if necessary, in the future but with appropriate Parliamentary oversight.

Justification for the procedure

891. The Government considers that this is the appropriate given the importance of the length of the period to the overall process. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate that important issue.

Clause 56: Right of trade unions to access workplaces, New section 70ZD(1)(d), Trade Union and Labour Relations (Consolidation) Act 1992: Power to provide the form and manner for notification of the CAC of the terms of the access agreement

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

892. An access agreement is entered into if various conditions are satisfied, including that the Parties jointly notify the CAC of the terms of the access agreement that have been agreed. The power provides that the Secretary of State can provide the form and manner for that notification in regulations.

Justification for taking the power

893. The level of detail being provided in secondary legislation is at the level of administrative detail more appropriate for delegated legislation. It will enable the form and manner for that notification to be adjusted if necessary in the future.

Justification for the procedure

894. The Government considers that the negative procedure is appropriate due to the technical level of detail that may be set out in the regulations and is consistent with existing provisions.

Clause 56: Right of trade unions to access workplaces, New section 70ZE(5)(b), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe the time period, starting on the day the access request was given, after which an application for a determination by the CAC cannot be made

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

895. Section 70ZE gives a power to prescribe the time period, starting on the day the access request was given, after which an application for a determination by the CAC cannot be made.

Justification for taking the power

896. It will enable the relevant periods to be adjusted if necessary, in the future but with appropriate Parliamentary oversight.

Justification for the procedure

897. The Government considers that this is the appropriate procedure given the importance of the length of the period to the overall process. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate that important issue.

Clause 56: Right of trade unions to access workplaces, New section 70ZF(3), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe terms of an access agreement that the CAC must consider as not unreasonably interfering with the employer's business; must consider as being reasonable steps an employer should take to facilitate the access; and must consider as being terms that are reasonable for the union to comply with

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

898. Where the employer has not provided a response in time, or terms of access have not been agreed before the end of the negotiation period, an application can be made for the Central Arbitration Committee to make a determination as to whether the union is to have access or not. The power in section 70ZF(3) enables the Secretary of State to prescribe terms of an access agreement that the CAC must consider as not unreasonably interfering with the employer's business; must consider as being reasonable steps an employer should take to facilitate the access; and must consider as being terms that are reasonable for the union to comply with.

899. The Chair of the Central Arbitration Committee decides whether a determination by the committee under section 70ZE as to whether officials are or are not to have access is made by a single member, or a tripartite panel. When making that allocation decision the Chair must consider whether any of the proposed terms are prescribed under section 70ZF(3), and if so whether that reduces the

complexity of the case, with a view to deciding that a single member can make determinations in less complex cases.

Justification for taking the power

900. The level of detail being provided makes secondary legislation appropriate and enables the terms to be updated as appropriate. These are largely practical matters and the legislation is likely to address what are reasonable expectations at various stages in the access process and across various different types of employer, business, workplace and other circumstances. It is also possible that adjustments will need to be made in the future, in the light of experience of how effectively access arrangements are working for unions and employers.

Justification for the procedure

901. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and the affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 56: Right of trade unions to access workplaces, New section 70ZF(4) and (5), Trade Union and Labour Relations (Consolidation) Act 1992: Power to prescribe the circumstances where it is to be regarded as reasonable for the CAC to make a determination that the union should not have access, or circumstances in which the CAC must make a determination refusing access

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

902. Under subsection (4)(a) the Secretary of State may prescribe the circumstances where it is to be regarded as reasonable for the CAC to make a determination that the union should not have access, or (under subsection 4(b)) circumstances in which the CAC must make a determination refusing access. A non-exhaustive list of matters that may be included within those circumstances is provided in subsection (5).

Justification for taking the power

903. The power enables the Secretary of State to exclude access, or set circumstances in which it would be reasonable for the CAC to exclude access, by reference to various matters, for example the number of workers employed by the employer, or the nature of the workplace (e.g. partially residential) in question.

904. The Government will consult on these matters which, given the breadth of the right of access and the great variety of size and nature of employers, are likely to need to be addressed with a level of detail and flexibility which would be difficult in primary legislation. Such consultation is important to setting this policy, hence the need for the power. Also, given the novelty and sensitivity of the issue of union access, the Government may need to respond quickly to amend the law to adapt to new circumstances where access has some unexpected consequence for a class of employers.

905. Given that the provision is of its nature very detailed, the Government considers that it is within the normal expectations of what is properly for primary and what is for secondary legislation.

Justification for the procedure

906. The Government considers that this is appropriate due to the level of detail and the nature of the issue. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 56: Right of trade unions to access workplaces, New section 70ZF(6), Trade Union and Labour Relations (Consolidation) Act 1992: Power to make regulations setting out matters which the CAC must have regard to, when considering an application for a determination, where an access request has not been agreed within the relevant timeframes

Power conferred on: Secretary of state
Power exercised by: regulations made by statutory instrument
Parliamentary procedure: Draft Affirmative

Context and Purpose

907. This power allows the Secretary of State to make regulations setting out matters which the CAC must have regard to, when considering an application for a determination, where an access request has not been agreed within the relevant timeframes.

Justification for taking the power:

908. This is to enable the Secretary of State to direct the CAC to have regard to specific matters when considering an application for a determination regarding access. This is to complement the power under subsection (4)(a) and (b), as there may be matters to which Secretary of State wants to ensure the CAC have regard to, rather than making provision for circumstances in which it is to be regarded as reasonable for the CAC to refuse access, or that the CAC must refuse access.

Justification for the procedure:

909. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and the affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 56: Right of trade unions to access workplaces, New section 70ZG(5)(a), Trade Union and Labour Relations (Consolidation) Act 1992: Power to provide the form and manner of notification to the CAC of variation or revocation of access agreements

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative

Context and Purpose

910. Section 70ZG provides that a variation or revocation only take effect if the Parties jointly notify the CAC. This power enables the form and manner for that notification to be provided for in secondary legislation.

Justification for taking the power.

911. The level of detail being provided in secondary legislation is at the level of administrative detail more appropriate for delegated legislation. It will enable the form and manner for that notification to be adjusted, if necessary, in the future. This power is very similar to the power under section 70ZD(1)(d) outlined above.

Justification for the procedure

912. The Government considers that the negative procedure is appropriate due to the technical level of detail that may be set out in the regulations and is consistent with existing provisions. This power is very similar to the power under section 70ZD(1)(d) outlined above, which is subject to the negative procedure.

Clause 56: Right of trade unions to access workplaces, New section 70ZJ, Trade Union and Labour Relations (Consolidation) Act 1992 – Powers to make provision about amounts payable under Section 70ZI

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

913. In the event of a successful complaint to the Central Arbitration Committee (CAC), the CAC may order a person to pay an amount to it. This clause provides a power to prescribe the maximum and minimum amount that the CAC can order to be paid as a penalty.

914. The power to set a maximum and minimum amount includes the power to set a fixed amount or to determine those amounts by reference to one or more prescribed factors (with further detail as to what those factors may be provided at subsection (3)). The power to set minimum and/or maximum amounts also includes the power to make provision as to the highest or lowest of two or more prescribed amounts, which can be fixed amounts or by reference to one or more prescribed factors (again with the further detail as to what those factors may be provided at subsection (3)).

915. The factors that may be prescribed include the annual turnover of the liable party, the total number of workers employed by the liable party or the number of members of a liable trade union.

