POLICE, CRIME, SENTENCING AND COURTS BILL

DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared by the Home Office and Ministry of Justice for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Police, Crime, Sentencing and Courts Bill. The Bill was introduced in the House of Commons on 9 March 2021. The memorandum identifies the provisions of the Bill which confer new powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Overview and purposes of the Bill

2. The purposes of the Bill are to:

    - Recognise the bravery, commitment and sacrifices of police officers by ensuring they have the support and protection they need.
    - Equip the police with the powers and tools they need to keep communities safe.
    - Create new duties on a range of specified agencies across different sectors, such as local authorities and health and probation services, to work collaboratively, share data and information, and put in place plans to prevent and reduce serious violence within their communities.
    - Establish a new, smarter approach to sentencing by providing for a sentencing regime that both takes account of the true nature of crimes and is robust enough to keep the worst offenders behind bars for as long as possible in order to protect the public from harm, but is also agile enough to give offenders a fair start on their road to rehabilitation.
    - Help modernise our courts and tribunals by updating existing court processes to provide better services for all court users and underpin open justice.

3. The Bill includes the following measures which contain new or amended delegated powers to:

    (i) Enable special constables to join the Police Federation of England and Wales;
    (ii) Amend the definitions of dangerous and careless driving in road traffic legislation so that the skills and training of police officers can be taken into account should there be any subsequent investigations into their actions;
    (iii) Place a new duty on specified authorities and bodies delivering public services to collaborate with each other to prevent and reduce serious violence;
    (iv) Place a duty on relevant homicide review partners to undertake a review of the circumstances of the death of a person aged 18 or over which involved an offensive weapon;
    (v) Create a statutory framework for the extraction of information from digital devices for the purposes of the prevention, detection, investigation or

prosecution of crime, safeguarding purposes and the purposes of investigating deaths;

(vi) Reform pre-charge bail to better protect vulnerable victims and witnesses;

(vii) Provide for the amending of the list of positions of trust to remove activities or include other activities where a person may be coached, taught, trained, supervised or instructed;

(viii) Amend the Crime (Overseas Production Orders) Act 2019 to ensure that it operates as intended so that the police and prosecutors have the power to obtain faster access to electronic data held overseas;

(ix) Confer powers on the police to obtain information about the location of human remains where there is no on-going criminal investigation;

(x) Strengthen police powers to tackle non-violent protests that have a significant disruptive effect on the public or on access to Parliament;

(xi) Strengthen police powers to tackle unauthorised encampments;

(xii) Place on a statutory footing police powers to charge for the provision of retraining courses for those admitting to low-level driving offences;

(xiii) Simplify the out of court disposals framework;

(xiv) Make provision for new “Problem-Solving Courts”, including a drug-testing measure;

(xv) Make changes to Youth Rehabilitation Orders, including increasing daily curfew hours and piloting mandatory location monitoring for intense supervision and surveillance requirements;

(xvi) Strengthen the powers of the Parole Board to provide that decisions may be reconsidered, and also, to enable decisions to be set aside if there is a clear mistake of law or fact, or if significant new information comes to light;

(xvii) Make provision for powers to change the Parole Board test for release and re-release of offenders who are referred to the Board as high-risk;

(xviii) Prescribe persons with whom probation providers must consult annually on the type of work done as part of unpaid work requirements;

(xix) Change to the power in the Scotland driving disqualification provisions to enable appropriate extension periods to be read in accordance with any changes made by order to proportion of sentence to be served;

(xx) Allow the Criminal Procedure Rules to permit procedural provision for use of live links in a broader range of criminal proceedings;

(xxi) Make provision to allow powers enabling open justice to be maintained where proceedings are conducted via live video/audio links to be extended to different sorts of proceedings across different courts or tribunals;

(xxii) Make provision for Serious Violence Reduction Orders to confer on the police new targeted stop and search powers to tackle those convicted of offences involving knives or offensive weapons;

(xxiii) Strengthen the management of sex offenders, including by enabling the Secretary of State, or other-directed person, to establish and maintain a list of countries where children are considered to be at high risk of sexual abuse and exploitation from UK offenders.

Analysis of delegated powers by clause

PART 1: PROTECTION OF THE POLICE ETC

Clause 3(2) – Amended section 51 of the Police Act 1996: Power to make regulations for special constables

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

4. Clause 3 of the Bill amends the Police Act 1996 to enable special constables to become members of the Police Federation of England and Wales.

5. Section 51 of the Police Act 1996 enables the Secretary of State to make regulations as to the government, administration and conditions of service of special constables.

6. Clause 3(2) inserts additional provision to section 51(2), to enable the Secretary of State to make regulations as to whether time spent by special constables in attendance of meetings of the Police Federation, and any recognised body under section 64 (membership of trades unions), is treated as time spent on duty.

7. The Secretary of State has the power, in section 50(2)(i) of the Police Act 1996, to make regulations relating to the time spent by members of police forces in meetings of the Police Federation and other recognised bodies. Clause 3(2) mirrors this power for special constables, reflecting the fact that special constables can now join the Police Federation and may therefore attend Police Federation meetings.

Justification for the power

8. The amendment is consequential to the extension of the scope of the membership of the Police Federation of England and Wales. It is considered that the Secretary of State should have the same power to make regulations relating to special

constables who attend Police Federation meetings as she does for other constables.

Justification for the procedure

9. The amendment mirrors the existing regulation-making power in section 50(2)(i), as regards members of police forces. That power is subject to the negative resolution procedure; accordingly, the negative procedure is considered to provide the appropriate level of parliamentary scrutiny.

Clause 3(8) – Amended section 60 of the Police Act 1996: Power to make regulations for Police Federations

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

10. Section 59 of the Police Act 1996 sets out the core functions of the Police Federation for England and Wales and the Police Federation for Scotland. Section 60 enables the Secretary of State to make regulations to prescribe the constitution and proceedings of the Police Federations, or authorise the Federations to make rules concerning such matters relating to their constitution and proceedings. The Police Federation (England and Wales) Regulations 2017 (SI 2017/1140) (the "2017 Regulations") were partially made under this power. The 2017 Regulations provide for membership of the Police Federation for England and Wales, the raising of funds and voluntary subscriptions, constitution and proceedings of the Federation branches.

11. Sections 59 and 60 of the Police Act 1996 and regulation 4 of the associated 2017 Regulations currently refers to the Police Federation being open to "members of police forces". Throughout policing legislation references to "members of police forces" have not been considered to mean the special constabulary in England and Wales. For example, section 90 of the Police Act 1996 relating to assaults against police officers refers to the special constabulary in addition to "members of a police force". In Scotland, special constables are considered to fall under the definition of

"members of police forces" by virtue of section 99 of the Police and Fire Reform (Scotland) Act 2012.

12. Clause 3 amends section 59 of the Police Act 1996 to allow special constables in England and Wales to join the Police Federation of England and Wales as members and to bring special constables into scope of the provisions relating to the Police Federation and the associated regulations which provide for membership.

13. Additionally, clause 3(8) amends section 60(2)(e), widening the power so that the Secretary of State may under this section make regulations about the pay, pension or allowance and other conditions of service for any member of a police force or special constable who is the secretary or officer of a Police Federation. The amendments will also apply existing regulations with modifications, by substituting references to specific Acts with more general wording as to pay, pension or allowances and other conditions of service.

Justification for the power

14. Clause 3(8) amends an existing regulation-making power in section 60(2)(e) of the Police Act 1996 to ensure that regulations made under this power apply to special constables, which is consequential to the extension of the scope of the membership of the Police Federation of England and Wales. Section 60(2)(e) is already considered to apply to special constables in Scotland. The substitution of the reference to specific Acts, with more general wording as to pay, leave or allowances and other conditions of service, provides the Secretary of State with the flexibility to make such provisions for members of the Police Federation generally, ensuring that both regular and special constables who are members of the Police Federation are adequately provided for.

Justification for the procedure

15. The extension of the regulation-making power does not change the essential nature of the power; accordingly, the negative procedure is considered to continue to provide the appropriate level of parliamentary scrutiny.

Clauses 4(3), 5(3) and 6 - New sections 2A(1A)(b), and 3ZA(2A)(b), and amended section 195, of the Road Traffic Act 1988: Power to prescribe training or skills for the purposes of section 2A(1B) or 3ZA(2B) of the Road Traffic Act 1988

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

16. The tests set out in the Road Traffic Act 1988 ("the 1988 Act") for the offences of careless and dangerous driving apply to police drivers in the same way as any other driver, taking no account of the various exemptions to road traffic legislation (for example, in relation to speed limits and road signs) that apply to the police or of their additional training. Those offences are committed when a person drives in a way that is below (careless) or far below (dangerous) what would be expected of a competent and careful driver, who is a member of the public.

17. Following a campaign by the Police Federation of England and Wales, the Home Office reviewed the law, guidance, procedures and processes surrounding police pursuits. In May 2018, the Home Office published a consultation, "The Law, Guidance and Training Governing Police Pursuits", which set out the findings of the review and options for changes in the law. The Government published its response to the consultation and the then Home Secretary issued a Written Ministerial Statement on 2 May 2019 announcing that the Government would seek to introduce a new test to assess the standard of driving of a police officer. These documents are available at www.gov.uk/government/consultations/police-pursuits.

18. This new test, which is provided for in the amendments made to the 1988 Act by clauses 4 and 5, will compare a police officer's driving for police purposes, against that of a careful, competent and suitably trained police driver. This is a change from the existing test which compares a police driver against a standard competent and careful driver. For a police officer, or police driving instructor, to benefit from this change to the dangerous and careless driving offences, they must have undertaken prescribed driver training or have the prescribed skills. By virtue of section 192(1) of the 1988 Act, "prescribed" means prescribed by regulations made by the Secretary of State. The amendment to section 195 of the 1988 Act made by clause 6 enables such regulation to make different provision for different purposes (for example, for constables in different police forces).

Justification for the power

19. In providing for the higher standards of driver training and competence to be taken into consideration when deciding whether to prosecute a police officer or police driving instructor for an offence of dangerous or careless driving, it is necessary to be able to objectively assess whether the officer or instructor has undertaken the appropriate enhanced driver training or has otherwise acquired the specialist driver skills. What constitutes the appropriate training or skills for these purposes necessarily involves specifying detailed technical standards which are properly a matter for secondary legislation.

20. The regulations will give details of police driver standards and training and will be aligned with the College of Policing's Authorised Professional Practice and national police driver training curriculum. Specifying the appropriate training and skills in regulations will enable them to be readily updated to reflect:

    - changes in the police driver training curriculum and to operational good practice;
    - emerging threats, crime trends or new technology either utilised by criminals or by the police;
    - new case law; or
    - learning from incidents involving police drivers, including recommendations made by HM Inspectorate of Constabulary and Fire & Rescue Services, the Independent Office for Police Conduct or coroners.

Justification for the procedure

21. By virtue of section 195(3) of the 1988 Act, regulations made under new section 2A(1A)(b) and 3ZA(2A)(b) of the 1988 Act will be subject to the negative procedure. Given the technical nature of the standards to be provided for in such regulations, and the fact that they would be worked up in consultation with all interested stakeholders and practitioners (see section 195(2) of the 1988 Act), the negative procedure is considered to provide an appropriate level of parliamentary scrutiny. This is consistent with other regulation-making powers in the 1988 Act in respect of the content of driver training (see, for example, sections 99ZC and 133ZA read with section 195(3) of that Act).

PART 2: PREVENTION, INVESTIGATION AND PROSECUTION OF CRIME

CHAPTER 1: FUNCTIONS RELATING TO SERIOUS VIOLENCE

Clause 7(9) and 8(9): Power to make provision for or in connection with the publication and dissemination of a strategy

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

22. The Government's Serious Violence Strategy was published in April 2018 in response to rises in knife crime, gun crime and homicide. It recommended a multi-agency approach involving a range of partners and agencies, such as education, health, social services, housing, youth and victim services with a focus on prevention and early intervention, while acknowledging that the success of the existing partnership landscape is mixed. It recognised that tackling serious violence is not a law enforcement issue alone and requires a multiple strand approach involving a range of partners across different sectors. This represented a step change in the way the Government thinks about serious violence, placing a new emphasis on early intervention to tackle the root causes of serious violence and providing young people with the skills and resilience to lead productive lives free from violence. The Strategy document can be found at https://www.gov.uk/government/publications/serious-violence-strategy.

23. Chapter 1 of Part 2 accordingly places a new duty on specified authorities (namely the local authorities, probation providers, youth offending teams, clinical commissioning groups (England), Local Health Boards (Wales), chief officers of police, and fire and rescue authorities) to collaborate and plan to prevent and reduce serious violence, with a corollary duty to prepare and implement a strategy. Functions are also placed on educational, prison and youth custody authorities in their area in respect of the preparation and implementation of serious violence strategies. Under clause 8 two or more specified authorities may work across boundaries where necessary in order to take a co-coordinated approach to serious violence.

24. Clause 7(9) and 8(9) confer on the Secretary of State a power to make provision in regulations for or in connection with the publication and dissemination of such serious violence strategies. By virtue of clause 21(2) such regulations may make different provision for different purposes or areas, consequential, supplementary, incidental, transitional, transitory or saving provision. Clause 21(3) includes a requirement for the Secretary of State to consult Welsh Ministers before making regulations under this Chapter if and to extent that the regulations make provision that applies in relation to a devolved Welsh authority within the meaning of the Government of Wales Act 2006 (see section 157A of that Act).

Justification for the power

25. Having established the principal duty in legislation requiring specified authorities to prepare and implement a serious violence strategy, the Government considers that secondary legislation is the appropriate mechanism for specifying detailed requirements in relation to the publication and dissemination of such strategies. Such regulations may specify, amongst other things, the date by which the first strategy must be published, and the method of publication of strategies. There is a power in respect of crime and disorder reduction strategies in section 6(2) of the Crime and Disorder Act 1998 ("the 1998 Act"), which provides regulations may be made about the formulation and implementation of such strategies, including analogous provision for or in connection with the publication and dissemination of a strategy. The powers in clause 7(9) and 8(9) allows for regulations to provide a

consistent approach to the publication and dissemination of strategies published across England and Wales.

Justification for the procedure

26. By virtue of clause 21(5)(a) and (b), and (6), regulations made under clause 7(9) and 8(9) are subject to the negative procedure. The Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny given that the duty on the specified authorities to prepare, review and implement serious crime strategies will be set out on the face of the Bill and that these regulations will set out secondary matters relating to publication and dissemination. The regulation-making power in section 6 of the 1998 Act is similarly subject to the negative procedure.

Clauses 9(1) and 9(2): Power to confer powers on a specified authority or a prescribed person to collaborate with each other for the purposes of preventing and reducing serious violence in a prescribed area and to authorise the disclosure of information by a prescribed person to a specified authority for the purposes of preventing and reducing serious violence in a prescribed area

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

27. Clause 9(1) enables the Secretary of State, by regulations, to confer powers on a specified authority to collaborate with a person prescribed in the regulations, and vice versa, for the purposes of preventing and reducing serious violence in a prescribed area. This could enable agencies which are not specified authorities – for example, other public bodies, charities or private companies – to collaborate where appropriate with the specified authorities. Complementary regulations made under clause 9(2) would provide for an information sharing gateway to enable a prescribed person to disclose information they hold to a specified authority for the same purposes. This would be a permissive gateway. It would permit but would not require the sharing of information. Information could be shared under this gateway notwithstanding any obligation of confidence or any other restriction on the disclosure of the information, save that disclosure would not be permitted if it would contravene data protection legislation or the prohibitions

on disclosure provided for in Parts 1 to 7 or Chapter 1 of Part 9 of the Investigatory Powers Act 2016 (clause 9(4) and (5)). An example of information that could be shared using such a gateway is management information held by a prescribed voluntary organisation, such as anonymised information about the characteristics of its clients or beneficiaries, which could be used to help to produce a problem profile or strategic needs assessment for a local area.

28. By virtue of clause 21(2) such regulations may make different provision for different purposes or areas, consequential, supplementary, incidental, transitional, transitory or saving provision. Clause 21(3) includes a requirement for the Secretary of State to consult Welsh Ministers before making regulations under this Chapter if and to extent that the regulations make provision that applies in relation to a devolved Welsh authority within the meaning of the Government of Wales Act 2006 (see section 157A of that Act).

Justification for the power

29. These powers would be exercised in response to concerns raised by non-duty holders about collaboration with a specified authority, including disclosing information to a specified authority. The powers would be exercisable in response to concerns that may be raised in the future including as a result of emerging serious crime threats, and so it is not possible to address them on the face of the Bill. Moreover, the power to authorise collaboration and establish information sharing gateways is specific to a prescribed person or prescribed area and therefore more appropriately provided for in secondary legislation.

Justification for the procedure

30. By virtue of clause 21(4), regulations made under clause 9(1) and (2) are subject to the draft affirmative procedure. This is considered appropriate as regulations would have the effect of conferring new powers on public authorities and others, including to share information. Given the sensitivities that can arise as a result of such information-sharing gateways, Parliament should have the opportunity to debate and approve any such new arrangements before they take effect.

Clause 10(7) and 11(3): Power to amend the list of specified authorities in Schedule 1 and the list of educational, prison and youth custody authorities in Schedule 2

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative procedure; negative procedure where the regulations remove an entry where the authority concerned has ceased to exist or the variation of an entry in consequence of a change of name or transfer of functions.*

Context and purpose

31. Schedule 1 to the Bill lists the specified authorities who are subject to the duty to collaborate and plan to prevent and reduce serious crime. The specified authorities must in preparing their serious violence strategies consult educational authorities, prison authorities and youth custody authorities for the local government area; such authorities also have functions under clause 14 of the Bill. Educational authorities, prison authorities and youth custody authorities are defined in Schedule 2. Clause 10(7) and 11(3) enable the Secretary of State, by regulations, to add, modify or remove an entry in Schedules 1 and 2 respectively.

32. By virtue of clause 21(2) such regulations may make different provision for different purposes or areas, consequential, supplementary, incidental, transitional, transitory or saving provision. Clause 21(3) includes a requirement for the Secretary of State to consult Welsh Ministers before making regulations under this Chapter if and to extent that the regulations make provision that applies in relation to a devolved Welsh authority within the meaning of the Government of Wales Act 2006 (see section 157A of that Act).

Justification for the powers

33. These powers are necessary to enable the list of public authorities in Schedules 1 and 2 to be kept up to date to reflect any change of name, alteration of functions or abolition of the listed agencies. It may also be the case that in the light of experience, for example reflecting changing crime patterns, it is appropriate to add new agencies to the list of specified authorities in Schedule 1. The power in clause 11(3) is subject to the constraint that Schedule 2 lists only educational, prison and youth custody authorities and so cannot be used to add authorities which do not exercise functions relating to education, prisons or youth custody. There are analogous powers in section 5(6) of the 1998 Act to amend the list of authorities responsible for crime and disorder strategies and in section 27(1) of the Counter-Terrorism and Security Act 2015 to amend the list of specified authorities subject to the duty to have due regard, when exercising their functions, to the need to prevent people from being drawn into terrorism.

Justification for the procedures

34. By virtue of clause 21(4), (5)(c) to (f) and (6), regulations made under clause 10(7) and 11(3) are subject to the draft affirmative procedure, save that the negative procedure would apply where regulations amend Schedule 1 or 2 to omit an entry relating to an authority that has ceased to exist or to amend an entry in consequence of a change of name or transfer of functions. The affirmative procedure is generally considered appropriate given the Henry VIII nature of the power and the significant consequences for a person or authority should they be added (or removed in circumstances where the negative procedure does not apply) from one or other Schedule. This approach mirrors that which applies to the analogous power in section 27 of the Counter-Terrorism and Security Act 2015.

Clause 13(4): Power to make provision conferring functions on a local policing body for the purposes of that body assisting a specified authority in the exercise in relation to that police area of functions under Chapter 1 of Part 2

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative procedure*

Context and purpose

35. Clause 13(1) enables a local policing body (that is, Police and Crime Commissioners, the Mayor's Office for Policing and Crime, and the Common Council of the City of London) to assist a specified authority in the exercise of their functions under Chapter 1 of Part 2 which fall within the police area. Clause 13(4) enables the Secretary of State, by regulations, to confer functions on a local policing body for the purposes of clause 13(1). Clause 13(5) contains a non-exhaustive list of the functions that may be conferred on local policing bodies under such regulations, including the provision of funding to a specified authority, and the convening and chairing of meetings for the purpose of assisting specified authorities to discharge their functions under clauses 7 and 8.

36. By virtue of clause 21(2) such regulations may make different provision for different purposes or areas, consequential, supplementary, incidental, transitional, transitory or saving provision. Clause 21(3) includes a requirement for the Secretary of State to consult Welsh Ministers before making regulations under this Chapter if and to extent that the regulations make provision that applies in relation to a devolved Welsh authority within the meaning of the Government of Wales Act 2006 (see section 157A of that Act).

Justification for the power

37. Local policing bodies have core functions in relation to community safety and crime prevention in their police force area, for example, the functions conferred on Police and Crime Commissioners and the Mayor's Office for Policing and Crime under Part 1 of the Police Reform and Social Responsibility Act 2011. They can be expected to have a leading role in supporting specified authorities in discharging their functions under clauses 7 and 8 of the Bill to prevent and reduce serious crime in their area. The role of local policing bodies in supporting specified authorities is expected to evolve over time as good practice in respect of the operation of the serious violence duty develops. As such, it is appropriate to confer power to add to the statutory functions of local policing bodies by secondary legislation.

Justification for the procedure

38. By virtue of clause 21(5)(g) and (6), regulations made under clause 13(4) are subject to the negative procedure. This is considered to afford an appropriate level of scrutiny given that the scope of this regulation-making power is narrowly-focused and is in keeping with the overarching functions of local policing bodies.

Clause 17(2): Power to give directions to a specified authority or educational, prison or youth custody authority for the purpose of securing compliance with the serious violence duty

Power conferred on: *Secretary of State*

Power exercisable by: *Direction*

Parliamentary procedure: *None*

Context and purpose

39. Clause 17(2) enables the Secretary of State, if satisfied that particular specified authorities under Schedule 1 or Schedule 2 have failed to discharge specified duties imposed by Chapter 1 of Part 2, to issue a direction to the authority for the purposes of securing compliance with that duty. The power be enforceable, on application made on behalf of the Secretary of State, by a mandatory order. Clause 17(4) provides that the Secretary of State must consult Welsh Ministers before giving a direction under this section to a devolved Welsh authority within the meaning of the Government of Wales Act 2006 (see section 157A of that Act).

Justification for the power

40. It is appropriate that the Secretary of State should have the power to direct particular specified authorities, educational, prison and youth custody authorities for the purpose of enforcing their duties under Chapter 1 of Part 2 where the Secretary of State is satisfied they have failed to discharge specified duties. The Government expects this power to be used sparingly. It is nevertheless a necessary mechanism by which certain specified authorities and educational, prison and youth custody authorities' compliance with their duties under the Bill can be enforced. It would not be appropriate for the direction-making power to be exercisable against a Secretary of State, accordingly this power is not exercisable in relation to probation services provided by the Secretary of State, or public sector prisons, young offender institutions, secure training centres or secure colleges. Alternative non-legislative arrangements for securing compliance with duties imposed by Chapter 1 of Part 2 will therefore apply to these bodies. The power in clause 17(2) is similar in kind to the power in section 30 of the Counter-Terrorism and Security Act 2015 to issue directions to a specified authority where the Secretary of State is satisfied that they have failed to discharge the duty to have due regard, when exercising their functions, to the need to prevent people from being drawn into terrorism.

Justification for the procedure

41. As with the direction-making power in section 30 of the Counter-Terrorism and Security Act 2015, the direction-making power in clause 17(2) is not subject to any parliamentary procedure. It would not be appropriate to require the giving of such directions to be subject to Parliamentary oversight. Parliament will have approved the lists of authorities which are to be subject to the direction power and it would be disproportionate for Parliament also to have to review and authorise each single

direction that the Secretary of State chooses to give to particular bodies to secure their effective compliance with that duty. To require this would blunt the effectiveness of the power, making the Secretary of State less able to respond swiftly to compliance failures. The power in the Bill is only enforceable by mandatory order and it would be open to an authority to contest a direction in legal proceedings.

Clause 18(1): Power to issue guidance to specified authorities and others

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

Context and purpose

42. Clause 18(1) makes provision for the Secretary of State to issue guidance to specified authorities, a person prescribed in regulations made under clause 10, educational, prison and youth custody authorities and local policing bodies. These bodies must have regard to the guidance when exercising any function conferred by or by virtue of Chapter 1 of Part 2. The guidance will provide advice on how these agencies may effectively work together locally to prevent and reduce serious violence in their area. Clause 18(3) includes a requirement for the Secretary of State to consult Welsh Ministers before issuing guidance relating to the exercise of functions conferred by or by virtue of Chapter 1 of Part 2 by a devolved Welsh authority within the meaning of the Government of Wales Act 2006 (see section 157A of that Act).

Justification for the power

43. The Bill itself establishes the duty on specified authorities and others to collaborate and plan to prevent and reduce serious violence. The purpose of any guidance under clause 18 is to support relevant public authorities in discharging their functions under Chapter 1 of Part 2. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with good practice and the changing nature of serious violence. The guidance will be prepared in consultation with practitioners.

Justification for the procedure

44. Any guidance issued under clause 18 will not be subject to any parliamentary procedure on the grounds that it would provide practical advice on the discharge by the persons listed in clause 18(2) of their functions under Chapter 1 of Part 2 and would be drafted in consultation with all interested stakeholders and practitioners. The guidance will not conflict with, or alter the scope of, the duties in Chapter 1 of Part 2. Moreover, whilst a person specified in clause 18(2) will be required to have regard to the guidance when exercising those functions, the guidance will not be binding. The approach taken in clause 18 is consistent with other legislative provisions providing for statutory guidance, including section 29 of

the Counter-Terrorism and Security Act 2015 which provides for the Secretary of State to issue guidance to authorities subject to the duty to have due regard, when exercising their functions, to the need to prevent people from being drawn into terrorism.

Clause 19(5) - amended section 6(2) of the Crime and Disorder Act 1998: Amended power to make provision about the formulation and implementation of crime and disorder reduction strategies

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

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative procedure*

Context and purpose

45. Section 6 of the Crime and Disorder Act 1998 Act ("the 1998 Act") makes provision about the formulation and implementation of crime and disorder reduction strategies. Under section 6(1) of the 1998 Act, responsible authorities for a local government area are required to formulate and implement strategies for: the reduction of crime and disorder in the area (including anti-social behaviour and other behaviour adversely affecting the local environment); combatting the misuse of drugs, alcohol and other substances in the local area; and the reduction of re-offending in the area. Clause 19(4) amends section 6 of the 1998 Act to include a new duty to formulate and implement a strategy to prevent people from becoming involved in serious violence, and to reduce instances of serious violence.

46. Under Section 6(2) of the 1998 Act, "the appropriate national authority [as defined in section 6(9)] may by regulations make further provision as to the formulation and implementation of a strategy under this section". Section 6(3)(e) and (6) of the 1998 Act provide that such regulations may make provision for or in connection with "objectives to be addressed in a strategy and performance targets in respect of those objectives", and that such provision may require a strategy to be formulated so as to address (in particular) "the reduction of crime or disorder of a particular description" or "the combatting of a particular description of misuse of drugs, alcohol or other substances".

47. Clause 19(5) amends section 6(6) of the 1998 Act to include that such provision may in addition require a strategy to be formulated so that it addresses "the prevention of people becoming involved in serious violence of a particular description" or "the reduction of instances of serious violence of a particular description". Clause 19(6) provides that the Secretary of State is the appropriate national authority for the purpose of making regulations in relation to such strategies, with clause 19(7) requiring that the Secretary of State consult with the Welsh Ministers before making such regulations where provision would apply in relation to a devolved Welsh authority within the meaning of section 157A of the Government of Wales Act 2006. Clause 19 therefore amends the existing power of the appropriate national authority to make regulations.

Justification for the power

48. This is an amendment to an existing power. The extension of the regulation-making power in section 6(2) of the 1998 Act is consequential on the extension of the scope of crime and disorder reduction strategies which responsible authorities for a local government area are under a duty to prepare and implement.

Justification for the procedure

49. Regulations made under section 6(2) of the 1998 Act are subject to the negative procedure (see section 114(2) of the 1998 Act). The extension of the regulation-making power does not change the essential nature of the power; accordingly, the negative procedure is considered to continue to provide the appropriate level of parliamentary scrutiny.

CHAPTER 2: OFFENSIVE WEAPONS HOMICIDE REVIEWS

Clause 23(1)(c): Power to specify the conditions for conducting offensive weapons homicide reviews

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft Affirmative Resolution*

Context and purpose

50. Clause 23 places a duty on relevant review partners (namely, chief officers of police, local authorities and clinical commissioning groups in relation to England or local health boards in relation to Wales) to arrange for there to be a review of the person's death (an "offensive weapons homicide review") when they are satisfied that certain conditions are met, subject to certain exclusions. The purpose of these reviews is to identify the lessons to be learnt from a death, and to consider whether it would be appropriate for anyone to take action in respect of those lessons learned.

51. The duty to arrange a review applies where the death is, or appears to be, a "qualifying homicide". A qualifying homicide is defined in clause 23(6) as one where the victim was aged 18 or over, and the death, or events surrounding the death, involved the use of an offensive weapon (defined by reference to the definition in section 1 of the Prevention of Crime Act 1953); the death occurred, or is likely to have occurred in a place in England or Wales; the review partner is a relevant review partner and the conditions that may be specified by regulations under clause 23(1)(c) are satisfied. Those conditions may include, for example, conditions relation to the circumstances of or relating to the death, or the circumstances or history of the person who died or other persons.

Justification for the power

52. Offensive weapons homicide reviews are being introduced to assist local partners to learn lessons from homicides by identifying points of failure to protect or intervene. They will also allow trends in homicide to be identified and to increase knowledge of how the threat from serious violence is evolving, allowing for stronger policy interventions.

53. It is not expected that every homicide involving an offensive weapon will involve institutional or local points of failure, or assist in understanding the local or national threat from serious violence. For example, there may be no points of failure or no lessons to learn from a review following a fight in a pub between two men in their 40s which results in a fatality because of a brain injury sustained as a result of a blow to the head using a broken snooker cue. Consequently, the Government does not expect or intend for review partners to have to conduct a homicide review in every instance of a homicide involving an offensive weapon (as defined in section 1 of the Prevention of Crime Act 1953).

54. Therefore, the Government considers it appropriate for the Secretary of State to specify in regulations the conditions which are to be met for an offensive weapons homicide review to be required. Specifying such matters in regulations is considered appropriate to enable the conditions to be readily updated in the light of experience in conducting such reviews (including following the pilots provided for in clause 33) and changing crime patterns. By setting out conditions in regulations it will be clear to the review partners as to the circumstances in which an offensive weapons homicide review must be conducted. In contrast, section 9 of the Domestic Violence, Crime and Victims Act 2004 provides that a legal duty on relevant persons to conduct a domestic homicide review is only where a direction is issued by the Secretary of State on a case-by-case basis. Such regulations may also make different provision for different purposes and different provision for different areas, consequential supplementary, incidental, transitional, transitory or saving provision by virtue of clause 34(2). This would allow different conditions to be set for different types of homicide and for any consequential, supplementary, incidental, transitional, transitory or saving provision that may be required in light of future amendments to the conditions, for example, in relation to reviews that are ongoing at the time conditions are amended.

Justification for the procedure

55. By virtue of clause 34(3), regulations made under clause 23(1)(c) are subject to the draft affirmative procedure. The affirmative procedure is considered appropriate given that the relevant offensive weapons homicide review partners must be satisfied that the circumstances or criteria specified in regulations are met before the duty to arrange a homicide review is triggered. Moreover, given the significant public and parliamentary attention afforded to homicides involving knives or other offensive weapons, it is considered appropriate that both Houses should have the opportunity to debate and approve the draft regulations providing for those circumstances or criteria.

Clause 23(7): Power to amend definition of "qualifying homicide"

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

56. Clause 23(7) confers a power on the Secretary of State to amend the definition of a qualifying homicide. It is expected that this power would, in particular, be used to add to the types of homicide that must be subject to a homicide review, extending the ambit of such reviews to cover homicides beyond those which involved the use of an offensive weapon.

57. As a consequence of amending the definition of a qualifying homicide, clause 23(7)(b) also enables regulations to make consequential amendments to Chapter 2 of Part 2. Such regulations may also make different provision for different purposes and different provision for different areas, consequential supplementary, incidental, transitional, transitory or saving provision by virtue of clause 34(2).

Justification for the power

58. Understanding and tackling the use of offensive weapons is just one of the many ways the Government is tackling serious violence and homicide. It is intended that reviews of homicides involving offensive weapons will help local and national understanding of the threat from serious violence and help identify policies to tackle homicide.

59. As provided for in clause 33, the Government intends to pilot these new homicide reviews before they are rolled out nationally to ensure that these reviews are designed in collaboration with local partners and practitioners to best achieve their objective and inform responses that will tackle homicide. Depending on the outcome of the pilot, or of subsequent assessments if the policy is rolled out nationally, it may be considered that homicide reviews can be helpful in tackling other type of homicide that do not involve offensive weapons (and are not covered by existing requirements to carry out homicide reviews). Alternatively, the threat posed to the public by serious violence may evolve and rely less on offensive weapons captured by the definition in the Prevention of Crime Act 1953. This power therefore allows the Secretary of State to extend the scope of these homicide reviews, should feedback, intelligence or threat change in the future. In legislating in the Bill for offensive weapons homicide reviews Parliament will have approved the statutory framework for such reviews, that being the case, the extension of this framework to cover other categories of homicide is considered to be an appropriate matter for secondary legislation.

60. If the scope of homicide reviews were amended to capture homicides that do not include offensive weapons, it may be necessary to make consequential amendments to Chapter 2 of Part 2 to reflect the expanded remit and supplementary, incidental, transitional, transitory or saving provision may be required in relation to any changed definition of qualifying homicide and reviews that are ongoing at the time of such a change coming into force, or deaths that occurred before a change in the definition came into force.

Justification for the procedure

61. By virtue of clause 34(3), regulations made under clause 23(7) are subject to the draft affirmative procedure. The affirmative procedure is considered appropriate to ensure that Parliament has the opportunity to consider the merit of extending the scope of homicide reviews, given this would place additional resourcing requirements on homicide review partners; the affirmative procedure also reflects the Henry VIII nature of the power.

Clause 24(1): Power to specify the relevant review partners

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft Affirmative Resolution*

Context and purpose

62. Clause 24(1) provides a power for the Secretary of State to make provision for identifying in regulations which review partners are the relevant review partners in respect of a person's death. The review partners are chief officers of police, local authorities and clinical commissioning groups in England/local health boards in Wales. The relevant review partners are those which are required to conduct an offensive weapons homicide review in a particular case. This power provides for the Secretary of State to specify which review partners will be the relevant review partners, the regulations may identify the relevant review partners by reference to the place the death occurred, or appeared to occur. The regulations may also identify the relevant review partners by reference to other matters, including, but not limited to, the last or an earlier place of residence of the person who died, or the place of residence of the person, or one of the persons, who caused or is likely to have caused the death. The regulations may also include provision about a group of review partners agreeing be a relevant review partner instead of another group of review partners; for specified review partners to agree between themselves as to who are the relevant review partners in a particular instance, and for the Secretary of State to give a direction specifying which review partners are the relevant review partners

Justification for the power

63. It is considered appropriate to set out the detail of which authorities will be relevant review partners in regulations in order to provide for all cases where a review might

be required. The level of detail required to cover the arrangements for the circumstances of any homicide is such that it is considered most appropriate to be set out in secondary legislation. For example, it is anticipated that in the first instance the relevant review partners for an offensive weapons homicide review will be determined by reference to the place of the death, or the place the death is likely to have occurred. However, provision will also be required for cases where that location is not known, and for cases where the victim's residence may not be known.

64. As the Secretary of State will have the power to amend the definition of qualifying homicide (under clause 23(7)) and the definition of review partner (under clause 35(2)), the power in clause 24 will also ensure that changes to provisions setting out the relevant review partners can be made if necessary, to reflect any additional categories of homicide and/or any additional review partners in future. Such regulations may make different provision for different purposes or areas, supplementary, incidental, transitional, transitory or saving provision.

Justification for the procedure

65. By virtue of clause 34(3), regulations made under clause 24(1) are subject to the draft affirmative procedure. The affirmative procedure is considered appropriate given that the regulations will determine which review partners the duty to conduct a review will fall on in specific cases. Given the significant public and parliamentary attention afforded to homicides involving knives or other offensive weapons, it is considered appropriate that both Houses should have the opportunity to debate and approve the draft regulations.

Clause 25(2) and (4): Power to disapply duty to conduct an offensive weapons homicide review

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

66. Offensive Weapons Homicide Reviews are being introduced to ensure lessons are learnt from certain homicides involving offensive weapons that are not currently subject to certain existing reviews, such as Domestic Homicide Reviews (under section 9 of the Domestic Violence, Crime and Victims Act 2004), Child Death Reviews (under section 16 of the Children Act 2004) and Safeguarding Adult Reviews (under section 44 of the Care Act 2014) or reviews undertaken by a Safeguarding Board under regulations made under section 135(4)(a) of the Social Services and Well-being (Wales) Act 2014).

67. It is intended that a death is only subject of an offensive weapons homicide review if it would not be considered under any existing review provisions. This will ensure that certain homicides involving offensive weapons which are currently not being reviewed are considered for lessons to be learnt and acted upon, and intends to avoid duplication of multiple reviews of each homicide. Clause 25(1) and (3) disapplies the requirement to undertake an offensive weapons homicide review when the homicide falls within scope of one of the existing reviews provided for in the statutory provisions listed in the paragraph above.

68. Clause 25(2) enables the Secretary of State to make regulations which similarly disapply the requirement to conduct an offensive weapons homicide review in cases where the death in question must or may be investigated under arrangements made by NHS bodies in England (being an NHS body as defined by section 275 of the National Health Service Act 2006 – see clause 35(1)) as a death caused by a person who is receiving or has received any health services relating to mental health. Clause 25(4) includes similar provision in respect of a death caused by a person who is receiving or has received any health services relating to mental health in Wales.