Justification for taking the power

916. The level of detail being provided makes secondary legislation appropriate and will be consulted upon. This enables the level of the maximum and minimum penalty to be provided for and for those levels to be adjusted as necessary depending on the evidence as to what is likely to be effective in promoting adherence to prescribed access agreements in the light of experience. Furthermore, the legislation is likely to need to take into account the varying size and nature of employers and unions which may be liable, as well as the nature of the breach and the previous behaviour of the liable party: details which are more suitable for secondary legislation.

Justification for the procedure

917. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and to ensure that the Parliamentary approach is consistent with the existing regulations which give effect to similar existing provisions. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 56: Right of trade unions to access workplaces, New section 70ZJ(4) Trade Union and Labour Relations (Consolidation) Act 1992 – Enforcement of access agreements: subsequent complaint

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft Affirmative

Context and Purpose

918. Where a subsequent complaint made to the Central Arbitration Committee (CAC) is declared to be well-founded, the CAC may order the liable party to pay an amount to the CAC.

919. This clause provides a power for Secretary of State to prescribe the matters to which the Central Arbitration Committee must have regard to in considering what amount is payable.

Justification for taking the power

920. The level of detail being provided in secondary legislation is appropriate and will be consulted upon. This enables the factors that the CAC should have regard to when determining the amount payable as a penalty to be provided for and for that to be adjusted as necessary depending on the evidence as to what is most likely to be effective in promoting adherence to prescribed access agreements.

Justification for the procedure

921. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and to ensure that the Parliamentary approach is consistent with the existing regulations which give effect to similar existing provisions. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

<u>Clause 57: Trade union recognition - Schedule 6: Trade union recognition: Conditions for trade union recognition, Schedule A1 paragraph 171B(2)(3) Trade Union and Labour Relations (Consolidation) Act 1992: Power to amend the required percentage for trade union membership of the proposed bargaining unit (Henry VIII)</u>

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

<u>Context and Purpose</u>

922. Paragraph 58 of Schedule 6 (Trade union recognition) inserts a new paragraph 171B after paragraph 171A in Part 9, Schedule A1 of the TULRCA ('the 1992 Act'). Paragraph 171B(1) sets the required percentage for trade union membership of the proposed bargaining unit at 10% (as it is currently) for the union to make an application for statutory trade union recognition to the Central Arbitration Committee (CAC).

923. The power in sub-paragraph 2 gives the Secretary of State the power to amend the required percentage via Regulations, subject to the percentage being no greater than 10% and no less than 2%. Subparagraphs 3(b) and (c) provide that the power in sub-paragraph 2 may include supplementary, incidental, saving or transitional provision, including provision amending the Schedule; and may make different provision for different cases.

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

924. This power is proposed to give effect to the policy intention to consider lowering the acceptance threshold for trade union membership (to no less than 2%).
925. Allowing for the percentage to be determined in regulations gives the ability to be flexible in the face of changing industrial relations and ensure this remains workable for the foreseeable future. The intention is to consider exercising this power once the Act is in force, and to consult prior to affirmative Regulations being laid before Parliament.

<u>Justification for the procedure</u>

926. The power is a narrowly defined power and will only be used to change the 'required percentage' that a union needs in the bargaining unit for its statutory recognition claim to be accepted by the CAC. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the final proposal.

<u>Clause 62(7): Facilities for equality representatives, section 173(3) Trade Union and Labour Relations (Consolidation) Act 1992 1992: Power to update and change the purposes for which an employee can take time off as a union equality representative</u>

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft Affirmative

<u>Context and Purpose</u>

927. This clause inserts new section 168B into TULRCA providing for time off for union equality representatives.

928. Section 173 of TULRCA includes a power for the Secretary of State to amend section 168A of TULRCA (time off for union learning representatives) for the purposes of updating and changing the purposes for which an employee can take time off under that section. Clause 62(7) widens this existing power to allow for regulations to be made to similarly update the purposes for which an employee can take time off under section 168B.

Justification for taking the power:

929. There is currently no statutory right for equality representatives to take facility time off from work for this role. It is an important role which may develop over time in ways which are valuable both to employers and to the workforce. As is the case currently for learning representatives, these powers will allow the detailed purposes for which time off can be taken under this section to be amended. This will ensure that the purposes can be updated if appropriate following further engagement with businesses and trade unions as part of the approach to updating the ACAS Code of Practice on facility time, as well as to reflect legislative or other developments in the promotion of equality. This level of detailed legislation is therefore considered appropriate for secondary legislation and is in keeping with other similar provisions.

Justification for the procedure

930. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate any proposed changes, and is in line with the procedure for the existing power that currently applies in relation to learning representatives.

Clause 64(2)(3) and (4): Blacklists: additional powers, section 3(1)(b), (2A) and (3)(za)(e) Employment Relations Act 1999: Extending existing power to make regulations to prohibit compilation, use, sale or supply of blacklists to cover compilation of lists where there was no intent to discriminate when the list was originally compiled

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

931. Sections 3(1) to (4) of the Employment Relations Act 1999 currently provide the Secretary of State with certain powers to make regulations to prohibit the compilation, use, sale or supply of lists containing information about individuals' trade union membership or activities with a view to their being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers already employed. Those powers are limited as a prohibited list needs to have been compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

932. Subsection (2) of the clause 64 of this Bill amends section 3(1)(b) of the 1999 Act to remove reference to 'employers or employment agencies', widening the scope of the existing power at section 3(1)(b). Subsection (3) of the clause inserts new subsection 2A into section 3 of the 1999 Act, which means that regulations can prohibit the compilation of lists where there was no intent to discriminate when the list was originally compiled, which will enable the scope of the prohibitions in the

current Regulations made under section 3 of the 1999 Act, the Employment Relations Act 1999 (Blacklists) Regulations 2010, to be expanded.

933. Subsection (4) of the clause inserts a new subparagraph (za) into section 3(3) of the 1999 Act which enables the Secretary of State to make provision in the Regulations so that a person who causes another person to do something is to be treated as doing that thing. Subsection (4) also makes a consequential amendment to subparagraph 3(3)(e) of the 1999 Act.

Justification for taking the power

934. Amending section 3(1)(b) of the 1999 Act, and inserting new subparagraph (za) in section 3(3) of the 1999 Act means the existing prohibitions in the current Regulations can be widened, to give effect to the policy intention that the Employment Relations Act 1999 (Blacklisting) Regulations are updated to strengthen existing protections where third party contractors are involved in blacklisting. The intention is to ensure that the Regulations can be brought up to date to deal with the issues workers are currently facing.

935. New section 3(2A) of the 1999 Act introduces a power to enable Regulations made under section 3 to prohibit the use of lists which may not have been originally compiled with a view to discriminate. The intention is to ensure that lists compiled using artificial intelligence will be within scope of the prohibitions provided for in the Regulations.

936. This approach is consistent with the current approach under section 3 of the Employment Relations Act 1999 to provide the Secretary of State with powers to prohibit activities in relation to blacklisting, which enables the Secretary of State to update the existing Regulations to reflect the policy intention that protections from blacklisting should clearly apply where third parties or artificial intelligence are involved. This approach is consistent with the approach already taken in the Employment Relations Act 1999, which already has a power for the Secretary of State to make regulations in relation to blacklisting. This power follows the same path but enables the regulations to be amended to widen the existing protections from blacklisting.

Justification for the procedure

937. The regulations will be subject to the affirmative resolution procedure as set out in the Employment Relations Act 1999. The Government considers that this is appropriate due to the level of detail that may be set out in the regulations and to ensure that the Parliamentary approach is consistent with the existing regulations which give effect to similar existing provisions. The affirmative resolution procedure will ensure that Parliament has the opportunity to debate the matters.