Justification for the power

69. The scheme as provided for in the Bill in relation to offensive weapons homicide reviews is intended to avoid duplication of homicide reviews where possible. It is therefore important for the review partners to understand the circumstances in which they are required to undertake an offensive weapons homicide review, and when that requirement does not apply.

70. While there is statutory provision for certain existing reviews, there is no statutory basis for homicide reviews where the death was caused by a person who is receiving or has received any mental health services in England. NHS England's Serious Incident Framework references such reviews, and accordingly the provision relating to such reviews may be changed by administrative means. In order to provide clarity for relevant review partners, it is considered appropriate to specify in regulations the circumstances in which an offensive weapons homicide review is not required in those cases where the death in question must or may be investigated under arrangements made by NHS bodies in England due to the death being caused by a person who is receiving or has received any mental health services. In respect of a death caused by a person who is receiving or has received any health services relating to mental health in Wales it is also considered appropriate to provide clarity in regulations as to the circumstances in which an offensive weapons homicide review would not be required in such cases where there may be a review of, or investigation into the provision of that healthcare under section 70 of the Health and Social Care (Community Health and Standards) Act.

71. Such regulations may also make different provision for different purposes and different provision for different areas, consequential supplementary, incidental, transitional, transitory or saving provision by virtue of clause 34(2) to allow different provision to be made for example in relation to different types of mental health services, or to make any consequential supplementary, incidental, transitional, transitory or saving provision which may be required in relation to ongoing reviews

if the regulations are amended in future, or in relation to deaths that occurred prior to amendments coming into force.

Justification for the procedure

72. The regulation-making powers in clause 25(2) and (4) are tightly focused. The clause itself establishes the principle that relevant review partners are not required to conduct an offensive weapons homicide review in specified circumstances and the powers to disapply this requirement in clause 25(2) and (4) are narrowly drawn. In these circumstances, the negative procedure (as provided for in clause 34(4)) is considered appropriate.

Clause 30(1) and (3): Power to make provision about the delegation of functions in respect of offensive weapons homicide reviews

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

73. Clauses 23 to 28 confer a number of functions on review partners regarding the arrangement and conduct of an offensive weapons homicide review. Clause 30(1) enables regulations to be made enabling relevant review partners to delegate one or more of the functions specified in the regulations to one of their number or to another person, which may include a third party to lead or chair the review. Clause 30(2) provides that the regulations may specify some or all of the functions of a review partner under clauses 27 and 28.

74. Clause 30(3) enables regulations to provide that in two-tier local government areas, the county council and a district council for an area within the area of the county council may agree that one of them carry out one or more functions specified in the regulations on behalf of the other. Clause 30(4) provides that the regulations may specify some or all of the functions of a review partner under clauses 23 to 28.

75. Such regulations may also make different provision for different purposes and different provision for different areas, consequential supplementary, incidental, transitional, transitory or saving provision by virtue of clause 34(2).

Justification for taking the power

76. While the Bill places the duty to undertake offensive weapons homicide reviews on the review partners, the Government acknowledges that there may be benefits in

delegating some or all of these functions to one of their number or to another person, for example appointing an external individual to act as the reviewer can help ensure an independent perspective is brought to the heart of the review (as seen in Domestic Homicide Reviews and Child Safeguarding Practice Reviews). It is also considered that it may be appropriate in two-tier local authority areas for one of a county and district council to be able to carry out all or some of the functions in clauses 23 to 28 on behalf of the other. It is also considered that it may be appropriate in two tier local authority areas for one of a county and district council to be able to carry out all or some of the functions in clauses 23 to 28 on behalf of the other.

77. The Government is committed to ensuring that the new model for offensive weapons homicide reviews is designed in partnership with local delivery partners having regard to the outcome of the pilot provided for in clause 33. Conferring a power to delegate functions by regulations will ensure that account can be taken of the consultation on the design of these homicide reviews, the learning from the pilot and developing good practice gleaned from subsequent experience of conducting these reviews.

Justification for the procedure

78. By virtue of clause 34(3), regulations made under clause 30(1) and (3) are subject to the draft affirmative procedure. The draft affirmative procedure is considered appropriate given that these regulations would enable review partners to delegate functions expressly placed on them by primary legislation. In these circumstances, it is appropriate that both Houses should be afforded the opportunity to debate and approve any delegations to be permitted.

Clause 31: Power to issue guidance in connection with homicide reviews

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

Context and purpose

79. Clause 31 requires review partners to have regard to any guidance issued by the Secretary of State in connection with the exercise of their functions under clauses 23 to 30.

Justification for taking the power

80. The purpose of guidance is to aid the implementation of offensive weapons homicide reviews by supplementing the legal framework provided for in Chapter 2 of Part 2 of the Bill. Amongst other things, the guidance will provide further information on the notification requirements, the conduct of reviews, the content of

the report, and information sharing. The Home Office will consult widely on the guidance before it is issued, including persons representing offensive weapons homicide review partners and, so far as the guidance relates to devolved Welsh authorities, the Welsh Ministers.

81. It is important that the guidance can be updated at regular intervals to ensure it reflects lessons learned from the delivery of offensive weapons homicide reviews and keep pace with good practice. In particular, offensive weapons homicide reviews will be piloted before being rolled out nationwide and it is expected that the guidance may need to be updated to reflect experience gained from the pilot stage. Section 9(3) of the Domestic Violence, Crime and Victims Act 2004 contains an analogous power to issue guidance in respect of domestic homicide reviews, the relevant guidance is available here.

Justification for the procedure

82. The guidance is not subject to any parliamentary procedure. It will deal with practical advice to those involved in undertaking offensive weapons homicide reviews and will have been the subject of a full consultation with interested parties before it is issued. The guidance will not conflict with the statutory framework governing offensive weapons homicide reviews and although offensive weapons homicide review partners must have regard to any guidance issued, there will be no statutory duty for persons to abide by the guidance – the aim is to assist practitioners not direct them. This approach is consistent with that taken in respect of domestic homicide reviews under section 9(3) of the Domestic Violence, Crime and Victims Act 2004.

Clause 33: Power to pilot offensive weapons homicide reviews

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory Instrument*

Parliamentary procedure: *None*

Context and purpose

83. Clause 33 provides for the provisions relating to offensive weapons homicide reviews to be piloted before being rolled out more generally. The clause introduces two conditions before the commencement power in clause 175(1) can be exercised to bring the provisions in Chapter 2 of Part 2 into force for all purposes and in relation to the whole of England and Wales.

84. The first condition is that the Secretary of State has first brought some or all of the provisions into force only for one or more specified purposes or in relation to one or more specified areas in England and Wales (for example, the provisions of Chapter 2 of Part 2 could be brought into force in one or more local authority areas).

85. The second condition is that the Secretary of State has laid before Parliament a report on the operation of the pilot.

Justification for taking the power

86. Before implementing offensive weapons homicide reviews across the whole of England and Wales it is proposed to pilot their operation. The pilot will, amongst other things, enable the Government to test the procedures and timescales for conducting such reviews and the overall effectiveness of these reviews in identifying lessons learnt and preventing future homicides.

87. Given the nature of the pilot – namely that it will be time bound and limited to one or more particular areas or particular purposes – it is appropriate to leave to secondary legislation the determination of the scope of pilot to be conducted, including the duration of the pilot, which can be specified by virtue of clause 33(4) and extended for a further specified period by virtue of clause 33(5). Both of these matters will be a matter for discussion with one or more police forces, local authorities, clinical commissioning groups in relation to England and/or local health boards in relation to Wales.

Justification for the procedure

88. As is usual with commencement powers, regulations made under clause 175(1) read with clause 33 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

89. In accordance with normal practice, the power to make pilot schemes is similarly not subject to any parliamentary procedure. Again, Parliament will already have approved the provisions to be commenced by enacting them, and partial commencement through the making of a pilot scheme affords the opportunity to assess the effectiveness of the provisions prior to national roll-out. This approach is consistent with the provision in section 33 of the Crime and Security Act 2010 which made provision for piloting Domestic Violence Protection Notices and Orders and the provision in section 31 of the Offensive Weapons Act 2019 which make similar provision for piloting Knife Crime Prevention Orders.

Clause 35(2): Power to amend the definition of "review partner"

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

90. Clause 23(1) places a requirement on relevant review partners to arrange for there to be an offensive weapons homicide review in relation to certain deaths. Clause 24 provides a power for the Secretary of State to specify in regulations the relevant review partners in respect of a person's death.

91. The terms "review partner" is defined in clause 35(1).

92. Clause 35(2) enables the Secretary of State, by regulations, to amend the definition of review partner and make other consequential amendments to Chapter 2 of Part 2 as appropriate. Such regulations may also make different provision for different purposes and different provision for different areas, consequential supplementary, incidental, transitional, transitory or saving provision by virtue of clause 34(2). This would allow, if appropriate, new review partners to be included only for certain types of qualifying homicide (if additional types of qualifying homicide were added in future by virtue of the power in clause 23(7)), and would allow consequential, supplementary, incidental, transitional, transitory or saving provision to be made in light of the addition of a new review partner, for example in relation to reviews where had begun before the addition of a new review partner.

Justification for the power

93. As the offensive weapons homicide reviews are a new review process, subject to a pilot, the Government may assess that it is necessary or beneficial to expand the list of bodies which are responsible for arranging and conducting an offensive weapons homicide review. Such an extension of the review partners may be appropriate as a result of the extension of the scope of homicide reviews (by virtue of the power in clause 23(7)) to encompass other homicides in addition to those committed using an offensive weapon. This power allows the Secretary of State to add other bodies to the list so that they too are subject to the duties, or to remove existing review partners. There is a duty on the Secretary of State to consult persons representing review partners, such other persons as the Secretary of State considers appropriate, and the Welsh Ministers (insofar as the proposed regulations relate to a devolved Welsh authority), before making such regulations.

94. A similar power exists in section 9(6) of the Domestic Violence, Crime and Victims Act 2004 providing the Secretary of State power to amend the list of bodies subject to the duty to establish, or participate in, a domestic homicide review.

Justification for the procedure

95. By virtue of clause 34(3), regulations made under clause 35(2) are subject to the draft affirmative procedure. The affirmative procedure is considered appropriate to ensure that Parliament has the opportunity to consider the merit of placing a legal requirement on new bodies, given the resourcing requirements this would

place on the body. The affirmative procedure is also appropriate in such circumstances given that this is a Henry VIII power.

CHAPTER 3: EXTRACTION OF INFORMATION FROM ELECTRONIC DEVICES

Clause 40(1): Duty to issue a code of practice regarding the use of the information extraction powers

Power Conferred on: *Secretary of State*

Power Exercisable by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative resolution*

Context and purpose

96. Clause 40(1) places a duty on the Secretary of State to issue a code of practice giving guidance to authorised persons about the exercise of the powers in clauses 36(1) and 39(1) in respect of the extraction of information from digital devices. In preparing the code, the Secretary of State is required to consult the Information Commissioner, the Scottish Ministers, the Department of Justice in Northern Ireland, and such other persons as she sees fit. Once prepared, the code must be laid before parliament and published, and is to be brought into force by regulations. The code may be revised from time to time – and these provisions on consultation, laying, publication and bringing into force apply to revisions (other than revisions which the Secretary of State considers to be insubstantial, where there is no duty to consult).

Justification for the power

97. The Government considers that a code of practice will assist authorised persons understanding the purpose and appropriate use of the new powers and considerations they should be making before relying on the powers. A code of practice will provide guidance to all authorised persons who use the powers on the purposes for which the powers can be used and by which authority. It will deliver greater consistency and ensure that those authorised persons relying on the power will be better able to achieve an effective balance between pursuing the purposes for which the powers may be exercised (for example, investigating crime) and the privacy for victims and witnesses.

98. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with good practice in the exercise of these powers. The guidance will be prepared in consultation with the Information Commissioner and others.

Justification for the procedure

99. The code (and any revised code) will be brought into force by regulations subject to the negative procedure (see clause 40(5)). In this instance, provision for parliamentary scrutiny is considered appropriate because of the intrusive nature of

the powers provided for in clause 36(1) and 39(1) and the level of parliamentary and public interest in the investigation and prosecution of sexual offences and other serious crimes. The code will not conflict with, or alter the scope of, the powers which will be set out in primary legislation and will be prepared in consultation with the Information Commissioner and others.

Clause 41(1): Duty to make regulations about the extraction of confidential information

Power Conferred on: *Secretary of State*

Power Exercisable by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative resolution*

Context and purpose

100. A digital device may contain material that is subject to legal professional privilege (or, in Scotland, material in respect of which a claim to confidentiality of communications could be maintained in legal proceedings) or other confidential material, such as material relating to journalistic sources.

101. The Attorney General's Office have recently updated their disclosure guidelines (which apply to England and Wales) on the handling of material subject to legal professional privilege to state:

> "26. No digital material may be requested or seized which an investigator has reasonable grounds for believing to be subject to legal professional privilege (LPP), other than under the additional powers of seizure in the CJPA [Criminal Justice and Police Act] 2001.
>
> 27. The CJPA 2001 enables an investigator to seize relevant items which contain LPP material where it is not reasonably practicable on the search premises to separate LPP material from non-LPP material.
>
> 28. Where LPP material or material suspected of containing LPP is seized, it must be isolated from the other material which has been seized in the investigation. Where suspected LPP material is discovered when reviewing material, and it was not anticipated that this material existed, again it must be isolated from the other material and the steps outlined below taken. The prosecution will need to decide on a case by case basis if the material is LPP material or not – defence may be able to assist with this."

102. The power in clause 36(1) requires agreement from a device user before information can be extracted, which means that the authorised person will likely be able to establish if the device is likely to contain confidential material by asking the device user. However, under clause 38 the power can also be used in certain situations where a user is unavailable, such as where a user is deceased or a user is missing and the authorised person reasonably believes that their life is at risk or they are at risk of serious harm. The power in clause 39(1) applies in relation to

the devices of a deceased person. In these cases, it is likely to be challenging for the authorised person to establish if the device is likely to contain confidential material.

103. In addition, the current capability for selective extraction from a device, that is only extracting a limited subset of information, is limited.

104. In these circumstances, clause 41(1) requires the Secretary of state to make regulations about the extraction of confidential information. Confidential information is defined in clause 41(2) and (3) and includes journalistic and legally privileged information. Clause 41(4) sets out a non-exhaustive list of the provision that may be included in such regulations, namely: provision about conditions which must be met before the powers to extract information may be exercised in relation to confidential information; provision about the exercise of those powers in relation to such information; and provision applying where such information is obtained in the exercise of the extraction powers. Regulations may contain consequential, incidental, supplementary, transitional, transitory or saving provision (clause 41(5)).

Justification for the power

105. As it is not currently technically possible for most authorised persons listed to extract a subset of information held on a device, the current practice (as outlined by the AGO) is to extract all the information and then isolate protected material from the rest of the extracted data and destroy it.

106. The technological capabilities of authorised persons will evolve and improve over time as new technology becomes available and best practice in the handling of confidential information will similarly evolve. Given these considerations, the Government considers that it is appropriate to make provision in respect of confidential information in secondary legislation so that the procedure governing the handling of such information can be readily updated.

Justification for the procedure

107. By virtue of clause 41(6), regulations under clause 41(1) are subject to the draft affirmative procedure. This is considered appropriate given the sensitivities around the processing of such confidential information and the likely high level of parliamentary interest.

Clause 42(4): Power to amend the list of persons authorised to exercise the powers to extract information from digital device

Power Conferred on:	*Secretary of State*
Power Exercisable by:	*Regulations made by Statutory Instrument*
Parliamentary Procedure:	*Draft affirmative resolution if adding a reference to a person; negative resolution if removing or modifying a reference to a person*

Context and purpose

108. Clause 36(1) and 39(1) provides that an authorised person may, provided certain conditions are met, extract information stored on a digital device from that device for purposes including preventing, detecting, investigating or prosecuting a criminal offence. Clause 42(1) defines "authorised person" as a person listed in Schedule 3. That Schedule comprises three parts – Part 1 lists persons (e.g. constables of various UK police forces) who may exercise either power for any of the specified purposes; Part 2 lists persons (e.g. immigration officers) may only exercise the clause 36(1) power, but for any of the specified purposes; Part 3 lists persons (e.g. officers of Revenue and Customs) may only exercise the clause 36(1) power and only for the purpose of the prevention, detection, investigation or prosecution of crime. Clause 42(4) enables the Secretary of State to amend Schedule 3 so as to add a reference to a person, remove a reference to a person or modify a description of a person. Clause 42(5) enables regulations under clause 42(4) to make transitional, transitory or saving provision.

Justification for the power

109. The case has been made for the persons listed in Schedule 3 to make use of these powers as they have responsibilities for the prevention, detection, investigation or prosecution of crime and they extract information from digital devices to support that purpose. In addition, persons listed in Part 2 of the Schedule have responsibilities for the location of missing person(s) and protecting vulnerable persons from neglect or physical, mental or emotional harm, and persons listed in Part 1 of the Schedule have responsibilities concerning the investigation of deaths – and in both cases they extract information from digital devices to support those purposes. It is possible that over time other persons who extract information from digital devices for these purposes will be identified and the power will need to be extended to them as quickly as possible once the case has been established. It is also possible that persons who are listed may see their responsibilities change, such that they no longer need to extract information, or their name changed.

110. An analogous power is contained in section 30 of the Data Protection Act 2018, which enables the Secretary of State, by regulations, to amend the list of persons specified or described in Schedule 7 to that Act who may process data for law enforcement purposes.

Justification for the procedure

111. Adding a person to Schedule 3 will have the effect of allowing that person to extract information from digital devices (for the stated purpose(s), and provided the conditions set out in clause 36 and 39 are satisfied), so it is appropriate to subject any such regulations to the affirmative resolution procedure (clause 42(6)). The same applies to removing a person from Part 3 of the Schedule and adding them to Part 1 or 2, or removing a person from Part 2 and adding them to Part 1 – such a change will have the effect of allowing that person to extract information in a wider set of circumstances, so it is appropriate to subject any such regulations to

the affirmative procedure. The affirmative procedure is also appropriate in such circumstances given that this is a Henry VIII power. However, the negative resolution procedure will apply (by virtue of clause 42(8)) to any regulations which do no more than reflect a change in the name of a person in Schedule 3 or remove a person from the Schedule. The same applies to removing a person from Part 1 of the Schedule and adding them to Part 2 or 3, or removing a person from Part 2 and adding them to Part 3 (clause 42(7)). Any such regulations will not have the effect of increasing the powers of any person (or, to put it another way, of extending the reach of the power), so the negative resolution procedure is considered appropriate.

CHAPTER 4: OTHER PROVISIONS

Schedule 4, paragraph 37 - new section 50B of the Police and Criminal Evidence Act 1984: Power to issue guidance on pre-charge bail

Power conferred on: *College of Policing*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *Laying only*

Context and purpose

112. Clause 43 of and Schedule 4 to the Bill reform the system of pre-charge bail. Pre-charge bail is a tool used by the police to manage suspects, often with the imposition of conditions, who have been arrested on suspicion of an offence but where more time is needed to complete the investigation before a charging decision is made. The investigation can continue whilst the suspect is on pre-charge bail.

113. The Bill makes three substantive changes to the pre-charge bail regime. First, it removes the presumption against pre-charge bail, providing a neutral position in relation to the imposition of pre-charge bail with the aim of ensuring that bail before charge is granted in all cases where it is necessary and proportionate to do so. Second, it alters the timescales for the period, and extensions of the period, on which a person can be released on bail (pre-charge) before attending a police station (to “answer bail”), known as the “applicable bail period”. In standard cases, the applicable bail period will run for three months from the bail start date. Extensions of this period in these cases will require approval from an officer of the rank of Inspector or above to six months from the bail start date, and a Superintendent or above will need to authorise any extension to nine months from the bail start date. Judicial approval will then be sought to extend beyond nine months. Different applicable bail periods, periods of extension and levels of authority apply for more complex investigations. Third, the Bill ensures that, where reasonably practicable, the views of alleged victims are obtained in relation to the imposition of bail conditions or variation of bail conditions. This aims to ensure that those in charge of investigating an offence and imposing or varying bail conditions are made aware of any safeguarding concerns, helping to ensure appropriate measures are in place.

114. Paragraph 37 of Schedule 4 inserts new section 50B into the Police and Criminal Evidence Act 1984 ("PACE") which confers a power on the College of Policing to issue statutory guidance in relation to bail granted to a person under Part 3 or Part 4 of PACE ("pre-charge bail"). New section 50B(2) of PACE sets out a non-exhaustive list of matters that may be covered in such guidance. Before issuing or revising the guidance, the College of Policing is required to secure the approval of the Secretary of State and to consult with the National Police Chiefs' Council, such persons as appear to the College of Policing to represent the views of local policing bodies, and any such other persons as they consider appropriate. Persons exercising functions relating to pre-charge bail will be required to have regard to the guidance (new section 50B(7)).

115. The Secretary of State will not be required to lay the guidance before Parliament (or any part of it) which in their opinion could prejudice the prevention or detection of crime or the apprehension or prosecution of offenders, or could jeopardise the safety of any person.

116. Section 39A of the Police Act 1996 ("the 1996 Act") confers an existing power on the College of Policing to issue codes of practice "relating to the discharge of their functions by chief officers of police" where certain conditions are met. As the reformed pre-charge bail regime places functions on custody officers, Inspectors and Superintendents and the policy intention is for these officers to be subject to, and to have regard to, the guidance a new, broader power to issue statutory guidance is required.

Justification for the power

117. The Bill itself reforms the current pre-charge bail system. The statutory guidance issued under new section 50B of PACE will support the police in discharging their functions. This will include operational guidance on the factors to be taken into consideration when assessing whether to release a suspect on bail or without bail, and in the former case, the conditions to be attached to pre-charge bail. The guidance will also cover communication with victims and witnesses. These are detailed, procedural matters which will be more appropriately set out in statutory guidance than on the face of the Bill or in regulations. While there is non-statutory guidance available[1] for the current regime, it appears that it is not sufficiently understood, and is not being adhered to consistently. Placing the guidance on a statutory footing will enhance understanding and consistency of application across all forces.

118. In addition, setting out such detailed operational procedure in statutory guidance, with power to revise, enables this information to be readily amended from time to time to reflect the development of good practice as to how the reformed pre-charge bail regime should operate.

[1] The current non-statutory NPCC "Operational Guidance for Pre-Charge Bail and Released under Investigation" is available at:
https://cdn.prgloo.com/media/832fb4a76353450ab555b7db1c93ed48.pdf

119. The College of Policing is the professional body for policing in England and Wales. Therefore, a function for this body to issue statutory guidance is consistent with its existing remit of providing those working in policing with the skills and knowledge necessary to prevent crime, protect the public and secure public trust. In addition to section 39A of the 1996 Act there are a number of other existing statutory powers to issue guidance conferred on the College, for example, section 53F of the 1996 Act (power to issue guidance about designated police volunteers) and section 87(1B) and 87A(2) of the 1996 Act (power to issue guidance in respect of discharge of disciplinary functions and in respect of conduct respectively).

Justification for the procedure

120. Any guidance issued under new section 50B of PACE, and any future revisions of the document, must be laid before Parliament, but is not otherwise subject to any parliamentary procedure. This absence of any parliamentary scrutiny reflects the fact that the statutory guidance will provide practical operational guidance which must be consistent with the statutory framework for pre-charge bail as provided for in Parts 3 and 4 of PACE, as amended by the Bill. The guidance will not conflict with, or alter the scope of, Parts 3 and 4 of PACE. The absence of provision for parliamentary scrutiny is in line with other statutory codes of practice and guidance issued by the College of Policing, including under the 1996 Act.

Clause 45(2) - new section 22A(4) of the Sexual Offences Act 2003: Power to amend of the list of positions of trust to remove activities or include other activities where a person may be coached, taught, trained, supervised or instructed

Power Conferred on: *Secretary of State*

Power Exercisable by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Draft affirmative resolution*

Context and purpose

121. Clause 45(2) inserts a new section 22A into the Sexual Offences Act 2003 to create further positions of trust where a person (A) coaches, teaches, trains, supervises or instructs another person (B), on a regular basis, in a sport or in a religion. These further positions were created to target situations where a child has some dependency on the adult involved, often combined with an element of vulnerability of the child, with the aim of stopping people abusing such positions by manipulating young people into sexual activity, even if such sexual activity is apparently consensual. The purpose of the power in new section 22A(4) is to enable the Secretary of State, by regulations, to amend subsections (1) and (2) of new section 22A to add or remove a field of activity (currently a “sport” or a “religion” as defined) in which a person may be coached, taught, trained, supervised or instructed.

Justification for the power

122. New section 22A(4) provides the power to add or remove an activity in which a person may be coached, taught, trained, supervised or instructed. The Inquiry by the All-Parliamentary Group on Safeguarding in Faith Settings highlighted other situations within which similar abuse has been shown to exist, for example, within transport, youth work, the scout movement, cadets, the charity sector and within the performing arts, which potentially also fall to be addressed in due course. However, in order to act proportionately in relation to this issue, there is a desire to ensure the balance is right and consider evidence for any further changes, before extending the positions of trust protections to cover the same or similar activities in other situations, or removing a position of trust on the basis it is no longer necessary to include it. This would be able to be done much more quickly by way of secondary legislation rather than primary legislation.

Justification for the procedure

123. By virtue of new section 22A(6) of the Sexual Offences Act 2003, regulations made under new section 22A(4) are subject to the draft affirmative procedure. This is considered appropriate as regulations would have the potential for impacting significantly on the rights of individuals to engage in sexual activities in certain situations which might otherwise be considered to be consensual and lawful. Therefore, given the need to achieve the appropriate balance between competing rights, Parliament should have the opportunity to debate and approve any such new arrangements before they take effect.

Schedule 5, paragraph 4(5) and 5(3) – New sections 9(5) and 14(6) of the Crime (Overseas Production Orders) Act 2019: Power to prescribe person to serve an Overseas Production Order

Power conferred on: *Secretary of State and Lord Advocate*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary procedure: *Negative*

Context and purpose

124. Clause 47 and Schedule 5 make amendments to the Crime (Overseas Production Orders) Act 2019 ("COPO Act"). These amendments are necessary to facilitate the implementation of the overseas production order ("OPO") scheme. At the time of the passing of the legislation the fine detail of the implementation was not known, and certain changes have had to be made to comply with the UK's international obligations. The OPO scheme allows for international requests for data to be made by UK judges by way of an OPO, which is then served on a communications service provider abroad. Initially the only other country with which the UK has an underpinning agreement is the USA. Negotiations with the USA have continued since the passing of COPO Act and it highlighted the need to make

some amendments to the legislation to better ensure that any agreement can be implemented as effectively as possible.

125. One specific area that needs amendments relates to serving of OPOs. Section 9(2) and 9(3) of the COPO Act require OPOs to be served by the Secretary of State if they are made in England, Wales or Northern Ireland or by the Lord Advocate if they are made in Scotland. Negotiations with the USA have highlighted practical arrangements which should be put in place to ensure that the UK can better comply with the international obligations arising from the agreement with the USA or any other country the UK chooses to engage with. The issue is around having the technical capability to provide secure transmission of OPOs to communications service providers.

126. It is therefore necessary to amend the COPO Act to remove the requirement for service to be carried out by the Secretary of State and the Lord Advocate and provide that this function can be delegated to a body which has the appropriate infrastructure and controls in place to be able to securely transmit requests and receive data from providers based overseas.

Justification for the power

127. The COPO Act is an enabling Act, designed to allow implementation of international data sharing agreements reached with other countries. The only agreement reached so far is with the USA, but the expectation is that others will follow. Each agreement will be separately negotiated, and it is likely that there will be some divergence in the fine detail. One area of real difficulty is the method of secure transmission as very few persons or organisations have the capability to effect service in compliance with the necessary security classification and data protection legislation. It is therefore not practical to limit the service function to the Secretary of State and the Lord Advocate and the preferred option is to allow this function to be delegated, if necessary, to allow specific implementation of future agreements.

128. The power will enable the Secretary of State and the Lord Advocate to prescribe another person to serve an OPO and to make arrangements for the ways in which an OPO or other document may be served. It is necessary to leave the person authorised to serve an OPO (if not the Secretary of State and Lord Advocate) to secondary legislation so that provision can be made on a case-by-case basis to reflect the terms of each bi-lateral agreement reached with another country.

Justification for the procedure

129. An OPO is an order made by a UK judge in accordance with the provisions of the COPO Act. The legislation contains many safeguards requiring the judge to be satisfied that it is necessary and proportionate to issue an OPO. All of those safeguards will remain; the only change being made to the process as a result of these amendments would be that service of the OPO, once it has been made, could be effected by a person other than the Secretary of State or the Lord Advocate. Method of service will be something explicitly agreed with the country in which the service is to take place so should be carried out by a body considered

suitable by the Secretary of State and Lord Advocate, as well as to the authorities of the other state. The method of service should not affect any other party. Given these considerations and the fact that Parliament will have approved in principle the delegation of this function, it is considered appropriate for this designation power to be subject to the negative resolution procedure (by virtue of the amendments made to section 17 of the COPO Act by paragraph 7(2) and (3) of Schedule 5 to the Bill).

Schedule 6, paragraph 12: Power to make criminal procedure rules in respect of proceedings under Schedule 6

Power conferred on: *The Criminal Procedure Rule Committee*

Power exercised by: *Rules made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

130. The provisions in clauses 50 to 52 and Schedule 6 increase the powers available to the police to seize evidence relating to the location of human remains outside of a criminal investigation. Existing powers in PACE to obtain search warrants to enter premises and/or seize evidence are limited to circumstances in which there is reason to believe an indictable offence has been committed and there is potential to charge an individual or individuals with said offence. These measures will allow the police to apply to the courts for a search warrant to seize evidence relating to the location of human remains in situations where an offence has been committed but it is not possible to bring anyone to justice, for example because suspects are deceased, or where there is no reason to believe an offence has been committed.

131. Schedule 6 provides conditions under which police can apply to the courts for access to special procedure material or excluded material under these new powers. Schedule 6 broadly mirrors Schedule 1 to PACE which provides similar conditions for search warrants applied for under section 8 of PACE. Paragraph 8 of Schedule 1 creates a power for the Criminal Procedure Rules Committee to make provisions about proceedings allowed under this Schedule, mirroring the similar power in paragraph 15A of Schedule 1 to PACE.

Justification for the power

132. The powers provided for in clauses 50 to 52 and Schedule 6 are intended to mirror the provisions of in section 8 of and Schedule 1 to PACE as closely as possible. Schedule 1 to PACE already provides that "Criminal Procedure Rules may make provision about proceedings under this Schedule, other than proceedings for an order … that relates to material that consists of or includes journalistic material". It is proposed to replicate this provision so that proceedings under Schedule 6 to the Bill can be fully set out in Criminal Procedure Rules.

133. The Criminal Procedure Rule Committee was established by the Courts Act 2003 specifically to make and maintain rules governing the practice and procedure of the criminal courts. It is independent of government. The powers provided in paragraph 12 of Schedule 6 confer on the Committee additional powers consistent with its existing statutory responsibilities. The point of allowing the Rules to provide the supplementary procedures is to keep criminal procedure consistent and easy to find, and to make it possible for the Criminal Procedure Rule Committee to keep that procedure up to date and efficient in the light of experience.

Justification for the procedure

134. The substance of the police powers is set out in the Bill and the rules will be entirely procedural in nature. The current power of the Criminal Procedure Rule Committee to make Criminal Procedure Rules is subject to the Lord Chancellor "allowing the rules" and negative Parliamentary process - see section 72 of the Courts Act 2003. It is therefore considered that the negative procedure is most appropriate level of Parliamentary scrutiny for this new rule-making power, as the content of the Rules for proceedings allowed under Schedule 6 will be similar to that in the current Criminal Procedure Rules.

PART 3: PUBLIC ORDER

Clause 54(4) and 55(6) - New sections 12(12) and 14(11) of the Public Order Act 1986: Power to make provision in about the meaning of "serious disruption to the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession" for the purposes of sections 12 and 14

Clause 60 - New section 14ZA(15) of the Public Order Act 1986 Act: Power to make provision about the meaning of "serious disruption to the activities of an organisation which are carried on in the vicinity of a one-person protest" for the purpose of new section 14ZA.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

135. Clauses 54(4) and 55(6) insert new section 12(12) to (15) and 14(11) to (14) into the Public Order Act 1986 (the "1986 Act") which enable the Secretary of State, by regulations, to make provision about the meaning of the phrase "serious disruption of the life of the community" and "serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession" in sections 12(1) and 14(1) of the 1986 Act. These are two of the triggers for the use of powers enabling the police to impose conditions on a public procession or public assembly. Should the senior police officer reasonably believe that a public assembly (including a static protest) or a public procession (including a moving protest) may result in "serious disruption of the life of the community" or "serious disruption to the activities of an organisation which are carried on in the vicinity of [the] procession/assembly", they may impose such conditions (such as duration, location, noise generated, etc) on said assembly or procession as appear to him necessary to prevent such disruption. The senior police officer must comply with the Human Rights Act 1998 when exercising such powers.

136. Additionally, clause 60 inserts a new section 14ZA into the 1986 Act, which also provides that should the senior officer reasonably believe that the noise generated by the person carrying on a one-person protest may result in "serious disruption to the activities of an organisation which are carried on in the vicinity of a one-person protest". They may impose such conditions on the one-person protest as appear necessary to prevent such disruption. The senior police officer must comply with the Human Rights Act 1998 when exercising such powers.

Justification for the power

137. These regulation-making powers are required to clarify ambiguous cases where, if they arise, it would not be clear that there would be "serious disruption to the life of the community" or "serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession/one-person protest". This will enable the police to make use of the powers available in sections 12, 14, and 14ZA of the 1986 Act with the confidence that they are doing so legally. Protesters have become adept at rapidly changing their tactics to avoid the use of police powers, so the flexibility of a statutory instrument is needed rather than instead looking to provide this clarity on the face of the Bill, which could soon become out of date. The statutory instrument will not apply retroactively, so it cannot be used to make lawful a previous decision by the police to impose conditions.

Justification for the procedure

138. By virtue of new section 12(15), 14(14) and 14ZA(18) of the 1986 Act, regulations made under new section 12(12), 14(11), and 14ZA(15) of that Act are subject to the draft affirmative procedure. The affirmative procedure is considered appropriate given that this power will have an impact of the police's ability to impose conditions on protest. Given the implications on freedoms of expression and assembly, Parliament should have the opportunity to debate and approve any such new arrangements before they take effect.

Clause 58 – new section 149A(1) of the Police Reform and Social responsibility Act 2011: Power to specify other areas as control areas

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative procedure*

Context and purpose

139. Part 3 of the Police Reform and Social Responsibility Act 2011 ("the 2011 Act") provides powers for a constable or other authorised person to direct that a person does not carry on prohibited activity in one of two controlled areas in the vicinity of Parliament: the controlled area of Parliament Square and the Palace of Westminster controlled area. Failure to comply with a direction is an offence.

140. The prohibited activities are, in relation to the controlled area of Parliament Square, erecting or using a tent or similar structure and keeping or using sleeping equipment, and in relation to the Palace of Westminster controlled area, operating any amplified noise equipment. Clause 69 of the Bill will introduce a new prohibited activity of obstructing the passage of a vehicle into/out of the Parliamentary Estate.

141. Clause 58 inserts new section 149A into the 2011 Act which allows the Secretary of State to provide, by regulations, that certain provisions of Part 3 apply, with or without modifications, to a new area specified in the regulations. The effect is that a direction may be given in that specified area in respect of some or all of the prohibited activities. The power is exercisable where either House of Parliament is, or is proposed to be located somewhere other than the Palace of Westminster as a result of the Restoration and Renewal Programme, or for any other reason (for example, an emergency decant), and where the Secretary of State considers it is reasonably necessary for existing prohibited activities to be prohibited in relation to the new specified area.

142. The clause includes a power to provide for any other enactment to have effect with modifications in consequence of those regulations.

Justification for the power

143. This regulation-making power is required in order to maintain existing levels of safety and security of Parliamentarians during any relocation of the Houses of Parliament to a location outside of the existing Parliamentary Estate. Given that

any future location of Parliament outside the Palace of Westminster is not yet known, it is not possible to provide for that new location on the face of the Bill, and it is appropriate that the Secretary of State is given discretion as to which of the prohibited activities should apply in relation to the new location.

Justification for the procedure

144. By virtue of section 154(3) of the Police Reform and Social Responsibility Act 2011, regulations made under new section 149A will be subject to the negative procedure. This is considered to afford an appropriate level of scrutiny given that the prohibited activities are set out in primary legislation and the circumstances in which the power may be exercised are narrowly defined. Although the clause includes a power to modify other enactments, such modification must be consequential on the exercise of the power, and the Government considers that the negative procedure is justified in such circumstances.

PART 4: UNAUTHORISED ENCAMPMENTS

Clause 63 – new section 62F(1) of the Criminal Justice and Public Order Act 1994: Duty to issue guidance in respect of the exercise of police powers relating to trespassers on land

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

Context and purpose

145. Clause 61(1) of the Bill inserts new section 60C into the Criminal Justice and Public Order Act 1994 ("the 1994 Act") which provides for a new offence relating to an intention to reside on land with a vehicle without consent. The offence will apply in circumstances where a person aged 18 or over resides or intends to reside on land without consent of the occupier of the land, they have or intend to have at least one vehicle with them on the land, they cause or are likely to cause significant damage, disruption or distress and they fail, without reasonable excuse, to leave the land or remove property in their possession of under their control once asked to do so by the occupier, the occupier's representative or a constable. It will also be an offence for the person to enter or return to the land with an intention to reside in a vehicle within twelve months of the request being made. New section 60D of the 1994 Act makes provision for the seizure of property where a constable reasonably suspects that an offence has been committed under section 60C. New section 60E of the 1994 Act provides for an award of forfeiture of such property to be made by the court that convicts the person for the offence.