Clause 73(2): Protection against detriment for taking industrial action, New section 236A(1) Trade Union and Labour Relations (Consolidation) Act 1992: Power to specify by regulations the prescription of detriment of a specific description, or prescription of detriment of any description

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

938. This clause confers on the Secretary of State a regulation making power to prescribe the detriment that a worker has a right not to be subject to, either for taking protected industrial action or to prevent, deter or penalise the worker from taking such action.

Justification for taking the power

939. The powers conferred by this clause are within what is considered standard division of primary and secondary legislation for the employment law field. What could be considered a detriment will vary hugely by sector and employer and therefore the Government intends to consult on what should be prescribed as a detriment for this purpose. In addition, the Government considers it appropriate that detriments are prescribed in secondary legislation as it will enable the prescribed detriments to be updated as appropriate.

Justification for the procedure

940. The affirmative procedure is considered appropriate for this power as the effect of this provision will be to introduce a key provision in the industrial action regime that prevents employers from subjecting workers to a detriment for taking protected industrial action. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Part 5 – Enforcement

Clause 87: Part 2 of Schedule 7, paragraph 35, subparagraphs (1) to (3): Power to amend, by regulations, Part 1 of Schedule 7 (the list of relevant labour market legislation) (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and Purpose

941. The Secretary of State will have the power to expand, by regulations, Part 1 of Schedule 7 to the Bill. Part 1 sets out the legislation falling in scope of the over-arching enforcement function which the Secretary of State will, through the actions of the Fair Work Agency (FWA), be responsible for enforcing. The power to expand the legislation in the Secretary of State's enforcement function will in practice enable the expansion of the FWA's remit. The power may only be used to add legislation relating to employment and trade union matters, or to vary an existing reference to an enactment in Part 1 of Schedule 7.

942. Where the power is exercised to add to Part 1 of Schedule 7 an enactment that deals with a matter that is transferred for Northern Ireland or to vary a reference to an enactment that deals with a transferred matter, the consent of the appropriate Northern Ireland department must be obtained. This is to provide Northern Ireland with greater control over the inclusion of transferred legislation in the FWA's remit.

943. In consequence of an amendment to the list of legislation in Part 1 of Schedule 7 to the Bill, this power may also be used to amend the provisions relating to the enforcement functions of the Secretary of State (Clause 88), the delegable functions of the Secretary of State (Clause 89), the meaning of "non-compliance with relevant labour market legislation" (Clause 147), and the power to give a notice of underpayment (Clause 100).

944. Regulations made using this power to add to Part 1 of Schedule 7 enactments conferring a statutory pay right or which restrict the withholding of payments may provide that a notice of underpayment (see Clause 100) may relate to amounts which became due before the regulations come into force.

945. The power granted to the Secretary of State is considered a Henry VIII power.

Justification for taking the power

946. The nature of employment practices and the economy can change rapidly. There may be a need to expand the FWA's remit, by expanding the Secretary of State's overarching enforcement function, to ensure it continues to effectively address emerging employment issues. Without this power, the Government would be unable to respond swiftly to such changes, potentially leaving gaps in the protection of workers' rights.

947. This delegated power provides the necessary flexibility for the Government to amend the FWA's remit and, consequently, amend certain provisions relating to enforcement promptly, while ensuring that the changes are subject to appropriate parliamentary scrutiny.

948. It is necessary to be able to make regulations which could have retrospective effect in relation to adding pay related enactments to Schedule 7 because otherwise the Fair Work Agency would not be able to take action to enforce those pay provisions in respect of any deductions made before the regulations come into force. This would severely limit the Fair Work Agency's ability to take action, and it could be several years before it could be fully effective in relation to enforcing a particular pay right. Any retrospective effect of regulations made using this power to add pay related enactments to Schedule 7 would only go back in time as far as Royal Assent if at all, and the power will not be used in a way which would enable a notice of underpayment to be given in relation to a period in time in which the unlawful activity in question was lawful.

Justification for the procedure

949. Regulations will be subject to the affirmative resolution procedure. This level of scrutiny is considered appropriate because changes in the FWA remit could have significant effects on businesses and workers. It is also in line with the Delegated Powers and Regulatory Reform Committee's (DPRRC) recommended approach where Henry VIII powers are being conferred. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 101(2): Notices of Underpayment ("NoU") – Calculation of the required sum – Power to make regulations setting out how the required sum should be calculated

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Procedure: Draft affirmative

Context and Purpose

950. This clause allows the Secretary of State to, by regulations, make provision for determining the sum to be paid to an individual under a statutory pay provision where the rate of pay (for example, sick pay or pay under a Fair Pay Agreement) has increased. This is similar to the 'indexing' effect under section 17(4) National Minimum Wage Act 1998 ("NMWA") whereby the 'relevant remuneration' a worker is due can be calculated by reference to a higher rate of national minimum wage. Regulations made under this section will not be able to make provision in relation to NMWA (in other words, section 17(4) NMWA will continue to apply to breaches of NMW).

Justification for taking the power

951. This power is necessary to allow the Secretary of State more flexibility in deciding how the 'indexing' effect introduced by this power should apply to different statutory pay rights. The rates payable under the statutory pay rights which are in scope of the Notice of Underpayment regime are not calculated consistently; some are calculated by reference to a set amount, and others by reference to a method of calculation. The rates for other pay rights have yet to be determined (e.g. pay under a Fair Pay Agreement). It is also envisaged that additional pay rights will be added into FWA's enforcement remit in the future (e.g. statutory parental pay rights). As such, it has not been possible to provide for a universal mechanism in the Bill which would apply to all pay rights in scope to deal with how the total amount owed is calculated where changes are made as to how the rates

of those pay rights are to be calculated. That detail can more appropriately be set out in respect of particular pay rights in regulations where necessary.

Justification for procedure

952. Secondary legislation made under this power will be subject to the affirmative resolution procedure, ensuring appropriate levels of scrutiny for the specific regulations. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 101(5): Notices of Underpayment – calculation of required sum: Power to set the maximum sum of arrears

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Procedure: Draft affirmative

Context and Purpose

953. This power allows the Secretary of State to, by regulations, set out what the maximum arrears that can be recovered in respect of a statutory pay right should be. This would ‘cap’ the arrears that can be recovered in a NoU.

Justification for taking the power

954. The FWA will not be subject to time limits for recovering arrears set out in a NoU. The back-stop of two years set out in section 23(4A) ERA will also not apply for the purposes of FWA enforcement using the NoU procedure. Both of these measures will mean that the quantum of arrears recoverable will be significantly greater than the arrears that can be recovered using the enforcement route available to the individual by submitting a claim to an ET. There is some uncertainty about the impact that this could have on FWA’s resources and workload, particularly in relation to holiday pay, for which there is no statutory minimum figure. In order to be able to manage the possible impact, a power is needed to set a maximum cap on arrears recoverable for different statutory pay rights. It is only possible to understand the true impact, and therefore whether and if so the level at which a cap should be set, once the NoU scheme has been in operation for a period of time, and the value of the claims brought to FWA and enforced using the NoU process can be assessed.

Justification for procedure

955. Secondary legislation made under this power will be subject to the affirmative resolution procedure, ensuring appropriate levels of scrutiny. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the content of regulations made using this power.

Clause 102(3): Notices of Underpayment – Period to which notice of underpayment may relate: Power to amend claim period (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Procedure: Draft affirmative

Context and purpose

956. Unlawful deductions occurring more than two years before the date of the claim cannot be recovered by virtue of section 23(4A) ERA. However, this back-stop will not apply for the purposes of FWA enforcement using the NoU process.

957. Instead, the arrears contained in a NoU must have become due in the six years prior to the date the NoU is served on an employer. This period is called the 'claim period'. This power gives the Secretary of State flexibility to change the claim period in respect of different statutory pay rights. For example, while the claim period for NMW is six years (and will remain six years), the Secretary of State may consider that a shorter period is appropriate for other pay rights depending on factors such as a value of the claim. The maximum claim period will be six years to provide parties with certainty as to the maximum period of time in which liability could arise

Justification for taking the power

958. This power will allow flexibility for the Secretary of State to set claim periods that are suitable when enforcing different pay related rights within the remit of the Fair Work Agency, having regard to both rights of workers and the impact on business. Setting different claim periods (subject to a maximum of six years) by regulations ensures that FWA is able to limit overall business liability (if necessary) once the number and value of claims brought to FWA can be assessed.

Justification for the procedure

959. Regulations made will be subject to the affirmative resolution procedure. Government considers this is an appropriate level of scrutiny as this relates to the enforcement powers of the FWA and will have impacts on businesses. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 104(7): Notices of Underpayment - Penalties for Underpayment: Power to amend penalties in the future (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Procedure: Draft affirmative

Context and Purpose

960. An NoU issued by the FWA will have both an 'arrears' element and a 'penalty' element. The arrears must be repaid to the worker by the employer. The penalty must be paid by the employer to the Secretary of State and will be paid into the Consolidated Fund. This delegated power will provide for the Secretary of State to amend the applicable percentage or amount of the penalties given to employers for breaches of pay rights. The power also enables different percentages or amounts to be specified for different purposes. The power to amend these amounts via regulations provides flexibility to change these to more appropriate

amounts in respect of different pay rights, including rights added to Schedule 7 and brought into scope of the NoU regime in future.

Justification for taking the power

961. This power and process is identical to the minimum and maximum penalty amounts and the relevant percentage set out in NMWA (sections 19A(5A), 19A(5B) and 19A(6) NMWA). The Secretary of State can amend these amounts so there is flexibility to change these to more appropriate amounts in respect of different pay rights. This flexibility will also ensure penalties keep pace with any future changes to the remit of the Fair Work Agency.

962. Having the ability to make these amendments shows that the FWA will take appropriate action against businesses that do not comply with the law and will provide clarity for businesses and individuals. Having the ability to make these amendments is necessary so that overall business liability can be managed where required once the number and value of claims brought to the FWA can be assessed.

Justification for the procedure

963. Regulations made will be subject to the affirmative resolution procedure. The Government considers this is an appropriate level of scrutiny as this relates to the enforcement powers of the FWA. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 105(1): Notices of Underpayment – further provision about penalties: power to make directions

Power conferred on: Secretary of State
Power exercised by: Directions
Procedure: N/A

Context and purpose

964. As noted above, a NoU can impose a penalty on an employer. This power allows the Secretary of State to, by directions, specify circumstances in which a NoU is not to impose a requirement to pay a penalty. An employer should not need to pay a penalty where, for example, they have already been penalised under another statutory penalty scheme (such as that which exists for sick pay). This is similar to the power of the Secretary of State to issue directions under NMWA 1998 which has been used to specify that employers do not need to pay a penalty if they have followed published guidance which was incorrect.

Justification for taking the power

965. This provides the Secretary of State with flexibility to determine circumstances whereby an employer should not have to pay a penalty where, where circumstances arise that mean it would be unfair for an employer to pay a penalty.

Justification for procedure

966. There may be circumstances where the need arises to impose specified conditions to not impose a requirement to pay a financial penalty where those conditions are met. The procedure will give the Secretary of State the ability to set out those conditions, and to amend them where appropriate. The Secretary of State would regularly review the effect of the direction.

Clause 115: Powers relating to civil proceedings – recovery of costs of legal assistance: Power to provide for how to calculate the Secretary of State's expenditure in providing legal assistance under this clause, for the purposes of recovery of such expenditure

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Procedure: Negative

Context and Purpose

967. This clause provides for the Secretary of State to recover expenditure in providing legal assistance under clause 114, when the person assisted becomes entitled to any of their costs in the legal proceedings. This delegated power enables provision to be made on how the expenditure of the Secretary of State is to be calculated for that purpose.

968. This delegated power would also allow provision to be made on how expenditure incurred by the Secretary of State is to be apportioned.

Justification for taking the power

969. This power mirrors a similar delegated power in section 29(5) of the Equality Act 2006 in relation to the recovery of expenses of the Commission for Equality and Human Rights where it has provided legal assistance under section 28 of that Act. It is appropriate that where a person has received legal assistance from the Secretary of State and then been given an award by a court or tribunal in relation to their costs, that the person concerned does not profit from such an award and that the Secretary of State can recover the expenditure incurred in providing assistance. This power would enable there to be clarity on what expenditure could be recovered under clause 115 and would help ensure that only relevant expenditure could be recovered.

Justification for the procedure

970. Regulations made using this power would be subject to the negative procedure in both Houses of Parliament. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations and their administrative nature. The negative resolution is also consistent with the similar power in the Equalities Act 2006.

Clause 117(3): Measures in LME undertakings: Power to make regulations to add measures which may be included in Labour Market Enforcement Undertakings

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

971. Provisions in Part 5 make reforms to the state enforcement of employment rights. They give the Secretary of State a new overarching function to enforce relevant labour market legislation. The intention is for this function to be discharged through the creation of a new executive agency called the Fair Work Agency (FWA) which will be responsible for enforcing a specified list of relevant labour market legislation. The FWA will bring together the existing labour market

enforcement agencies as well as incorporate a wider range of employment rights and protections. Existing enforcement bodies can currently seek Labour Market Enforcement (LME) Undertakings (LMEUs) and Orders (LMEOs), which are provided for in sections 14 to 30 of the Immigration Act 2016. These can be sought for breaches of specified legislation that are known as “trigger offences”.

972. The Fair Work Agency (FWA) will, through functions and powers conferred on the Secretary of State and on enforcement officers, have a range of enforcement powers that will include the ability to seek LMEUs and LMEOs. The Bill will widen the list of trigger offences (known as labour market offences under the Bill) so the FWA will be able to seek LMEUs and LMEOs in relation to offences under any legislation that will be within its remit to enforce.

973. The application of the LME regime would typically start with an LMEU. It is an agreement between the enforcing authority (which will be the FWA) and a person on what measures that person will take to restore and maintain compliance. This agreement will set out what needs to be done and by when (by reference to a specific date) and how. If the LMEU is not complied with – or if the person does not agree the LMEU within 14 days—the Secretary of State may apply to the court for a Labour Market Enforcement Order (LMEO). A court may also independently issue an LMEO, when dealing with someone convicted of a labour market offence. An LMEO would set out requirements or prohibitions to prevent or reduce the risk of non-compliance with labour market legislation. Breach of an LMEO is an offence.

974. Under the Bill, LMEUs may include prohibitions, restrictions or requirements (known as “measures”). Measures may be for the purpose of preventing or reducing the risk of a person breaching legislation that is within the FWA’s remit. LMEUs may also include measures for the purpose of bringing the LMEU to the attention of persons likely to be interested.

975. LMEUs may also include measures that are specified, or are of a description specified, in regulations made by the Secretary of State. Therefore, this power is for the Secretary of State to add, by affirmative regulations, to the list of measures which may be included in LMEUs. There is precedent for this power in section 15(3) of the Immigration Act 2016.