146. The new offence builds on existing powers to tackle unauthorised encampments in sections 61 to 67 of the 1994 Act. Those provisions comprise:

a. Power to remove trespassers on land (section 61);

b. Power to remove trespassers where alternative sites are available (section 62A);
c. Offences for failing to comply without reasonable excuse with a direction under section 61 or section 62A (section 61(4) and section 62B).
d. Subsequent powers to seize and remove a vehicle following failure to comply with a direction under section 61 or section 62A (section 62 and section 62C).
e. Power of the Secretary of State to make regulations regulating (amongst other things), the disposal and destruction of vehicles seized under section 62(1) and section 62(C)(3) (section 67).

147. Clause 63 inserts a new section 62F into the 1994 Act which places a duty on the Secretary of State to issue guidance relating to the exercise by constables and police officers of their functions under the new offence relating to residing in a vehicle on land without consent and the associated seizure and disposal powers, as well as the regulations made under section 67 of the 1994 Act relating to the retention and charges for property seized under sections 62(1) and 62C of that Act. Constables and police officers will be required to have regard to the guidance in exercising any of the functions conferred on them under the above-mentioned provisions.

Justification for the power

148. The guidance will provide advice for the police on how they can use their various powers under the 1994 Act, as amended, to take enforcement action against unauthorised encampments, including the circumstances in which the powers may be exercised and the procedural steps that must be complied with. This will provide reassurance to the police that they are acting within the law when they decide to take enforcement action. The guidance will also help to ensure consistency of practice across all forces.

149. Additionally, the Government expects that such guidance will act as an important tool in guiding forces' understanding of when it would be appropriate to exercise the new power of arrest and seizure under sections 60C and 60D of the 1994 Act instead of the existing powers under sections 61 and 62A to 62E of the 1994 Act.

150. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with good practice in tackling unauthorised encampments. The guidance will be prepared in consultation with the police.

151. There are existing powers conferred on the Secretary of State to issue guidance to the police regarding the investigation of certain criminal offences, for example section 77 of the Serious Crime Act 2015 in respect of the offence of controlling or coercive behaviour in an intimate or family relationship.

Justification for the procedure

152. Any guidance issued under new section 62F of the 1994 Act will not be subject to any parliamentary procedure on the grounds that it would provide practical

advice to the police on the exercise of their powers under sections 60C to 62E, and the regulations made under section 67 of the 1994 Act, as amended, and would be prepared in consultation with the police. The guidance will not conflict with, or alter the scope of, the criminal offences or police powers in sections 60C to 62E, or the regulations made under section 67, of the 1994 Act which will be set out in primary or secondary legislation. Moreover, whilst the police will be required to have regard to the guidance when exercising their functions under sections 60C to 62E, and the regulations made under section 67, of the 1994 Act, the guidance will not be binding. The approach taken in new section 67A of the 1994 Act is consistent with other legislative provisions providing for statutory guidance, including section 77 of the Serious Crime Act 2015.

PART 5: ROAD TRAFFIC

Clause 67(1) and (2) - New section 90G(3) and (4) of the Road Traffic Offenders Act 1988 and new Article 91G(3) and (4) of the Road Traffic Offenders (Northern Ireland) Order 1996: Power to make provision in respect of fees charged for courses offered as alternative to prosecution for certain road traffic offences

Power conferred on: *Secretary of State and the Department of Justice*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

153. Persons who commit certain low-level road traffic offences (for example, a speeding offence detected by a speed camera, driving without due care and attention, traffic light offences or not wearing a seat belt) may be offered educational courses to become better drivers and avoid offending in the future. Such courses are offered as an alternative to prosecution or the offer of a fixed penalty notice, and therefore a driver who successfully completes a course avoids any liability to prosecution, financial penalty or having endorsable points on their driving licence. These driver retraining courses are provided under the banner of the National Driver Offender Retraining Scheme ("NDORS") – see https://www.ukroed.org.uk/.

154. A motorist who decides to accept a course is required to pay a fee that covers the cost of administering and providing the course, but also contains an element which goes to fund road safety measures. Clause 67 puts the current charging arrangements for these educational courses on a statutory footing.

155. The current course fee, set by individual police forces, varies according to the nature of the course and the local provider. The fee charged by the provider is typically around £100; a list of fees charged by each force for different courses is available on the NDORS website. The provider retains the course fee element (some £60) and pays the other £40 to UK Road Offender Education ("UKROEd"), a private not-for-profit company which conducts the management and administration of NDORS on behalf of the police service. UKROEd retains a £5 "central charge" and pays £35 to the original police force in the area in which the offence took place, it is this element of the fee which will, in part, be used to fund road safety measures in addition to meeting forces' administrative costs.

156. Clause 67(1), in particular:

- Provides that a policing body (namely a local policing body or the British Transport Police Authority) may charge a fee to a motorist for enrolment on an approved course as an alternative to prosecution for a specified fixed penalty offence (new section 90G(1) of the Road Traffic Offenders Act 1988 ("1988 Act")).
- Enables the fee to be set at a level that exceeds the cost of administering and delivering the course in question, but requires that the income from any excess must be used for the purpose of promoting road safety (new section 90G(2) of the 1988 Act).
- Confers a power on the Secretary of State, by regulations, to make further provision about how the fees (or the components of fees) are to be calculated, the level of fees (or the components of fees) or the use of fee income (new section 90G(3) of the 1988 Act). Such regulations may specify the amount, or maximum amount, of a fee or a component of the fee (new section 90G(4) of the 1988 Act) and may make different provision for different purposes (new section 90I(3) of the 1988 Act).

157. Clause 67(2) makes parallel provision for Northern Ireland.

<u>Justification for the power</u>

158. The provisions in clause 67(1) and (2) provide the overarching statutory basis for the charging of fees for diversionary driver retraining courses and establishes the principle that the fees charged for such courses may be set at a level above that necessary to secure full cost recovery, provided that any excess is used for the purpose of promoting road safety. Having established these core charging principles in primary legislation, detailed provision about the level of the fees, or how they are to be calculated by police forces, is properly a matter for secondary legislation and reflects the usual practice elsewhere in the statute book. Leaving the level of the fees, the maximum level of fees or the method of calculation to secondary legislation will enable such levels to be adjusted from time to time to reflect changes in the value of money, changes to course content (and therefore

the cost of delivery) or to the types of courses available, and changes to the amount of the additional charge which it is considered appropriate to add to the fee to fund road safety activities. Similarly, leaving to regulations any particular uses to which fee income may be put (subject to the limitation that it must be for the purposes of promoting road safety) will enable account to be taken of changes to the type of road safety activities which it would be appropriate (or inappropriate) to fund from fee income drawing on development and evolution of good practice over time.

Justification for the procedure

159. By virtue of new section 90I(2) of the 1988 Act, regulations under new section 90G(3) are subject to the negative resolution procedure, as are the regulations made under the similar Northern Ireland provisions. Where fees are charged in accordance with regulations in the area of road transport, those regulations are generally made subject to the negative resolution procedure (see, for example, section 99ZC(1)(d) of the Road Traffic Act 1988 (which confers power to make provision in regulations setting the maximum amount of any charges payable by persons undergoing compulsory driving training courses) read with section 195(3) of that Act). There appears to be no need to depart from the standard procedure here.

Clause 67(1) and (2) - New section 90G(6) of the Road Traffic Offenders Act 1988 and new Article 91G(6) of the Road Traffic Offenders (Northern Ireland) Order 1996: Power to specify fixed penalty offences and body to approve courses for the purposes of section 90G

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

160. Under the statutory scheme for charging for diversionary driver retraining courses, the charging power only applies to courses offered for specified fixed penalty offences and in relation to approved course. It is in the interest of justice that these driver retraining courses are only available as an alternative to a

prosecution or the issue of a fixed penalty notice in the case of low-level road traffic offences. In addition, to maintain public confidence in the scheme and ensure that the retraining courses have the desired effect of improving driving standards, it is important that the course provided are accredited to meet appropriate minimum standards. Accordingly, new section 90G(6) of the 1988 Act (and the equivalent and Northern Ireland provisions) confer a power to specify, in regulations, the relevant fixed penalty offences and the body which can approve courses for the purpose of the provision.

Justification for the power

161. New evidence may develop over time, showing which driving offences can be appropriately dealt with by way of a retraining course (in that education can effect a change in relation to that offending behaviour). It is therefore appropriate to include this detail in secondary legislation, so that the list of relevant fixed penalty offences can be more readily amended. This approach also reflects the fact that the list of fixed penalty offences set out in Schedule 3 to the 1988 Act is itself subject to amendment by secondary legislation (see section 51(3) of the 1988 Act), accordingly it may be necessary to revise the list prescribed under new section 90G(6)(a) to reflect changes to the list of offences in Schedule 3 to the 1988 Act effected by order made under section 51(3).

162. In relation to the power in new section 90G(6)(a) to specify a body to approve courses for the purposes of section 90G, the selection of such a body is properly an administrative procedure. In addition, the body specified to approve courses may change over time. For example, it is possible that the body initially specified to approve courses will, in the future, cease to exist, or its functions may be taken over by another body. In addition, should the specified body not perform its duties to an acceptable standard, its authorisation to approve courses will be removed. For these reasons, the designation of the body is considered an appropriate matter for secondary legislation. The Road Traffic Act 1988 adopts a broadly analogous approach by providing for regulations to make provision for the approval by the Secretary of State of persons providing certain training courses or for the Secretary of State to approve training schemes (see sections 97(3A) and 101(4) and (5).

Justification for the procedure

163. By virtue of new section 90I(2) of the 1988 Act, regulations under new section 90G(6) are subject to the negative resolution procedure, as are the regulations made under the similar Northern Ireland provisions. The primary legislation limits the scope of the charging power to courses offered in relation to fixed penalty offences, and the secondary legislation will further limit the scope of the charging power. It is also noted, by way of comparison, that the order-making power in

section 51(3) of the 1988 Act referred to above is subject to the negative resolution procedure. It is therefore considered that the negative resolution procedure is the appropriate level of parliamentary scrutiny for regulations made under new section 90G(6)(a). The negative procedure is similarly considered to provide an appropriate level of parliamentary scrutiny for regulations made under new section 90G(6)(b) given that such regulations will simply be used to name a body able to grant approval for courses.

Clause 67(1) and (2) - New section 90H(1) and (2) of the Road Traffic Offenders Act 1988 and new Article 91H(1) and (2) of the Road Traffic Offenders (Northern Ireland) Order 1996: Power to prevent courses being offered for repeat offences

Power conferred on: *Secretary of State and Department of Justice*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

164. New section 90H(1) and (2) of the 1988 Act confers power on the Secretary of State to make regulations prohibiting a chief officer from offering an approved diversionary driver retraining course to a person who has attended and satisfactorily completed a similar approved course within a period to be specified in regulations. This is in order to prevent courses being offered for repeat offences. If regulations are made under this provision, they must include provision as to what counts as a similar course, and may also confer power on a person to determine what counts as similar.

Justification for the power

165. To maintain public confidence in NDORS, it is important that offenders do not repeatedly avoid prosecution for a fixed penalty offence by attending successive approved courses over a relative short period. The view as to what that period should be may change over time. As the content of approved courses changes

over time it is also appropriate to leave to secondary legislation the process by which a determination is made as to whether two courses are “similar” for these purposes.

Justification for the procedure

166. By virtue of new section 90I(2) of the 1988 Act, regulations under new section 90H(1) are subject to the negative resolution procedure, as are the regulations made under the similar Northern Ireland provisions. Having established on the face of the Bill the principle that repeat offenders should not be able to avoid prosecution for a fixed penalty offence by attending a further similar approved training course within a specified period, it is considered that the negative resolution procedure provides the appropriate level of scrutiny for the secondary detail of the scheme to be addressed through these regulations.

Clause 67(3): Power to make provision for Scotland in respect of fees charged for courses offered as alternative to prosecution for certain road traffic offences

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

167. Clause 67(3) enables the Secretary of State may make regulations to amend Part 3B of the 1988 Act to make provision in respect of the fees charged for courses offered as an alternative to prosecution in Scotland for a fixed penalty offence. Such provision must be corresponding or similar to that contained in new sections 90G or 90H of the 1998 Act as inserted by clause 67(1). Before making such regulations, the Secretary of State must consult the Lord Advocate.

Justification for the power

168. While diversionary courses are offered as an alternative to prosecution for careless driving offences in Scotland, Speed Awareness Courses are not offered

as a diversion from speeding offences currently. Scotland's Road Safety Framework to 2020 contains the commitment, by road safety partners, to "Consider if the introduction of a Speed Awareness Scheme focused on speeding would be an appropriate contribution to road safety in Scotland". It is necessary for such consideration to have been completed before the charging scheme is determined for Scotland, as such, it is considered appropriate to leave the details of the scheme in Scotland to be prescribed in regulations. Proceeding by secondary legislation will also enable full consultation with the Lord Advocate, Police Scotland and others.

Justification for the procedure

169. By virtue of clause 67(7), regulations made under clause 67(3) are subject to the affirmative procedure as befitting a Henry VIII power. Further, given that the provision for England and Wales and Northern Ireland is set out in primary legislation, it is appropriate that Parliament should be expressly required to consider and approve the scheme for Scotland.

PART 6: CAUTIONS

Clauses 76(6)(b) and (c): Prohibitions on the use of out of court disposals for excluded offences

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Draft affirmative Procedure*

Context and purpose

170. Part 6 of the Bill introduces a two-tier framework for out of court disposals for adults ("OOCDs") replacing the use of the six main adult OOCDs currently available. The two-tier framework consists of a lower-tier disposal (community caution) and an upper-tier disposal (diversionary caution), which may include rehabilitative, reparative and punitive conditions.

171. Part 6 will exclude the use of community cautions for all indictable-only offences and prescribed either way and summary-only offences. This will ensure the integrity of the OOCDs regime by preventing these disposals from being issued in relation to more serious offences, or offences of community concern.

Justification for taking the power

172. An OOCD is, and will remain under the new OOCD regime, one of the least onerous types of disposal a person can obtain for offending. Although it is considered that Parliament ought properly to scrutinise and validate the overarching OOCD scheme fully, excluded offences will be subject to continual updating and changing which makes it more suitable for secondary legislation. The list of offences which may not be suitable for an OOCD is likely to change regularly.

Community expectations are frequently developing in relation to certain types of offending (eg, drugs, knife crime, burglary, auto-related crime) and as criminalistic tendencies change and develop, those offences considered unsuitable for an OOCD will need to be expanded or removed from the list as public perception or need dictates, perhaps at short notice.

Justification for the procedure

173. The prohibition on the use of OOCDs for particular offences will have a significant impact on offenders, victims and the public. There will also be operational impacts on the police, practitioners and the services used for the support pathways where there are amendments to this list. The affirmative procedure is considered appropriate as it enables Parliament to debate the details of the restrictions on OOCDs. It is considered this is consistent with other comparable powers, for example section 130 and 138(2) of the Sexual Offences Act 2003 which prescribes relevant offences for the purposes of notification requirements for sexual offenders.

Clauses 79(8) and 88(8): Power to amend the maximum number of hours for unpaid work and attendance

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Draft affirmative procedure if increasing, negative if decreasing*

Context and purpose

174. Part 6 will allow a reparative condition for unpaid work or attendance to be imposed as part of diversionary cautions and community cautions. The number of maximum hours set out on the face of the legislation is currently 20 hours for diversionary cautions and 10 hours for community cautions. Clauses 79(8) and 88(8) confer powers to amend the maximum number of hours for unpaid work and attendance.

Justification for taking the power

175. As the new OOCDs regime takes effect, changes may be necessary to the capped amount of hours which may be conditionally imposed. This flexibility will allow changes deemed necessary to the level of unpaid work and attendance, once the embedding has taken place.

176. The number of hours of unpaid work should be provided in delegated legislation to enable it to be regularly updated to consider developments in good practice and operational changes. In relation to the latter, given that the police will be responsible for delivering and monitoring compliance with unpaid work, it is important for there to be flexibility to allow for changes to arrangements in police operations. Additionally, given the current uncertain operational landscape

regarding COVID-19, the changes to the maximum hours might need to take place at short notice.

Justification for the procedure

177. Use of this power to increase the maximum amount of hours available to an authorised officer may result in an offender being impacted by receiving a higher number of hours to contribute as part of their OOCD conditions, and failure to comply with the conditions could result in enforcement actions for community cautions and prosecution for diversionary cautions. An increase will also require deployment of more operational resources to ensure compliance. It is therefore considered the affirmative procedure for scrutiny of the increase is more appropriate.

178. It is appropriate that the power to reduce the hours should be subject to the negative procedure (as provided for in clause 100(5)). It should be noted that changes only vary the scope for an authorised officer to utilise discretion in imposition of the condition and do not automatically mean an offender will get a higher or lower number of hours imposed. The procedure is identical to that for aligned powers, see for example paragraph 9 of Schedule 23 to the Sentencing Act 2020, to amend maximum number of hours available for youth rehabilitation order requirements.

179. The Government's view is that regulation to reduce the hours will not impact an offender's rights and is administrative in nature and therefore it is not necessary for such powers to be subject to parliamentary scrutiny by affirmative resolution. It is considered that the negative procedure is the most appropriate level of Parliamentary scrutiny for these powers.

Clause 80(3) and 89(3): Power to set and vary the maximum financial penalty for diversionary cautions and the single level financial penalty for community cautions

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary Procedure:	*Draft affirmative procedure for first set and any which increase amount beyond value of currency alone, otherwise negative*

Context and purpose

180. Part 6 of the Bill will allow for financial penalties to be available for all offences for which the diversionary cautions can be issued. Under clause 80(3) and 89(3), the Secretary of State must prescribe the maximum penalty that can be set as a financial penalty condition for community and diversionary cautions by regulations.

Justification for taking the power

181. The regulation of financial penalties by secondary legislation is essential to ensure that penalties can be amended to reflect changing policy positions with regard to financial penalties as a part of OOCDs and also so that they can be updated to reflect inflationary pressures. It is appropriate for this to be set out in delegated legislation. Examples of similar delegated powers to set maximum penalties can be found in section 32(2A) of the Immigration and Asylum Act 1999 and Part IA of Schedule 2 to the Immigration Act 1971.

Justification for the procedure

182. The first regulations under clause 80(3) or 89(3) setting the maximum amount of financial penalty are subject to the affirmative procedure, as are any other regulations which increase the maximum amount of a financial penalty by more than is necessary to reflect changes in the value of money (see clause 98(4)(c) and (d)). Regulations which decrease the maximum amount are subject to the negative procedure (clause 98(5)). The affirmative procedure is considered necessary for potential increase in any penalty, and resources required to enforce that penalty, as expressed above for the power to amend the maximum number of hours for unpaid work and attendance. Given the impact on offenders and the public, the affirmative procedure is considered most appropriate for initial setting of maximum and for any substantive increases which may occur in future. The negative procedure is considered appropriate for reducing the financial penalty, as this will not have any adverse impact or impact on rights and is considered to be administrative in nature.

Clause 94(1) and (5): Code of Practice

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative procedure*

Context and purpose

183. Under clause 94, the Secretary of State must prepare, publish and lay before Parliament a code of practice in relation to diversionary and community cautions. The code is to be brought into force by regulations and can be revised from time to time.

Justification for the power

184. The Code of Practice will create the systems on which the OOCDs regime will be rolled out and enforced. Compliance with the Code as a statutory guide will be required by those authorised to issue OOCDs. Codes of Practice are properly considered to be creatures of secondary legislation due to their length, complexity and need to be updated regularly to reflect developing practices (for example, section 67 of the Police and Criminal Evidence Act 1984).

Justification for the procedure

185. The power is subject to affirmative procedure befitting of a Code of Practice of this nature which may affect the rights of offenders (see clause 98(3) and (4)(e)). The affirmative procedure is considered suitable to obtain appropriate Parliamentary scrutiny, and is consistent with the existing conditional caution code of practice power located in section 25 of the Criminal Justice Act 2003.

Clause 95(1): Restrictions on multiple use of cautions

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Draft affirmative Procedure*

Context and purpose

186. Clause 95 provides that the Secretary of State by regulations may prohibit the giving of an OOCD where an earlier OOCD has already been given in prescribed circumstances. This will ensure the integrity of the OOCDs regime by preventing these disposals from being issued where there is repeat offending, recent offending or commission of offences of concern.

Justification for taking the power

187. An OOCD is the least onerous type of disposal a person can obtain for offending and must be regulated to ensure it retains integrity as a disposal. As with the power to prescribe excluded offences above, prescribed circumstances for excluding the use of multiple cautions will be subject to continual updating and changing which makes it more suitable for secondary legislation. As well as community expectations as discussed in the justification for the power to prohibit OOCDs for certain offences, certain numbers of OOCDs and certain time periods elapsing between receipt will differ depending on the offences and will need to be prescribed and be able to be updated as policing and community needs dictate. These Regulations are therefore going to need to be expanded or changed, perhaps at short notice, and secondary legislation is considered the most appropriate way to give effect to this need for flexibility.

Justification for the procedure

188. The prohibition on the use of multiple OOCDs will have a significant impact on offenders, victims and the public. There will also be operational impacts on the police, practitioners and the services used for the support pathways where there are amendments to this list. The affirmative procedure (as provided for in clause 98(3) and (4)(e)) is considered appropriate as, although the measures do not amend primary legislation, it enables Parliament to debate the details of the restrictions on OOCDs.

Clause 95(2): Power to make different provision for different purposes and to make consequential, supplementary, incidental, transitional and transitory and savings provision for OOCD regulations made under Part 6

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*As for substantive power*

Context and purpose

189. All the above regulations in Part 6 of the Bill include power to make consequential, supplementary, incidental, transitional and transitory and savings provision, and to make different provision for different purposes.

Justification for taking the power

190. The two-tier framework will ensure national consistency by overriding a complicated existing framework of legislative and non-legislative out of court disposals. In making regulations under the Part, it will be necessary to make transitional and transitory provision to ensure those who have pending cautions or conditions pursuant to existing OOCDs can be fairly and adequately catered for. Where the powers to increase or decrease numbers of hours or financial penalties are exercised, transitional and savings provisions will be essential to ensure smooth transition to new potential maximums and ensure no offenders subject to previous regimes are adversely affected. Where Codes of Practice are revised, incidental and transitional provision will be essential to ensure no unfairness to offenders currently being dealt with under the previous version.

191. Different regions have different needs in relation to OOCDs. The power to make different provision for different purposes enables the flexibility to ensure regional differences can be considered and tailoring changes made efficiently if needed, for example in setting hours of unpaid work if it becomes apparent the maximum is barely used, or where operational need requires reduced hours in certain areas (for example, owing to COVID-19). The power will also enable the testing of the new OOCD regime for effectiveness by, for example, increasing or decreasing the level of financial penalty or the number of hours of unpaid work that can be set as a condition.

192. Consequential amendments are likely to be necessary as a consequence of making regulations under Part 6, for example where new prosecutorial authorities are added, consequential provision will be needed to those agencies' enabling legislation, as well as supplemental provision and transitional measures.

Justification for the procedure

193. Regulations which utilise the power in clause 98(2) are subject to the same procedure as the substantive power.

Clause 99(e): Power to specify the further prosecuting authorities

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative Resolution*

Context and purpose

194. Part 6 of the Bill (in clause 99(e)) will provide a defined list of prosecuting authorities, including the Serious Fraud Office, Director of Public Prosecutions, the Attorney General, the Secretary of State and a person prescribed in regulations. Authorised officers of prosecuting authorities may issue OOCDs. As there are a number of other authorities with prosecutorial functions in England and Wales, and it is not yet known how useful or appropriate the new OOCDs would be as a tool, the Secretary of State may specify further relevant prosecutors by regulations.

Justification for taking the power

195. There are likely to be further prosecution authorities identified in the future who would be appropriate to issue OOCDs. Once identified, these may be prescribed by the Secretary of State so as to be able to utilise this method of disposal.

Justification for the procedure

196. OOCDs are a valuable tool to address low level offending, which is of very high volume. Should other authorities with prosecutorial functions be considered appropriate to utilise the disposals, it is not considered full Parliamentary scrutiny is necessary but that negative resolution (as provided for in clause 98(5)) is suitable to the administrative task of adding another agency as was the case with section 27 of the Criminal Justice Act 2003 on which this provision is modelled.

PART 7: SENTENCING AND RELEASE

Clause 108(12): Power to change test for the release on licence of prisoners to whom section 244ZB and 244ZC apply

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by Statutory Instrument*

Parliamentary Procedure: *Affirmative Resolution*

Context and purpose

197. The Bill includes an amendment to an existing delegated power in section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to change the test for release on licence of certain prisoners. Similarly to the new power described below, section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("2012 Act") provides a power for the Secretary of State to change the release test applied by the Parole Board for the initial release of a prisoner serving:

- an indeterminate sentence for public protection (IPP) under section 225 of the Criminal Justice Act 2003 ("2003 Act") (release for which is governed by section 28 of the Crime (Sentences) Act 1997);
- a determinate extended sentence under section s 254, 266 and 279 of the Sentencing Act 2020 ("the Code") (release for which is under 246A of the 2003 Act);
- a sentence for offenders of particular concern under section 265 or 278 of the Code (release for which is under section 244A of the 2003 Act);
- Terrorist offenders referred to the Parole Board under section 247A of the 2003 Act;
- and some transitional determinate sentence prisoners (release for which is under paragraph 6, 15, 25 or 28 of Schedule 20B to the 2003 Act).

198. The release provisions of all these sentences make provision for offenders to be released by discretion of the Parole Board. The power under section 128 of the 2012 Act allows the Secretary of State to make an order setting out the conditions under which the Parole Board may release such prisoners. The conditions may be either requirements that must be satisfied for release to be directed, or requirements that must be satisfied for release to be refused. The power allows for consequential amendment of the sections which would need to be altered to achieve the change.

199. The Bill makes provision to alter automatic release for standard determinate sentenced offenders considered by the Secretary of State to be high-risk. Under new sections 244ZB and 244ZC of the 2003 Act, these offenders will be referred to the Parole Board instead of being automatically released at the half-way or two-thirds point of their sentence.

200. The Bill amends the existing power in section 128 of the 2012 Act so that it also covers the Parole Board release test for high-risk offenders referred under section 244ZB. Clause 108(12) of the Bill provides for new section 244ZB of the 2003 Act (as to be inserted by clause 108 of the Bill) to be added to the list of provisions to which section 128 of the 2012 Act can apply. This would therefore allow for an order under section 128 of the 2012 Act to alter the Parole Board release test in new section 244ZC.

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

201. Currently the Parole Board applies the same release test to all prisoners and the test to be applied in new section 244ZC conforms with that test. The power in section 128 of the 2012 Act is designed to allow for different release tests for prisoners subject to different sentencing release regimes, if, or when, evidence indicated that the current test was not suitably calibrated for the release or

continued detention of a cohort of offenders. The new power in 244ZB will apply to offenders serving sentences who are considered on reasonable grounds to pose a significant risk to members of the public of serious harm through commission of further serious offences if released. This is a novel power and there is insufficient evidence presently to determine if this group may need to be treated differently in respect of the requirements they have to meet to be released. It is evident however that the power will not be able to be exercised unless there is evidence of an offender posing a serious risk, meaning this group of offenders will pose a demonstrable risk of harm to the public if released. If it was found that the current release test did not adequately identify the risk posed by these prisoners, or found that prisoners were not able to meet the test, then it would be important to be able to alter the test without having recourse to primary legislation and waiting for the availability of a suitable Bill.

202. It would create an inconsistency to have this power available to alter all Parole Board release tests for all determinate sentence prisoners except those that fall under new section 244ZC, in particular where these offenders have the group characteristic of being identified as posing a risk to the public based on new or previously unconsidered evidence post-sentence, which may make it easier or more necessary to focus a different test. Although it will be important to establish if the current test ensures effective public protection while allowing offenders to demonstrate that they can be safely managed in the community, these offenders are identified as high-risk and it is in the interests of justice and public protection that the Department would want to be able to respond swiftly to any conclusion that the release test should be revised so that different conditions must be satisfied.

203. Changing the release test will not change the parameters of the sentence set by the Court. Nor will it change the eligibility points for release. In enacting section 128 of the 2012 Act, Parliament has already found that secondary legislation is suitable for this purpose.

Justification for the procedure

204. Section 128 of the 2012 Act is already subject to the affirmative resolution procedure and there is no proposal to alter that position. The procedure is suitable because exercise of the power will amend primary legislation.

Clause 109 – new section 239(5A) of the Criminal Justice Act 2003: Power to make rules which confer a power on the Parole Board to set aside or reconsider its decisions

Power conferred on: *Secretary of State*

Power exercisable by: *Rules by Statutory Instrument*

Parliamentary procedure: *Negative procedure*

Context and purpose

205. Section 239 of the Criminal Justice Act 2003 ("CJA 2003") provides that the Secretary of State may make rules with respect to proceedings of the Parole Board ("the Board"). Such rules may concern all proceedings before the Board, whether concerned with initial release or re-release after recall or with determinate or indeterminate sentenced prisoners referred to the Board.

206. Clause 109 extends the scope of the rules which may be made, enabling the Secretary of State to confer a power on the Board to set aside its own decisions. The Bill will restrict the power to set aside to two instances or 'tests'. The first test is where a Board decision to release or not release is made which the Board determines resulted from a clear mistake in law or fact. The second test is where a Board decision to release is made which the Board determines it would not have given if either information that was not available to the Board when the direction was given had been so available or a change in circumstances relating to the prisoner that occurred after the direction was given had occurred before it was given. The Board may only set aside a release decision where the prisoner has not already been released; in some cases such release may not occur for a period after the release decision is given pending the fulfilment of licence conditions pursuant to which the prisoner is to be released, such as finding a place for them in suitable 'move on' accommodation.

207. This provision enables the Board to set aside its own decisions where they result from a clear mistake of law or fact or where, in the context of a release decision, information or a change in circumstance arises which means the Board would not have directed release. In the absence of this provision, the Board, prisoner or Secretary of State would be required to judicially review the decision in order to overturn it, as the Board considers itself *functus officio* once it has made a decision. Such provision had historically been exercised based on judicial authority (*R v Parole Board (ex parte Robinson)* [1999] Lexis Citation 2679) but that practice is no longer available following the recent High Court decision of *Secretary of State for Justice v Parole Board* [2020] EWHC 3490 (Admin). The purpose is to put this on a statutory footing for clarity and certainty as to its scope.

208. Clause 121 also provides specific vires for rules to be made regarding a 'reconsideration mechanism'. That mechanism is already included in the Parole Board Rules 2019 (principally Rule 28). It provides that certain decisions of the Board are provisional for a period starting at 21 days, though the period may be reduced. During that period, either the prisoner or the Secretary of State may apply to the Board for the decision to be reconsidered on the grounds it is irrational or procedurally unfair. If such application is made, the Board must assess the application and either direct that the provisional decision be reconsidered or dismiss the application. Where the Board dismiss the application, or no application is received within the period, the provisional decision becomes final. This mechanism was incorporated into the rules to provide an alternative to judicial review, through which the Board may reconsider its own decisions before they become final. The reconsideration mechanism was recently considered by the High Court in *Huxtable v Secretary of State for Justice* [2020] EWHC 2494, which dismissed a judicial review challenging it as ultra vires to the rule making power in section 239 of the CJA 2003. Despite the successful defence of that challenge at first instance, the Court of Appeal has now given permission to appeal that decision

and it is considered prudent to put beyond doubt the question of vires of the reconsideration mechanism by specifically articulating in the CJA 2003 that rules can be made to that effect. It should be noted that this is distinct from the power to set aside decisions. Reconsideration may only be made in respect of provisional decisions and on standard judicial review style grounds, whereas it is intended that the power to set aside may be exercised in respect of final decisions but applying the much narrower tests set out above, the circumstances of which do not necessarily render a decision irrational or procedurally unfair.

Justification for taking the power

209. The ability for the Board to set aside its decisions is a new substantive power and one that needs to be provided for in primary legislation. The scope of the tests as to when that power may be exercised by the Board is also likely to be considered substantive and for that reason should also be specified and restricted to tests set out in primary legislation.

210. However, the Government considers it is justified to take a power to make rules in respect of the circumstances and process by which the Board may exercise its ability to set aside its decisions. This is consistent with the existing legislative framework for the Board: its powers and functions to make decisions on release, and the test that it is to apply in respect of such decisions, are set out in primary legislation; whereas, the detailed procedure that the Board and the parties to its decision-making are to follow are set out in rules. We consider it appropriate and justified to adopt a similar framework in this instance and preserve all Board process in a single set of rules rather than dividing the process between primary and secondary legislation. This also simplifies the ability to make changes to the process where it is considered necessary or beneficial for operational decision-making.

211. Taking a power to make rules in respect of setting aside decisions is also consistent with, and in some ways more restrictive than, the legislation that confers similar powers on tribunals to set-aside their decisions. Sections 9 and 10 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) provides that, respectively, the First-tier and Upper Tribunals may review and set aside their respective decisions. Though the 2007 Act excludes some decisions from the scope of the power, it leaves the instances when such review and set aside may take place and the procedure as to application of the power to tribunal procedure rules (paragraph 15 of Schedule 5 to the 2007 Act). Rule 45 of the First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008 regulates the procedure to set aside decisions in respect of that Chamber, including decisions on mental health cases which may be comparable with the Board given that Chamber is responsible for decisions concerning the safe release of patients.

212. With regard to the power to make rules in respect of the reconsideration mechanism, the Government considers it is justified to take this power for similar reasons to those above: the mechanism is procedural and takes no substantive power away from the Board, who remain the final arbiters to determine if their decisions should be reconsidered.

Justification for the procedure

213. As set out above, while we respect that the conferring of a function and power to set aside decisions is a matter for primary legislation, we do not consider the same is true for the processes and practice by which those powers are to be exercised. Moreover, by specifying in the Bill the tests that are to be applied to set aside a decision, the primary legislation clearly restricts the circumstances by which the secondary legislation can operate.

214. All the primary legislation then leaves for the rules is the technical processes to be put in place as to the exercise of that power and application of those tests. These may include details such as the timings of when the Board may exercise the power, representations to the Board in respect of the power, any documentation to be supplied to the Board and the constitution of any panel of the Board to determine the matter. The Government do not consider it to be in the interests of Parliament or Parliamentary time for such procedural detail to be scrutinised by way of the affirmative procedure, but consider it more justified for the negative procedure to apply. This is particularly relevant given refinements and amendments to the process are likely to be required to respond to practical issues arising on exercise of the power.

215. Use of the negative procedure is also consistent with the existing rule making power for proceedings of the Board in section 330(6) of the CJA 2003. We consider it is justified for consistency that the powers referred to in the Clause and procedure by which those powers are to be exercised is similarly made under the negative procedure, to avoid different provisions of the same rules requiring different procedure. This is also consistent with the Parliamentary procedure for tribunal procedure rules, which may include rules to set aside decisions (paragraph 28(6) of Schedule 5 to the 2007 Act).

216. With regard to the power to make rules in respect of the reconsideration mechanism by way of the negative procedure, again, we consider similar reasons apply to those above: the mechanism is process driven and it would not be an effective use of Parliamentary time to have the technical details of the process considered by way of the affirmative procedure.

Clause 113(2) - new section 256AZB of the Criminal Justice Act 2003: Power to alter the test to determine automatic release after recall or release after recall: determinate sentences

Power conferred on: *Secretary of State*

Power exercisable by: *Order by statutory instrument*

Parliamentary procedure: *Draft affirmative procedure*

Context and purpose

217. Section 255A(4) of the Criminal Justice Act 2003 (“CJA 2003”) sets out the test the Secretary of State is to apply when determining whether a recalled offender

serving a determinate sentence should be subject to automatic release after 28 days (or in some cases 14 days) or whether re-release by the Secretary of State or the Parole Board should follow an assessment of risk. Sections 255B(2) and 255C(2) also set out the tests the Secretary of State is to apply to 'executively' release a recalled determinate prisoner at any time. Under the existing provisions of sections 255B, 255C and 256A of the CJA 2003, the Board may direct the release of a recalled prisoner. Clause 113 inserts into those sections the re-release test the Board is to apply when determining whether to direct release. This test is consistent with the test applied by the Board for initial release of determinate prisoners in section 244A(4)(b) of the CJA 2003 (release of persons sentenced to a sentence for offenders of particular concern), section 246A(6)(b) of the CJA 2003 (release of persons sentenced to an extended determinate sentence) and section 247A(5)(b) of the CJA 2003 (release of terrorist prisoners) and initial release of indeterminate prisoners in section 28(6)(b) of the Crime (Sentences) Act 1997 (release of certain life prisoners). It also reflects the existing test applied in practice by the Board.

218. Clause 125 inserts new section 256AZB into the CJA 2003 which will enable the Secretary of State by order to change those tests. Section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act") currently provides a power for the Secretary of State, by order, to change the test for initial release on licence of certain discretionary release prisoners. This clause therefore makes equivalent provision in relation to the tests for the type of recall awarded by the Secretary of State and for re-release on licence after recall by the Secretary of State or the Board of determinate sentence prisoners.

219. Parliament has, in fact, already approved an equivalent power to change the tests for determinate recall in section 10 of the Criminal Justice and Courts Act 2015. Those powers have not, however, been commenced as they were inextricably linked to, and could not be severed from, other provisions introduced by that Act to 'transfer' the determination of release of determinate recalls from the Board to a new body of 'recall adjudicators'. Those provisions are now considered redundant and are repealed by this Bill. Section 10 will also be repealed by the Bill with clause 124 effectively recasting the power to change the tests as they apply to the Board (in the place of recall adjudicators).

Justification for taking the power

220. The arrangements for the recall and release of determinate sentence prisoners on licence are set out on the face of the 2003 Act. However, as has previously been acknowledged by Parliament in the 2015 Act and in the 2012 Act, it is appropriate for release tests to be changed by delegated legislation in order to respond to the changing nature of the prison population and the operation of the scheme in practice.