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

976. The Bill is conferring a power on the Secretary of State to add to the list of measures which may be included in LMEUs. This power is needed to ensure that the FWA’s enforcement powers and use of LMEUs remains flexible and may be updated in response to changes in the wider labour market.

977. There is precedent for this power as it replicates the power in section 15(3) of the Immigration Act 2016.

<u>Justification for the procedure</u>

978. Regulations made will be subject to the affirmative resolution procedure. The Government considers this is an appropriate level of scrutiny as this relates to the enforcement powers of the FWA. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 123(3): Measures in LME orders – Power to make regulations to add measures which may be included in Labour Market Enforcement Orders

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Draft affirmative

Context and purpose

979. As with LMEUs, LMEOs may include prohibitions, restrictions or requirements (known as "measures"). Measures may be for the purpose of preventing or reducing the risk of a person breaching legislation that is within the FWA's remit. LMEOs may also include measures for the purpose of bringing the LMEO to the attention of persons likely to be interested.

980. LMEOs may also include measures that are specified, or are of a description specified, in regulations made by the Secretary of State. Therefore, this power is for the Secretary of State to add, by affirmative regulations, to the list of measures which may be included in LMEOs. There is precedent for this power in section 21(3) of the Immigration Act 2016.

Justification for taking the power

981. The Bill is conferring a power on the Secretary of State to add to the list of measures which may be included in LMEOs. This power is needed to ensure that the FWA's enforcement powers and use of LMEOs remains flexible and may be updated in response to changes in the wider labour market.

982. There is precedent for this power in section 21(3) of the Immigration Act 2016.

Justification for the procedure

983. Regulations made will be subject to the affirmative resolution procedure. The Government considers this is an appropriate level of scrutiny as this relates to the enforcement powers of the FWA. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 132(6): Disclosure of information: Power to amend, by regulations, Schedule 9 containing the list of bodies for information sharing purposes (Henry VIII)

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Draft affirmative

Context and purpose

984. The Fair Work Agency (FWA), through the data sharing powers conferred on the Secretary of State, will need to be able to share and receive information (including personal data) from and to other specified bodies for the purpose of carrying out its statutory duty, and for purposes connected with functions of those other bodies.

985. This delegated power will provide for the Secretary of State to update, expand, or otherwise modify the list of organisations and public bodies with which information can be shared. This will be set out in Schedule 9 of the Bill. This power is therefore considered a Henry VIII power.

Justification for taking the power

986. The enforcement of employment rights often involves collaboration between various bodies. The landscape of relevant bodies can change over time due to reorganization, the creation of new bodies, or changes in responsibilities. The remit of the Fair Work Agency is likely to change over time as the Secretary of State exercises the power to add to Part 1 of Schedule 7. There may be additional organisations which it would be necessary to share information.

987. This power will allow the Secretary of State to ensure information sharing provisions keep pace with any future changes to the remit of the FWA, by enabling amendment to Schedule 9 without requiring further primary legislation.

Justification for the procedure

988. Regulations will be subject to the affirmative resolution procedure. This is in line with the Delegated Powers and Regulatory Reform Committee's (DPRRC) recommended approach where Henry VIII powers are being conferred. The affirmative resolution procedure will ensure that both Houses of Parliament have the opportunity to debate the matters.

Clause 140: Power to recover costs of enforcement: to make regulations providing for charges to be imposed to recover the costs of enforcement action taken by the Fair Work Agency where businesses are found to be non-compliant.

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Procedure: Negative

Context and Purpose

989. Provisions in Part 5 make reforms to the state enforcement of employment rights. They give the Secretary of State a new overarching function to enforce relevant labour market legislation set out in part 1 of Schedule 7. The Secretary of State will, in practice, discharge this responsibility through a new executive agency called the Fair Work Agency (FWA) and enforcement officers acting on their behalf. The Fair Work Agency will, through functions and powers conferred on the Secretary of State and on enforcement officers, have a range of enforcement powers.

990. This delegated power provides for the Secretary of State to make regulations providing for charges to be imposed to recover the costs of enforcement action taken by the Fair Work Agency where businesses are found to be non-compliant. This provision aims to ensure the financial sustainability of the Fair Work Agency.

991. Regulations made under this power, by the Secretary of State, will be able to set out the charges on businesses or how they are to be calculated (which could be in accordance with a scheme made and published by the Secretary of State), any relevant exemptions or waivers, how charges are to be paid, and any associated interest on unpaid charges.

Justification for taking the power

992. This delegated power will allow for the Secretary of State to impose appropriate charges for cost recovery for the Fair Work Agency's enforcement actions. The

power to impose charges is limited to those persons who have failed to comply with any relevant labour market legislation. It is appropriate that enforcement costs can be recovered from those who breach that legislation. Given that the Secretary of State is newly taking on many of these enforcement functions, judgement will be needed about how to set charges initially to achieve appropriate costs recovery and avoid making a profit.

993. This power also allows for periodic adjustments in response to inflation and changes in the operational costs of the Fair Work Agency, including any efficiency savings. It is important that these charges can be adjusted over time to ensure they are set at the right level to achieve the policy aim and remain consistent with the principles governing charging set out in HM Treasury's Managing Public Money.

Justification for the procedure

994. Regulations to prescribe the Secretary of State's charges and to set out how charges may be calculated will be subject to the negative procedure in both Houses of Parliament. Regulations made using this power would be administrative in nature. The choice of negative procedure is considered to provide for the appropriate level of scrutiny and opportunity for debate, if desired, without requiring a debate as a matter of course. In addition, it is consistent with the current procedure for fee-related regulations made under the Building Act 1984 (section 105B) and the Building Safety Act 2022 (section 28).

Clause 146: Consequential and transitional provision - Part 2 of Schedule 10, Paragraph 63: Consequential amendment to the Police and Criminal Evidence Act 1984 (PACE): Power to make regulations applying provisions of PACE to enforcement officers appointed under the Employment Rights Act 2025

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

995. In its current form the power at s.114B of PACE provides the Secretary of State with the power to make regulations applying provisions of PACE to labour abuse prevention officers acting for the Gangmasters and Labour Abuse Authority.

996. The Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017 (PACE Regulations) were made under this power.

997. The purpose of this amendment is to remove references in this power to labour abuse prevention officers and the Gangmasters and Labour Abuse Authority (which are being removed) and replace these with references to enforcement officers appointed under the Employment Rights Act 2025. The substance of the power will remain the same.

Justification for Power

998. In order to make regulations applying provisions of PACE to enforcement officers appointed under the Employment Rights Act 2025. This is to ensure enforcement officers, as specifically appointed by the Secretary of State, will have the requisite police-style powers set out in PACE to enable them to carry out investigations of labour market offences. The existing power is being amended with updated references and the PACE Regulations will be amended with any required updates.

Justification of Procedure

999. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations, and this is the procedure for the power as it currently exists – so there is no plan to change the procedure.

Clause 146: Consequential and transitional provision - Part 2 of Schedule 10, Paragraph 74(3): Consequential amendment to the Police Reform Act 2002: Power to make regulations conferring functions on the IOPC in relation to functions exercised by enforcement officers appointed under the Employment Rights Act 2025

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

1000. This is an amended power that provides the Secretary of State with the power to make regulations conferring functions on the Independent Office for Police Conduct (IOPC) in relation to handling complaints and misconduct regarding enforcement officers who are acting by virtue of section 114B of the Police and Criminal Evidence Act 1984 (police-style PACE powers).

1001. It is an existing power set out under s.26D of the Police Reform Act 2002 and the Gangmasters and Labour Abuse Authority (Complaints and Misconduct) Regulations 2017 (the "2017 Regulations") were made under this power. Section 26D is being repealed by the Bill (paragraph 74(4) of Part 2, Schedule 10) and replaced by a new section 26CA under paragraph 74(3) of Part 2, Schedule 10 of the Bill.

1002. The purpose of this amendment is to remove references in this power to labour abuse prevention officers and the Gangmasters and Labour Abuse Authority (which are being removed) and replace these with references to enforcement officers appointed under the Employment Rights Act 2025. The substance of the power will remain the same.

Justification for Power

1003. In order to make regulations conferring functions on the IOPC in relation to handling complaints and misconduct regarding enforcement officers who are acting with police-style PACE powers. This is to ensure adequate oversight of the conduct of enforcement officers. The existing power is being replaced with updated references and the 2017 Regulations will be remade with any required updates.

Justification of Procedure

1004. The Government considers that the negative resolution is appropriate due to the discrete issue covered by these regulations, and this is the procedure for the power as it currently exists – so there is no plan to change the procedure.

PART 6 – General

Clause 151(1): Power to make Consequential Amendments (Henry VIII)
Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: Any regulations which amend primary legislation are subject to the draft affirmative procedure, any other regulations made under this section are subject to the Negative procedure.

Context and Purpose

1005. The Secretary of State is provided with the power to make consequential provision in connection with this Bill or regulations made under it. Regulations made under this power may amend primary legislation, as such this is a Henry VIII power.

Justification of Power

1006. The purpose of this power is to enable the Secretary of State to amend existing legislation to ensure that this Bill works alongside all existing legislation. It is not possible to establish in advance all consequential provisions that may be required; a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force.

Justification of Procedure

1007. The Government considers that the affirmative resolution procedure should apply where the power is exercised to amend an Act of Parliament. The Government considers that the negative resolution procedure is appropriate for all other cases.

Clause 152(1): Power to make transitional or saving provisions
Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: No procedure

Context and purpose

1008. The power provides the Secretary of State with the power to make transitional or saving provisions in connection with the coming into force of any provision of the Act.

Justification for Power

1009. The purpose of this power is to enable the Secretary of State to make any specific provision needed to determine the changeover from the state of the law prior to the coming into force of the Bill and following this.

Justification of Procedure

1010. Consistent with common practice regulations under this clause are not subject to any Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them and the power can only be exercised to make provision in connection with the coming into force of those provisions.

Clause 156(3): Commencement
Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary procedure: No procedure

Context and Purpose

1011. This power provides for the Secretary of State to bring certain provisions of the Bill into force by commencement regulations.

Justification for power

1012. The power will allow the Secretary of State to commence those provisions of the Bill at an appropriate time.

Justification for procedure

1013. Consistent with common practice, commencement regulations under this clause are not subject to any Parliamentary procedure. Parliament will have approved the principle of the provisions in the Bill by enacting them; commencement by regulation enables the provisions to be brought into force at an appropriate time.

D. Non-Legislative Powers

Part 2 – Other Matters Relating to Employment

Clause 30(2): Public sector outsourcing: protection of workers – New section 83D(1) and (2) Procurement Act 2023: Power to issue a code of practice on relevant outsourcing contracts

Power conferred on: Minister of the Crown, Scottish Ministers, Welsh Ministers
Power exercised by: Code of Practice
Parliamentary Procedure: Code of practice laid before Parliament, the Scottish Parliament or Senedd Cymru without further procedure

Context and Purpose

1014. This clause amends the Procurement Act 2023 to insert new section 83D . Subsection (1) of this new section places a duty on a Minister of the Crown to publish a Code of Practice for the purposes of ensuring that workers transferring from public sector to private sector employment as a result of a relevant outsourcing contract are treated no less favourably following that transfer, and that other specified workers of the supplier are treated no less favourably than those transferring workers. Contracting authorities (as defined by the Procurement Act 2023) will be required to have regard to this Code of Practice where they enter into contracts outsourcing the provision of services.

1015. New Part 5A is brought forward to meet the Government's manifesto commitment to reinstate the Two-Tier Code, a non-binding Code of Practice in place between 2005 and 2010 which sought to prevent the emergence of two-tier workforces where former public sector workers work alongside private sector workers on different, and often less favourable, terms and conditions.

1016. Most workers transferring from the public sector to the private sector would have their terms and conditions protected by TUPE, including these workers within the scope of the Code of Practice will allow Ministers to set out guidance applicable in circumstances where TUPE may not apply or where Ministers wish to encourage the suppliers to whom they are transferred to go further. It is anticipated that the power to specify those workers of the supplier to which regulations will apply will be used to specify that the workers must work exclusively or mainly on the relevant outsourcing contract.

1017. This aligns with the regulation-making power in section 83C of the same provision and ensures that Ministers can both set out in regulations concrete steps which contracting authorities must take to show all reasonable steps to implement when outsourcing services, and in the Code of Practice broader aims and outcomes which contracting authorities should work towards. The Code of Practice will apply to circumstances in which the regulations also apply, but may, additionally, make provision in respect of circumstances in which they do not. For example, where it is not considered feasible to impose requirements to which the stricter legal obligation to take all reasonable steps will apply. It will also allow Ministers to set out guidance on how contracting authorities should seek to achieve these outcomes, including steps which they may take to include and implement any model contract clauses within their contracts.

Justification for taking the power

1018. The very varied nature of outsourcing contracts means that primary legislation is not always a suitable means of bringing about necessary changes. By taking both a regulation-making power and a power to issue statutory guidance, in the form of a Code of Practice, Ministers will be able to take a nuanced, targeted and more effective approach, by both identifying required actions and outcomes, and encouraging the implementation of particular policies.

1019. The use of a Code of Practice, rather than guidance with no statutory foundation, will ensure that contracting authorities are required to have regard to it, including outside central government. Currently, Government procurement guidance is typically published in the form of Procurement Policy Notes (often referred to as "PPNs"). Central government contracting authorities must have regard to these, but there are no such obligations on contracting authorities outside central government. Ensuring that all contracting authorities must have regard to the Code of Practice promotes consistency and fairness for those employees impacted by the outsourcing of services.

1020. A Code of Practice will also allow for the flexibility to respond to changes in employment law and practice and provide an opportunity to set out guidance on how contracting authorities should respond to regulations made under subsection (4).

Justification for the procedure

1021. Requiring that the Code of Practice be laid before Parliament is appropriate in light of what the Code seeks to achieve, that is to say, only to influence and encourage, rather than to control behaviours.

Part 3 – Pay and Conditions in Particular Sectors

Clause 35: Pay and conditions of school support staff in England - Schedule 4 - Paragraph 1 - 148P(1) Education Act 2002: Power to issue guidance about an agreement of the SSSNB

Power conferred on: SSSNB, with approval of Secretary of State
Power exercised by: Statutory guidance
Parliamentary Procedure: N/A

Context and Purpose

1022. This power will allow the SSSNB, with the approval of the Secretary of State, to give statutory guidance about an agreement of the SSSNB that has been ratified through regulations or an agreement to which regulations require prescribed people to have regard in exercising prescribed functions. Local education authorities, governing bodies of maintained schools and academy proprietors must have regard to that guidance.

Justification for taking the power

1023. This power will enable the SSSNB to provide school support staff and their employers with detailed guidance on the changes that have been made to support staff contracts and the implementation and implications of such. It also allows SSSNB to provide guidance on agreements to which prescribed people are required to have regard in exercising prescribed functions, for example through explaining the way in which the agreement affects the exercise of those functions.