Justification for the procedure

221. The power will enable the amendment of primary legislation and Parliament will have an interest in the terms and impact of any amended test, so the order is subject to the affirmative resolution procedure (see section 330 of the CJA 2003

as amended by clause 125(3)). This reflects the existing position in relation to the power in section 128 of the 2012 Act and that approved, but not commenced, by Parliament in section 10 of the 2015 Act.

Clause 117(3) to (5): Change to the power in the Scotland driving disqualification provisions to enable appropriate extension periods to be read in accordance with any changes made by order to proportion of sentence to be served

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory Instrument*
Parliamentary Procedure:	*Draft affirmative resolution*

Context and purpose

222. The Bill makes a technical change adjusting current definitions in the driving disqualification provisions for setting appropriate extension periods in Scotland by adjusting references in section 35C of the Road Traffic Offenders Act 1988 and section 248D of the Criminal Procedure (Scotland) Act 1995 to remove reference to the uncommenced Custodial Sentences and Weapons (Scotland) Act 2007 and replace those references with Scottish legislation currently in force.

223. The purpose of the legislation is to ensure the appropriate extension period reflects the release point of the offender so that the disqualification itself may be served, as far as is possible, in the community. The existing provisions contain a delegated power in subsections (7) to (9) which functions so that, where the Scottish Ministers lay an order under section 7 of the 2007 Act changing the proportion of a prisoner's sentence which is to be served in custody, a subsequent affirmative order can be laid by the Secretary of State which has the effect that a particular proportion of a prisoner's sentence referenced in subsection (4) of the extended disqualification provisions shall be construed as a reference to the new proportion specified in the section 7 Order. An identical power exists in uncommenced form in paragraph 35 of Schedule 22 to the Coroners and Justice Act 2009 to cater for other types of sentence. These powers enable the appropriate extension period to keep step with the release point of custodial sentences. This reference to the 2007 Act, which is yet to be commenced, is to be replaced by the Bill with reference to changes a proportion of a prisoner's sentence made by the Scottish Ministers under section 27(2)(b) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, which permits the Scottish Ministers to amend any of the release provisions in the 1993 Act to refer to a different proportion of the sentence. The replacement power will include that contained in paragraph 35 of Schedule 22 to the 2009 Act which will itself be repealed.

Justification for taking the power

224. It is necessary to take this power because where a change is made to the release point of an offender's sentence, the appropriate extension period must in turn be updated to reflect this. Otherwise, the appropriate extension period will fall out of step with the offender's release point and their driving disqualification may

be subsumed by their custodial period, or they may serve a longer period of disqualification than they ought. It is appropriate that a power be taken to mirror the power to amend release points and this change simply amends and consolidates the existing power inserted by the Coroners and Justice Act 2009 to provide the same functionality.

Justification for the procedure

225. Exercise of these powers has the potential to lengthen an offender's potential driving disqualification order. It is considered this power should be subject to the affirmative procedure. This is consistent with the existing provisions, the equivalent provisions in England and Wales under section 35A of the 1988 Act and section 166 of the Sentencing Act 2020, and with the order-making powers which amend the release point, and is therefore the most appropriate level of Parliamentary scrutiny for these powers.

Schedule 13, paragraph 2 – New section 395A of the Sentencing Code: Power to specify "special procedures" for Community and Suspended Sentence Orders

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative Resolution*

Context and purpose

226. These provisions provide the legislative basis for introducing a problem-solving court approach in relation to certain community orders and suspended sentence orders. The Government has committed in the Smarter Approach to Sentencing White Paper to piloting this approach in up to five courts across England and Wales in the first instance. The pilots will focus on certain groups of offenders with complex needs, such as offenders with substance misuse issues, female offenders and domestic violence preparators.

227. The aim of a problem-solving court approach is to improve offender compliance with community orders and suspended sentence orders and to reduce reoffending. This is achieved through a multi-agency approach with links to wider support services, one element of which is providing for close oversight by a court of particular sentences being served in the community. This enables the court to be responsive to an offender's criminogenic needs and ensures that changes to the balance of incentives and sanctions can be made swiftly and directly by the reviewing judge.

228. While some of the elements of a problem-solving court approach either already exist or do not require primary legislation, primary legislative changes are necessary to ensure that some elements are put in place so that the recommendations made by the 2016 Working Group can effectively be put into

practice and to ensure that a thorough evaluation can take place. This Bill will therefore

i. give the court a power to regularly review community and suspended sentence orders and to initiate breach proceedings at a review hearing;
ii. expand the power to test for illicit substances outside the provisions of Drug Rehabilitation Requirements; and
iii. enable the court to impose short custodial penalties for non-compliance.

229. The intention is to pilot the measures for an initial 18-month period within each of the pilot sites, that period to be commenced at an appropriate date when the site is operationally ready to commence the pilot. The intention is also that the pilot may be applied to different cohorts in different areas so that, for example, it may apply only to female offenders in certain areas, or only to those being sentenced for domestic abuse offences in others.

230. This different provision will be achieved by allowing the Secretary of State to make regulations specifying community orders or suspended sentence orders which qualify for special procedures for the purposes of a relevant provision (i.e. such that the new powers of review, enabling judges to initiate breach proceedings and/or to commit an offender to custody can apply to those sentences). The regulations may provide that orders which are of a description specified in the regulations and made within a specified period of time or at a specified time, will qualify for special procedures. The description may, among other things, be framed by reference to the court in which the orders are made (meaning that certain courts can be specified to participate in the pilot), the persons who are subject to the orders (which means that the pilot may, for certain courts, focus on a specific group of offenders, such as female offenders) and/or the offences to which the orders relate (so that the pilot may, in certain courts, focus on, for example, those who have committed domestic abuse related offences, or cases where the offending is related to substance misuse issues).

231. Where the regulations specify a new description for the first time, the period of time specified in the regulations must be 18 months. This means that there must always be an initial pilot period of 18 months for each court which is specified, and for each group of offenders. After the conclusion of that 18 month period, however, regulations could be made which apply the provisions for that court and for those groups of offenders indefinitely.

232. The new provisions are intended to run alongside the existing provisions for managing community orders and suspended sentence orders, as set out in the sentencing code. There is no intention that the problem-solving approach will replace or supersede the existing approach, as there will always be cases which are not appropriate for a problem-solving approach.

233. The progress of the pilots in meeting the policy intention will be monitored throughout and the evaluation process will provide analysis at defined stages, including reconviction information after the necessary period has elapsed. The

governance and oversight for the pilots will decide what interim evaluation is needed during the pilots on which a decision to extend them to other courts, or begin a roll-out more widely. . For example, a decision could be made regarding the timing of the roll out of the problem-solving approach to other courts and this will also need to take into account of any issues with regard to operational delivery.

Justification for taking the power

234. The power is necessary to enable the Secretary of State to pilot the provisions in certain courts, and for certain cohorts of offenders, and to start those pilots on different dates to reflect the operational readiness of each court. It would not be appropriate nor workable for this level of detail to be set out on the face of the primary legislation.

235. Given the nature of the pilot, namely that it will be time bound and limited to certain courts the Government considers it appropriate to allow for flexibility to determine, following the conclusion of the pilot, whether it is necessary or beneficial to expand the problem-solving approaches, and how that ought to be done. For example, whether it ought to be rolled out to other courts or groups of offenders, and whether the pilot ought to be capable of extension beyond the initial 18 month period and over what period. The Government considers it appropriate that such changes may be made by way of further secondary legislation, so as to allow it to make a full assessment of the effectiveness of the problem-solving approach.

236. The Government also considers that it is appropriate to take a power to enable it to make regulations to implement permanently an approach that has been trialled successfully over the required initial 18 month period. This will ensure that the approach can be implemented quickly and its benefits can be realised without the need to make further primary legislation.

Justification for the procedure

237. This power is subject to the negative procedure (new section 395A(5)). The Government's view is that the principle of the provisions is made clear on the face of the legislation, and the power is limited by the legislation such that it may only be used to apply the provisions to different courts and cohorts of offenders and for different time periods. These matters are administrative in nature and therefore it is not necessary for such powers to be subject to parliamentary scrutiny by affirmative resolution.

Clause 130 – new section 10A(2) of the Offender Management Act 2007: Power to prescribe persons for consultation on unpaid work requirements

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by Statutory Instrument*

Parliamentary Procedure: *Negative Resolution*

Context and purpose

238. Unpaid work requirements are frequently used and may be imposed as part of an OOCD, YRO or community sentence, and as of December 2020, the unpaid work caseload was 45,000. Under the Unified Model, unpaid work will be delivered by the National Probation Service, who will also be responsible for the proposed consultation process. Given the prevalence of unpaid work requirements, it is important to deliver quality placements that are beneficial to local communities and improve offender outcomes. In order to achieve this, we believe that greater consultation is required at a regional level with relevant community stakeholders, which will in turn ensure that unpaid work placements are responsive to local need. The power enables the Secretary of State to prescribe persons with whom probation providers must consult annually on the type of work done as part of unpaid work requirements. Regulations under this power will be subject to the negative procedure.

Justification for taking the power

239. The prescribed persons will likely include statutory bodies and key local authorities such as local policing, criminal justice, health and social care bodies. We will also seek to include consultation with relevant non statutory bodies such as third sector organisations, bodies and organisations which are considered to be principally involved in the delivery of services which influence and impact criminal justice outcomes in the local community. We acknowledge that the range of services available varies depending on location, and in order to maximise local opportunity, we will need to identify which stakeholders are relevant for individual regions. As a result of geographic diversity, National Probation Service will only be required to consult the prescribed persons operation in their region, and justifying the use of a delegated power. The Government recognises that this list is central to the scope and effect of this clause and continues to consult with organisations and bodies to identify those to which the duty should attach.

240. The regulation-making power will enable the regulations to vary the description of a body or organisation listed. The Government's expectation is that where a specified public authority was renamed, it would normally be for the legislation renaming the body to make the necessary consequential amendment to the regulations, but this may not always be the case and it may be that it is necessary to change the description of a public authority for other reasons. Authorities or not for profit organisations which emerge will need to be provided for where relevant and appropriate. It is considered that secondary legislation is an appropriate mechanism to identify a list of bodies and organisations of this nature and to keep it up to date.

Justification for the procedure

241. As the amendments are to the Offender Management Act 2007, by virtue of section 36(4) of the Offender Management Act 2007, the regulation-making power will be subject to the negative procedure. Having established on the face of the Bill the principle of a duty to consult persons prescribed in a list and that those listed will be subject to the duty, and given that the power to describe the body and

organisations and to vary the list of persons prescribed will be administrative in nature, and it is not considered that parliamentary scrutiny is necessary, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny.

PART 8: YOUTH JUSTICE

Clause 135(3): Power to bring youth electronic monitoring provisions into force for specified purposes and continue them in force

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *None*

Context and purpose

242. The Bill introduces a new requirement available to be imposed for Youth Rehabilitation Orders ("YRO") – the Electronic Whereabouts Monitoring Requirement which allows for the monitoring of the child's location. This will be available for all YROs but is mandatory for a YRO with Intensive Supervision and Surveillance ("YRO with ISS"). The Bill also amends the maximum length of a YRO with ISS from 180 days to 365 days. The Electronic Whereabouts Monitoring Requirement and the increase of the maximum length of the YRO with ISS are going to be piloted to assess the requirement being available for all children and to measure whether there should be restrictions to its availability and also to test whether the requirement should be mandatory for all children sentenced to YROs with ISS.

243. Clause 135(3) give the power to bring these provisions into force for specified purposes and in specified areas for specified periods. Clause 135(4) gives the power to continue the regulations that were made under clause 135(3) for a further specified purpose, specified area, for specified period. The power also permits transitional and savings provision to be made resulting from these regulations. Both powers are subject to the negative procedure.

Justification for the power

244. The power is administrative in nature and allows for the commencement of the provisions for the specific purpose of a pilot, and in certain areas, once the administrative and operational arrangements have been made. The pilot will expire after the limited time and then regulations can be made to bring the powers into force fully after the outcome of the pilot can be assessed.

Justification for the procedure

245. As is usual with commencement powers, regulations made under clause 135(3) are not subject to any parliamentary procedure. Parliament has approved the

principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

246. In accordance with normal practice, the power to make pilot schemes is similarly not subject to any parliamentary procedure. Again, Parliament will already have approved the provisions to be commenced by enacting them, and partial commencement through the making of a pilot scheme affords the opportunity to assess the effectiveness of the provisions prior to national roll-out.

Clause 135(8): Power to amend piloted youth electronic monitoring provisions and make consequential amendments to relevant primary legislation

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

247. Clause 135(8) enables the YRO provisions which have been piloted under 135(3) and (4) (see previous entry) to be fully commenced.

248. Once the pilot has been completed, it may be necessary to make changes to the electronic monitoring regime before the measures are commenced in full, depending on the outcome of the pilot. Clause 135(7) provides that, if the provisions in subsections (4) and (5) are fully commenced, regulations under (8) may make amendments to the provisions themselves (and other amendments consequential thereon) subject to the affirmative procedure.

249. Any relevant provisions for the purposes of clause 135(3) that are not piloted may be brought into force by regulations with no Parliamentary procedure.

250. Any provision that is piloted under clause 135(3) and (4) but is not amended under clause 135(8) may be brought into force by regulations with no Parliamentary procedure.

Justification for the power

251. The provisions currently provide for an Electronic Whereabouts Monitoring Requirement to be available to be imposed on any YRO and to be compulsory for all YROs with ISS, and for the maximum length of a YRO with ISS to be increased to a year. A pilot will be conducted in order to analyse the effectiveness of the requirements. The pilot should demonstrate whether the provisions should be limited to certain ages or certain types of offending behaviour and, if the pilots show that the availability of these requirements should be limited, regulations are the most appropriate avenue to amend the availability of the requirements.

252. Any provisions that are not piloted or are piloted but are brought into force without any amendments, are not subject to Parliamentary procedure as they are straightforward commencement regulations.

Justification for the procedure

253. As the regulations under clause 135(8) might amend primary legislation, they will be subject to the affirmative resolution procedure (as provided for in clause 135(9)).

254. Any regulations that commence provisions that are not piloted or provisions that are piloted but make no amendments are simply commencing the provisions as set out in the Bill and therefore the Government consider that no Parliamentary procedure is necessary.

PART 10: MANAGEMENT OF OFFENDERS

CHAPTER 1: SERIOUS VIOLENCE REDUCTION ORDERS

Clause 139(1) - new sections 342B(1)(b) and 342C(1) of the Sentencing Code: Power to make provision for additional requirements or prohibitions to be imposed on an offender subject to a serious violence reduction order

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative procedure*

Purpose of the power

255. Chapter 1 of Part 10 inserts new Chapter 1A of Part 11 of the Sentencing Code (comprising new sections 342A to 342K) which provides for Serious Violence Reductions Orders ("SVROs"), a new court order to target known carriers of knives or offensive weapons, by making it easier for the police to stop and search those convicted of an offence involving a knife or offensive weapon. Where an SVRO is made, the person subject to the order must notify the police, within three days of the order taking effect, of their name (including any assumed name) and their home address (which may be an address or location where they can be found if they have no permanent home address) (new section 342B). Any changes to those details must also be notified to the police, within three days of the change, including where the individual decides to live at an address which is not their home address for a period of one month or more. Where a person is subject to an SVRO, a constable may stop and search the person for the purpose of ascertaining whether the person is carrying a knife or other bladed article or offensive weapon. The police do not need to have a reasonable suspicion that the person is carrying a knife etc. in order to exercise this stop and search power. A breach (without reasonable excuse) of an SVRO, provision of false information in purported compliance with an SVRO, or intentionally obstructing a constable exercising the

stop and search power is a criminal offence subject to a maximum penalty, on conviction on indictment, of two years' imprisonment, a fine or both.

256. New section 342B(1)(b) confers on the Secretary of State a power to make regulations to specify additional requirements or prohibitions (in addition to the notification requirements) to be imposed on an offender subject to an SVRO. The power is only exercisable once the Secretary of State has laid before Parliament a report of the outcome of the pilot of SVROs (see below) and if the Secretary of State considers that it is appropriate to make the regulations for the purpose of assisting constables to exercise their powers to search the offender under section 342E.

257. New section 342C(1) confers of the Secretary of State a power to make regulations to specify additional requirements or prohibitions that may be imposed on the offender if the court considers it appropriate to impose any such requirements or prohibitions for the purpose of assisting constables to exercise their powers to search the offender under section 342E. The power is only exercisable once the Secretary of State has laid before Parliament a report of the outcome of the pilot of SVROs (see below).

Justification for taking the power

258. In order to assist the police in targeting offenders who have been issued with an SVRO for the purposes of protecting the public, or particular member of the public, from the risk of harm from knives or offensive weapons, or to prevent further knife or offensive weapons crimes from being committed, the legislation must provide for an SVRO to impose the right requirements or restrictions on offenders. The notification requirement included in new section 342B will assist the police with the exercise of the stop and search powers provided for in new section 342E, but it may that additional notification or other requirements or restrictions are needed in the light of operational experience to achieve the purpose of these orders.

259. SVROs will be piloted (see clause 140) and the operation of the pilot might provide information as to other requirements or prohibitions that would be helpful to include to improve the effectiveness of these orders. This could be additional types of notification requirements, other requirements or prohibitions that would assist the police to identify individuals who are subject to an SVRO. Providing the Secretary of State with a power to add requirements or prohibitions that are either mandatory requirements of all SVROs, or that courts can consider and add to an SVRO will allow any insight gained from the pilot, or subsequently, to be reflected in the requirements of an SVRO.

260. It is considered appropriate to be able to specify in regulations under section 342B(1)(b) any such additional requirements or prohibitions that must be imposed on an offender subject to an SVRO in order that operational experience can be taken into account and reflected in the restrictions and prohibitions of the Order. It is also considered appropriate for the power in section 342C(1) to allow for the potential that it would be appropriate for the court to consider whether particular additional restrictions or prohibitions should be imposed in individual cases. In other examples of civil orders, the courts have discretion as to the restrictions or

prohibitions that may be included in an order, subject to a necessity test – see for example, section 21 of the Offensive Weapons Act 2019 in respect of knife crime prevention orders and section 103C of the Sexual Offences Act 2003 in respect of sexual harm prevention orders. Similarly, existing notification regimes for sex offenders and terrorist offenders include powers to add to the list of notification requirements by regulations (see section 83(5)(h) of the Sexual Offences Act 2003 and section 47(2)(h) of the Counter-Terrorism Act 2008).

Justification for the procedure

261. By virtue of new sections 342B(8) and 342C(4), regulations made under new section 342B(1)(b) and 342C(1) are subject to the affirmative procedure. The affirmative procedure is considered appropriate given that such regulations would require the courts to impose additional notification or other requirements or restrictions on persons subject to an SVRO, which would not have previously been considered by Parliament. Moreover, a failure to comply with any additional requirement or restriction would constitute a criminal offence. Powers under the Sexual Offences Act 2003 and the Counter-Terrorism Act 2008 to add to list of notification requirements are also subject to the affirmative procedure.