1024. The power to issue statutory guidance allows the SSSNB to effectively support employers and school support staff within the wide range of education settings in scope of the SSSNB.

1025. The same power was taken in s.238(1) Apprenticeships, Skills, Children and Learning Act ASCL 2009.

Justification for the procedure

1026. The guidance will consist of advice for employers in the education sector on their implementation of changes to terms and conditions made through secondary legislation. It will not be “legislative” in nature and therefore does not require parliamentary scrutiny. It will be carefully considered by the SSSNB, which includes both employer and employee representatives, and subject to approval by the Secretary of State.

Clause 35: Pay and conditions of school support staff in England - Schedule 4 - Paragraph 1 - 148P(2) Education Act 2002: Power to issue guidance about an agreement of the SSSNB

Power conferred on: Secretary of State
Power exercised by: Statutory guidance
Parliamentary Procedure: N/A

Context and Purpose

1027. This power allows the Secretary of State to give statutory guidance about a SSSNB agreement that has been ratified by regulations, a SSSNB agreement to which regulations require prescribed people to have regard in exercising prescribed functions, regulations made by the Secretary of State under

s.148J(2)(d), s.148K(2)(b) or (4)(b) Education Act 2002 or the training and career progression of school support staff.

1028. Local education authorities, governing bodies of maintained schools and academy proprietors must have regard to that guidance.

Justification for taking the power

1029. This power is necessary to allow the Secretary of State to provide school support staff and their employers with detailed guidance about changes that are made to support staff contracts and the implementation and implications of such. Further, the Secretary of State may provide guidance on agreements to which prescribed people are required to have regard in exercising prescribed functions, for example through explaining the way in which the agreement affects the exercise of those functions.

1030. The power also enables the Secretary of State to issue statutory guidance in relation to the training and career progression of school support staff in order to professionalise the workforce and raise educational standards. These matters require a flexible, individual approach and are generally not apt for incorporation in employment contracts. Statutory guidance is therefore an effective means of achieving improvement in this area.

1031. The power allows the Secretary of State to effectively support employers and school support staff within the wide range of education settings in scope of the SSSNB.

1032. A similar power was taken in s.238(2) Apprenticeships, Skills, Children and Learning Act 2009.

Justification for the procedure

1033. The guidance will consist of advice for employers in the education sector on their implementation of changes to terms and conditions made through secondary legislation, the impact of any requirement upon those within the wider sector to have regard to ratified agreements or regulations and matters relating to the training and career progression of school support staff. It will not be “legislative” in nature and therefore does not require parliamentary scrutiny.

Part 4 – Trade Unions and Industrial Action etc

Clause 57: Recognition – Paragraph 8 of Schedule 6– New Paragraph 19L(1) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition

Powers conferred on: ACAS and the Secretary of State
Powers exercised by: Issue or revision of Codes of Practice
Parliamentary procedure: See sections 200 (ACAS Codes) and 204 (Secretary of State Codes) of TULRCA

Context and Purpose

1034. Sections 199 and 203 of TULRCA empower respectively ACAS and the Secretary of State to issue Codes of Practice containing practical guidance for (among other things) promoting the improvement of industrial relations.

1035. There is currently in effect a Code of Practice on access and unfair practices during recognition and derecognition ballots.

1036. The current Code was issued by the Secretary of State under section 203 of TULRCA came into effect on 1st October 2005. Notwithstanding the breadth of the power in section 203, Schedule A1 to that Act currently contains a number of provisions which provide expressly that the powers of ACAS under section 199 and of the Secretary of State under section 203 are to be taken to include power to issue Codes of Practice about certain matters provided for in Schedule A1. For example, paragraph 26(8) of Schedule A1 does this in relation to the reasonable access required to be provided to the union prior to a recognition ballot and in relation to the duty of the employer not to offer inducements to workers (the fourth duty currently provided for in paragraph 26 of Schedule A1).

1037. The purpose of the power provided for in new paragraph 19L(1), and of similar powers referred to below, is to maintain that approach to the powers of ACAS and the Secretary of State to issue Codes of Practice in the light of the extensive amendments made to Schedule A1 to the 1992 Act by the Bill. The powers addressed below: in new paragraphs 19M(6), 81F(1), 81G(6), 116F(1) and 116G(7) are all intended to maintain this approach also. The detail provided in this entry is therefore also relevant to each of the entries below, which we have not repeated for brevity.

1038. New paragraph 19L(1) deals specifically with access agreements in relation to the recognition process under Part 1 of Schedule 1A.

Justification for taking the power

1039. It is very likely that the Secretary of State will wish to update and revise the current Code of Practice on access and unfair practices (or to issue a new but similar Code). The amendments made by the Bill on these subjects are significant and extensive and the current Code of Practice will be materially out of date. Schedule A1 to the Act, as amended by the Bill, will be very lengthy and detailed but will not (and cannot feasibly) deal with all the preparatory, operational and practical matters which are more suitable for a Code of Practice. Such a Code can address the subjects of access and unfair practices with more practicality, flexibility and informality than is possible in legislation (as can be seen in the

current Code of Practice). It will also be capable of being more easily revised than Schedule A1 itself, which revision may be necessary in the light of experience once the new legislation has been in force for a time. Revision of Codes of Practice is permitted by sections 199 and 203 of the Act.

1040. Taking into account the provision currently made in Schedule A1, the Government does not want there to be any doubt about the power to issue a revised or new Code of Practice on access and unfair practices. The powers addressed below: in new 19M(6), 81F(1), 81G(6), 116F(1) and 116G(7) are all intended to also ensure that there is power to issue a revised or new code on each of the specific areas they relate to. The memo will not repeat this justification for each entry for brevity.

1041. Broadly speaking, the proposed powers therefore follow a similar approach to that currently taken by Schedule A1, with a view to a revised or new Code of Practice being able to give practical guidance on the law as amended by the Bill.

Justification for the procedure

1042. The procedures for the issue and revision (other than merely consequential provision) of Codes of Practice by ACAS and the Secretary of State are addressed respectively by sections 200 (ACAS) and 204 (Secretary of State) of TULRCA These well-established procedures are not amended by the Bill and, in the Government's view, there is no reason not to follow them in relation to these powers.

Clause 57: Recognition – Paragraph 9 of Schedule 6 – New Paragraph 19M(6) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition

Powers conferred on: ACAS and the Secretary of State
Powers exercised by: Issue or revision of Codes of Practice
Parliamentary procedure: See sections 200 (ACAS Codes) and 204 (Secretary of State Codes) of TULRCA

Context and Purpose

1043. The legislative context of this power is as detailed at paragraphs 1033-1035 above.

1044. New paragraph 19M(6) deals specifically with unfair practices in relation to the recognition process under Part 1 of Schedule 1A.

Justification for taking the power

1045. The justification for taking the power is as detailed at paragraphs 1038-1040 above, which we have not repeated for brevity.

Justification for the procedure

1046. The procedures for the issue and revision (other than merely consequential provision) of Codes of Practice by ACAS and the Secretary of State are addressed respectively by sections 200 (ACAS) and 204 (Secretary of State) of TULRCA. These well-established procedures are not amended by the Bill and, in the Government's view, there is no reason not to follow them in relation to these powers.

Clause 57: Recognition – Paragraph 33 of Schedule 6– New Paragraph 81F(1) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition

Powers conferred on: ACAS and the Secretary of State
Powers exercised by: Issue or revision of Codes of Practice
Parliamentary procedure: See sections 200 (ACAS Codes) and 204 (Secretary of State Codes) of TULRCA

Context and Purpose

1047. The legislative context of this power is as detailed at paragraphs 1033-1035 above.

1048. New paragraph 81F(1) deals specifically with access in relation to changes affecting the bargaining unit under Part 3 of Schedule A1.

Justification for taking the power

1049. The justification for taking the power is as detailed at paragraphs 1038-1040 above.

Justification for the procedure

1050. The procedures for the issue and revision (other than merely consequential provision) of Codes of Practice by ACAS and the Secretary of State are addressed respectively by sections 200 (ACAS) and 204 (Secretary of State) of TULRCA. These well-established procedures are not amended by the Bill and, in the Government's view, there is no reason not to follow them in relation to these powers.

Clause 57: Recognition – Paragraph 34 of Schedule 6– New Paragraph 81G(6) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition

Powers conferred on: ACAS and the Secretary of State
Powers exercised by: Issue or revision of Codes of Practice
Parliamentary procedure: See sections 200 (ACAS Codes) and 204 (Secretary of State Codes) of TULRCA

Context and Purpose

1051. The legislative context of this power is as detailed at paragraphs 1033-1035 above.

1052. New paragraph 81G(6) deals specifically with unfair practices in relation to changes affecting the bargaining unit under Part 3 of Schedule A1.

Justification for taking the power

1053. The justification for taking the power is as detailed at paragraphs 1038-1040 above.

Justification for the procedure

1054. The procedures for the issue and revision (other than merely consequential provision) of Codes of Practice by ACAS and the Secretary of State are addressed respectively by sections 200 (ACAS) and 204 (Secretary of State) of

TULRCA. These well-established procedures are not amended by the Bill and, in the Government's view, there is no reason not to follow them in relation to these powers.

Clause 57: Recognition – Paragraph 40 of Schedule 6 – New Paragraph 116F(1) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition

Powers conferred on: ACAS and the Secretary of State
Powers exercised by: Issue or revision of Codes of Practice
Parliamentary procedure: See sections 200 (ACAS Codes) and 204 (Secretary of State Codes) of TULRCA

1055. Context and Purpose

1056. The legislative context of this power is as detailed at paragraphs 1033-1035 above.

1057. New paragraph 116F(1) deals specifically with access in relation to derecognition under Part 4 of Schedule A1.

Justification for taking the power

1058. The justification for taking the power is as detailed at paragraphs 1038-1040 above.

Justification for the procedure

1059. The procedures for the issue and revision (other than merely consequential provision) of Codes of Practice by ACAS and the Secretary of State are addressed respectively by sections 200 (ACAS) and 204 (Secretary of State) of TULRCA. These well-established procedures are not amended by the Bill and, in the Government's view, there is no reason not to follow them in relation to these powers.

Clause 57: Recognition - Paragraph 41 of Schedule 6 – New Paragraph 116G(7) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992: Extending existing power for Secretary of State and ACAS to issue a code of practice on trade union recognition

Powers conferred on: ACAS and the Secretary of State
Powers exercised by: Issue or revision of Codes of Practice
Parliamentary procedure: See sections 200 (ACAS Codes) and 204 (Secretary of State Codes) of TULRCA

Context and Purpose

1060. The legislative context of this power is as detailed at paragraphs 1033-1035 above.

1061. New paragraph 116G(7) deals specifically with unfair practices in relation to derecognition under Part 4 of Schedule A1.

Justification for taking the power

1062. The justification for taking the power is as detailed at paragraphs 1038-1040 above.

Justification for the procedure

1063. The procedures for the issue and revision (other than merely consequential provision) of Codes of Practice by ACAS and the Secretary of State are addressed respectively by sections 200 (ACAS) and 204 (Secretary of State) of TULRCA. These well-established procedures are not amended by the Bill and, in the Government's view, there is no reason not to follow them in relation to these powers.

Clause 61(2)(a) and (3)(a): Facilities provided to trade union officials and learning representatives, Section 168 and 168A Trade Union and Labour Relations (Consolidation) Act 1992: Amending existing power for ACAS to issue a code of practice on trade union facilities

Power conferred on: ACAS

Power exercised: Codes of Practice

Parliamentary Procedure: Affirmative procedure, plus a commencement order to bring the Code into force which is not subject to parliamentary procedure.

Context and Purpose

1064. Currently section 168 of the 1992 Act provides that the time off that trade union representatives are to be permitted to take off for carrying out duties or undergoing training is what is reasonable in all the circumstances having regard to relevant provisions of a Code of Practice issued by ACAS. Clause 61(2)(a) amends section 168 to also include the provision of accommodation and other facilities for carrying out duties or undergoing training for which the employee takes time off. This is subject to what is reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS. Clause 61(3)(a) makes equivalent provision for trade union learning representatives.

Justification for taking the power

1065. The clause relies on the existing powers in the 1992 Act for ACAS to issue Codes of Practice, in particular section 199(2) and 200(3). The Clause amends section 199 and 200 to include facilities.

Justification for the procedure

1066. The current affirmative procedure continues to apply to Codes of Practice under section 200(3), and the Bill does not alter that position.

Clause 62(2): Facilities for equalities representatives, New section 168B(6),(8) and (9) Trade Union and Labour Relations (Consolidation) Act 1992 and Clause 62(8)(9) and (10) amending sections 199, 200 and 203 Trade Union and Labour Relations (Consolidation) Act 1992: Amending existing power for ACAS to issue a code of practice to cover certain matters in relation to trade union equality representatives

Power conferred on: ACAS/Secretary of State

Power exercised: Codes of Practice

Parliamentary Procedure: Affirmative procedure, plus a commencement order to bring the Code into force which is not subject to parliamentary procedure.

Context and Purpose

1067. This clause (2) makes provision for trade union equality representatives to take time off, for further details see paragraph 484 above. In new section 168B, subsection (6) provides that sufficient training is sufficient having regard to any relevant provision of a Code of Practice issued by ACAS or the Secretary of State. Subsection (8) provides that the amount of time off, the purposes for which, the occasions on which and any conditions subject to which time off may be taken, are what is reasonable in all the circumstances having regard to any relevant provision of a Code of Practice issued by ACAS or the Secretary of State. Subsection (9) provides that the accommodation and other facilities that are to be provided are what is reasonable in all the circumstances, having regard to any relevant provisions of a Code of Practice issued by ACAS.

1068. Clause 62 (8), (9) and (10) amend sections 199, 200 and 203 so that provision can be made in Codes of Practice as provided for by Clause 62(2) in relation to trade union equality representatives. Section 199 makes provision for Codes of Practice by ACAS; section 200 deals with the procedure for the issue of such Codes; and section 203 deals with the procedure for the issue of Codes of Practice by the Secretary of State.

Justification for taking the power

1069. This will allow Codes of Practice to cover certain matters in relation to trade union equality representatives, in the same way that currently applies for trade union learning representatives.

Justification for the procedure

1070. This is consistent with the current approach for trade union learning representatives. It will allow Parliament the opportunity to debate such Codes. In addition, the existing requirements that apply to ACAS when issuing a draft Code to consider any representations made to it about the draft will apply to Codes of Practice containing practical guidance about trade union equality representatives. Similarly, the existing requirement that applies to the Secretary of State when issuing such a draft Code to consider any representations made will also apply to Codes of Practice containing practical guidance about trade union representatives.

Department Name: Department for Business and Trade
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