Clause 139(1) - new section 342F(2) of the Sentencing Code: Power to make provision regulating the retention, safe keeping, disposal and destruction of things seized by a constable following the search of a person subject to subject to a serious violence reduction order

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative procedure*

Purpose of the power

262. New section 342E of the Sentencing Code provides a power to search a person subject to a SVRO in order to ascertain if the person is carrying a bladed article or an offensive weapon in a public place. In the event that a bladed article or an offensive weapon is being carried, this clause provides a constable with powers to seize and retain the items. New section 342F(1) provides that anything seized as a result of a search may be retained by the constable in accordance with regulations made under new section 342F(2). Such regulations may make provision for the retention and safe keeping of seized items and for their disposal or destruction in prescribed circumstances (for example, following the conclusion of any criminal proceedings connected with the seized item).

Justification for taking the power

263. Having provided for the power of seizure and retention on the face of the Bill, the detail as to the arrangements for the retention and disposal of seized items is properly a matter for secondary legalisation. It is expected that regulations made under new section 342F(2) will make analogous provisions in relation to bladed

articles and offensive weapons to those contained in the Police (Retention and Disposal of Items Seized) Regulations 2002 (SI 2002/1372) made under section 60A of the Criminal Justice and Public Order Act 1994 ("CJPOA"). That is setting out the necessary arrangements which must be followed by the police for retention, safe-keeping, disposal and destruction which will apply to any item seized under the stop and search power to which existing provision, for example, the Police (Property) Regulations 1997, would not apply.

Justification for the procedure

264. By virtue of new section 342F(3), regulations made under new section 342F(2) are subject to the negative resolution procedure. This is considered to afford an appropriate level of parliamentary scrutiny given the technical nature of the matters to be addressed in the regulations. This approach is consistent with the regulation-making power in section 60A of the CJPOA.

Clause 139(1) - new section 342J of the Sentencing Code: Guidance in respect of the exercise of functions in relation to Serious Violence Reduction Orders

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

Context and purpose

265. New Chapter 1A of Part 11 of the Sentencing Code (as inserted by clause 152 of the Bill) confers a number of powers and duties on the police in relation to SVROs. New section 342J provides that the Secretary of State may issue guidance to the police on the exercise of these and other functions under this Chapter. Police constables and chief officers of police are required to have regard to any guidance when exercising functions to which the guidance relates.

Justification for the power

266. The purpose of any guidance under new section 342J is to support the police in relation to the exercise of their functions in relation to SVROs. Amongst other things, the statutory guidance will provide clear advice about the operation of SVROs and monitoring and reporting of their use. Any such guidance will complement separate revisions the relevant code of practice (Code A) under section 66 of the Police and Criminal Evidence Act 1984 ("PACE") on the exercise of statutory stop and search powers which will be revised to set out the stop and search power under new section 342E. There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events, operational good practice and the outcome of the pilot provided for in clause 140.

267. The requirement for the guidance to be published in such manner as the Secretary of State sees fit will ensure that it remains accessible to those who need to refer to it.

Justification for the procedure

268. Such guidance is not subject to any parliamentary procedure on the grounds that it will be prepared in consultation with the police, it will not conflict with the statutory framework in new Chapter 1A of Part 11 of the Sentencing Code and the police will not be under a statutory duty to follow the guidance. This approach is consistent with similar guidance, for example, that provided for in sections 103J(1) and 122J(1) of the Sexual Offences Act 2003 in respect of sexual harm prevention orders and sexual risk orders (available here) and section 30 of the Offensive Weapons Act 2019 in respect of knife crime prevention orders.

Clause 140: Power to pilot Serious Violence Reduction Orders

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *None*

Context and purpose

269. Clause 140 requires the provisions relating to SVROs to be piloted before being rolled out more generally. The clause introduces two conditions before the commencement power in clause 175(1) can be exercised to bring the provisions in clause 139 into force for all purposes and in relation to the whole of England and Wales.

270. The first condition is that the Home Secretary has first brought some or all of the provisions into force only for one or more specified purposes or in relation to one or more specified areas in England and Wales (for example, the provisions new Chapter 1A of Part 11 of the Sentencing Code could be brought into force in one or more police force areas, or part of such areas).

271. The second condition is that the Home Secretary has laid before Parliament a report on the operation of the pilot(s).

Justification for taking the power

272. Before implementing the new SVROs across the whole of England and Wales it is proposed to pilot their operation. Such pilots will, amongst other things, enable the Government to test the effectiveness of the overall effectiveness of these orders in combatting knife and offensive weapons crime.

273. Given the nature of a pilot – namely that it will be time bound and limited to one or more particular areas or purposes – it is appropriate to leave to secondary legislation the determination of the scope and duration (which can be set, an extended by subsections (4) and (5)) of the pilot. Both of these matters will be a matter for negotiation with one or more police forces and other stakeholders.

Justification for the procedure

274. As is usual with commencement powers, regulations made under clause 175(1) when read with clause 140 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

275. In accordance with normal practice, the power to make pilot schemes is similarly not subject to any parliamentary procedure. Again, Parliament will already have approved the provisions to be commenced by enacting them, and partial commencement through the making of a pilot scheme affords the opportunity to assess the effectiveness of the provisions prior to national roll-out. This approach is consistent with the provision in section 33 of the Crime and Security Act 2010 which made provision for piloting Domestic Violence Protection Notices and Orders and section 31 of the Offensive Weapons Act 2018 which make similar provisions for piloting Knife Crime Prevention Orders.

CHAPTER 2: MANAGEMENT OF SEX OFFENDERS

Clause 141(3) – New section 87(2A) of the Sexual Offences Act 2003: Power to specify list of police stations for purposes of sex offender notification requirements

Power conferred on:	*Chief officers of police in England and Wales*
Power exercisable by:	*Statutory document*
Parliamentary procedure:	*None*

Context and purpose

276. Part 2 of the Sexual Offences Act 2003 ("the 2003 Act") requires relevant offenders (those convicted of a sexual offence listed in Schedule 3 to the 2003 Act) to comply with the notification requirements as set out in that Part. Relevant offenders are required to notify the police of specified information (including their name(s) and home address) and keep such information up to date. Relevant offenders are required to make such notifications by attending a police station in their local police force area which is for the time being specified in regulations made by the Secretary of State (see section 87(1)(a) of the 2003 Act). The current

regulations are the Sexual Offences Act 2003 (Prescribed Police Stations) (England and Wales) Regulations 2018 (SI 2018/447), as amended.

277. Clause 141 amends section 87 of the 2003 Act to replace the requirement on the Secretary of State to prescribe a list of relevant police stations with a requirement on each chief officer of police to publish, and keep up to date, a document containing the name and address of each police station in their police force area where relevant offenders can give the required notifications under Part 2 of that Act.

Justification for the power

278. The list of police stations at which relevant offenders can give the required notifications under Part 2 of the 2003 Act is properly an operational matter for individual chief officers of police. Decisions are properly taken locally to open, close or relocate police stations (or public enquiry desks within police stations) according to operational need. While the list of police stations prescribed under section 87(1)(a) of the 2003 Act is generally updated on an annual basis, the list can quickly become out of date and reviewing it annually places a bureaucratic burden on the Home Office. In the Government's view, the list of relevant police stations is properly a matter for individual forces to promulgate and make available to relevant offenders.

279. There are similar notification regimes in other legislation which operate effectively without having a nationally prescribed list of police stations, for example, a person subject to the notification requirements under Part 4 of the Counter-Terrorism Act 2008 complies with the requirements by making a notification by "attending at a police station in the person's local police area" (see section 50(2)(a) of the Counter-Terrorism Act 2008).

Justification for the procedure

280. The existing regulation-making power in section 87(1)(a) of the 2003 Act is subject to the negative procedure. While this may be appropriate for regulations made by the Secretary of State listing relevant police stations throughout England and Wales, it is not considered necessary to apply any parliamentary procedure to a document issued locally by each of 43 chief officers of police. As indicated above, maintaining and promulgating a list of relevant police stations for the purposes of these notification requirements is properly an operational matter for individual chief officers – as are the precursor decisions about the number and location of police stations in the force area – and not therefore an appropriate matter for parliamentary oversight.

Clause 145(1): Power to prepare a list of countries considered to be at high risk of child sexual abuse or exploitation by UK nationals and residents

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory document*

Parliamentary procedure: *Laying only*

Context and purpose

281. The provisions in clauses 145 and 146 (taken together) fulfil a recommendation made by the Independent Inquiry into Child Sexual Abuse ("IICSA") in its *Children Outside the United Kingdom Report*, published in January 2020. This report set out the findings of an investigation by the Inquiry into the extent to which institutions and organisations based in England and Wales have taken seriously their responsibilities to protect children outside the UK from sexual abuse. The matters considered by the investigation included the effectiveness of the civil order regime in protecting children overseas from those looking to travel from the UK to abuse.

282. The IICSA reported that very few foreign travel prohibitions via civil orders are made in respect of individuals that may pose a risk of sexual harm to children overseas. It found that the available data suggested that around 0.2% of registered sex offenders typically have their travel prohibited via a civil order. The IICSA considered it to be a reasonable inference that more sexual harm prevention orders ("SHPOs") and sexual risk orders ("SROs") with foreign travel prohibitions might rightly be made.

283. Clauses 145 and 146 of the Bill are intended to support applicants and the courts in considering whether it is necessary to apply for or make, as the case may be, an SHPO or SRO for the purpose of protecting children outside the UK from the risk of sexual harm from the defendant and whether the inclusion of a foreign travel prohibition in such an order is necessary for that purpose.

284. Clause 145 of the Bill provides for the establishment of a list of countries and territories considered to be at high risk of child sexual exploitation and abuse from UK nationals and residents. Clause 145(1) confers the power on the Secretary of State to prepare such a list or direct a relevant person - defined as a person whose statutory functions relate to the prevention or detection of crime, or other law enforcement purposes (for example, the National Crime Agency) - to prepare such a list on behalf of the Secretary of State. Clause 145(6) provides that the person who prepared the list may, from time to time, prepare a revised list and clause 145(9) provides that they may withdraw it where necessary. The list of high-risk countries will have effect for the purposes of section 346 of the Sentencing Code (exercise of power to make sexual harm prevention order), section 103A of the Sexual Offences Act 2003 (sexual harm prevention order: application and grounds) and section 122A of that Act (sexual risk orders: applications, grounds and effect).

Justification for the power

285. The Government considers it appropriate for the Secretary of State to establish, or direct a relevant agency to establish, a list of countries considered to be at high-risk of child sexual exploitation and abuse by UK nationals and residents. The IICSA noted that this would be a similar approach to that taken by the European

Commission in maintaining a list of countries that pose a significant risk in terms of money laundering; companies and other entities are required to undertake enhanced checks on financial dealings with customers and financial institutions from the listed high-risk countries.

286. The establishment and revision of the list will be an operational matter, based on intelligence and other insights from law enforcement agencies. The Government considers that the changing nature of this intelligence and potential requirement for quick and reactive revisions to the list lends itself to a delegated power rather than placing the list on the face of the Bill. Given the specific and narrow purpose of the list in informing decisions by applicants for an SHPO or SRO and the courts in making an SHPO or SRO it is also considered sufficient that the list is published rather than prescribed in regulations.

Justification for the procedure

287. Clause 145(3)(b) provides that the Secretary of State must lay the list before Parliament. The requirement upon the courts and certain persons to have regard to the list (conferred by clause 146) will only apply in select circumstances, namely in the course of considering whether to apply for or make a SHPO or SRO, and particularly whether a prohibition on foreign travel is necessary to safeguard children overseas from sexual harm. The defendant will be able to make representations to the court as to why any such prohibitions should not apply in their case. Given the narrow context in which applicants and the courts will be required to have regard to the list, and the requirement on the courts to consider the individual merits of the relevant civil order application having regard to any representations made by the defendant, the Government does not consider additional parliamentary procedure or scrutiny to be necessary.

Clause 151(4), (10) and (14)– New section 348A(6) of the Sentencing Code and new sections 103FA(6) and 122EA(6) of the Sexual Offences Act 2003: Power to specify description of "responsible person"

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*None*

Context and purpose

288. Part 2 of the 2003 Act provides for two civil order to protect persons from sexual harm – the Sexual Harm Prevention Order ("SHPO") (see also Chapter 2 of Part 11 of the Sentencing Code) and Sexual Risk Order ("SRO"). An SHPO can be made by a court in respect of an individual who has been convicted or cautioned for a relevant offence and who poses a risk of sexual harm to the public in the UK or children or vulnerable adults abroad. An SHPO may impose any restriction the court deems necessary for the purpose of protecting the public from sexual harm, and makes the offender subject to notification requirements (requiring the subject

of an order to notify the police of their name and address and certain other specified information). SHPOs are available to the court at the time of sentencing for a relevant offence, or on free-standing application to a magistrates' court by the police or National Crime Agency after the time of the conviction or caution. An SRO can be made by a court in respect of an individual who has done an act of a sexual nature and who, as a result, poses a risk of harm to the public in the UK or children or vulnerable adults abroad. For an SRO to be imposed, the individual does not need to have committed a relevant (or any) offence. An SRO may impose any restriction the court deems necessary for the purposes of protecting the public from harm (this includes harm from the defendant outside the United Kingdom where those to be protected are children and vulnerable adults) and requires the individual to notify certain information to the police. An SRO is available on free-standing application to a magistrates' court by the police or National Crime Agency. Clauses 161 to163 enable the Court to include positive requirements in SHPOs and SROs where necessary for the purpose of protecting the public from sexual harm.

289. Clause 151 amends the provisions relating to SHPOs and SROs to explicitly allow for the court to attach an electronic monitoring requirement to an order. An electronic monitoring requirement may be imposed to support the monitoring of an individual's compliance with other requirements of the order (for example, the operation of an exclusion zone around the victim's home). Electronic monitoring is undertaken using an electronic tag usually fitted to a subject's ankle.

290. The tag worn by the subject transmits data to a monitoring centre where it is processed and stored. The monitoring centre, operated by a "responsible person", reviews this data to see whether an individual being electronically monitored is complying with the conditions of the SHPO or SRO. Where a subject has failed to comply, the responsible person provides information to the relevant authority, in this case the police, responsible for the enforcement of the order.

291. The Sentencing Code and 2003 Act, as amended by clause 164, set out further provision about electronic monitoring requirements. New section 348A(5) of the Sentencing Code and new sections 103FA(5) and 122EA(5) of the 2003 Act provide that an SHPO or SRO, as the case may be, which includes an electronic monitoring requirement must specify the person who is responsible for the monitoring ("the responsible person"). New section 348A(6) of the Sentencing Code and new sections 103FA(6) and 122EA(6) of the 2003 Act provide that the responsible person must be of a description specified in regulations made by the Secretary of State. Similar enabling powers are contained in, for example, section 3AC(2) of the Bail Act 1976, section 215(3) of the Criminal Justice Act 2003 and clause 35(7) of the Domestic Abuse Bill. The relevant statutory instrument made under the first two of those powers is the Criminal Justice (Electronic Monitoring) (Responsible Person) Order 2017 (SI 2017/235).

<u>Justification for the power</u>

292. The regulations will effectively specify which service provider or providers are contracted for the time being to provide electronic monitoring services for the purposes of the SHPO and SRO regimes. The selection of one or more suitable

contractors is properly an administrative procedure. In addition, such contractors will change over time and may need to be changed at short notice. For these reasons, the designation of the responsible person is considered an appropriate matter for secondary legislation.

Justification for the procedure

293. Regulations made under new section 348A(6) of the Sentencing Code and new sections 103FA(6) and 122EA(6) of the 2003 Act are not subject to any parliamentary procedure (see section 407 of the Sentencing Code and section 138(3) of the 2003 Act as amended by clause 164(11)). The primary purpose of these regulations is simply to put into the public domain the name of one or more persons contracted to provide electronic monitoring services for the purposes of SHPOs and SROs; as indicated above, the selection of the contractor(s) is properly an administrative matter for the executive. Given this, no form of parliamentary scrutiny is considered necessary. This mirrors the approach with the analogous delegated powers in section 3AC(2) of the Bail Act 1976, section 215(3) of the Criminal Justice Act 2003 and clause 35(7) of the Domestic Abuse Bill.

Clause 151(4), (10) and (14) – New section 348B of the Sentencing Code and new sections 103FB and 122EB of the Sexual offences Act 2003: Duty to issue code of practice relating to data from electronic monitoring

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory code of practice*
Parliamentary procedure:	*None*

Context and purpose

294. As a result of the amendments made by clause 151(4), (10) and (14), amongst the requirements which a court may attach to an SHPO or SRO is an electronic monitoring requirement. Clause 151(4), (10) and (14) also inserts new section 348B into the Sentencing Code and new sections 103FB and 122EB into the 2003 Act which requires the Secretary of State to issue a code of practice on the processing of data gathered in the course of an electronic monitoring requirement of an SHPO or SRO.

295. The processing of such data will be subject to the requirements in the General Data Protection Regulation and the Data Protection Act 2018. The code of practice issued under new section 348B of the Sentencing Code and new sections 103FB and 122EB of the 2003 Act is intended to set out the appropriate tests and safeguards for the processing of such data, in order to assist with compliance with the data protection legislation. For example, the Government envisages that the code will set out the length of time for which data may be retained and the circumstances in which it may be permissible to share data with the police to assist with crime detection. It is intended that the code will cover the storage, retention and sharing of personal data gathered under a requirement that is imposed for the purpose of monitoring compliance with another requirement.

296. Similar provision for a code of practice in respect of the processing of data from electronic monitoring is included in section 215A of the Criminal Justice Act 2003 (as inserted by the Crime and Courts Act 2013). The code is available here. Clause 49 of the Domestic Abuse Bill also makes similar provision in relation to Domestic Abuse Prevention Orders.

Justification for the power

297. The Government considers that a code of practice is the most appropriate vehicle to set out expectations and broad responsibilities in relation to the processing of data gathered under the electronic monitoring requirement. There is a vast range of statutory guidance issued each year and it is important that guidance can be readily updated to keep pace with events and operational good practice.

Justification for the procedure

298. Given the likely content and nature of the code, and in particular the fact that it will not define or create new legal responsibilities and that the processing of data must be in accordance with the requirements of data protection legislation, the Government does not consider it is necessary for the code to be subject to any parliamentary procedure. This approach is consistent with the analogous code provided for in section 215A of the Criminal Justice Act 2003 and clause 49 of the Domestic Abuse Bill.

PART 12: PROCEDURES IN COURTS AND TRIBUNALS

Clause 168 – revised section 51 of the Criminal Justice Act 2003: Power to make rules relating to "live links" in a wider range of criminal hearings

Power conferred on:	*The Criminal Procedure Rule Committee*
Power exercisable by:	*Rules made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

299. The measures make permanent many of the temporary modifications in the Coronavirus Act 2020 which expand the use of live video and audio links in criminal proceedings, remove the prohibitions and limitations on the use of live links and make provision for remote juries. The provisions function by re-enacting the existing regimes for preliminary hearings, sentencing hearings and enforcement hearings in section 51 of the Criminal Justice Act 2003, which dealt with other criminal hearings. Section 55 of the Criminal Justice Act 2003 provides an existing power for the making of rules in relation to procedure, arrangements and safeguards for section 51 purposes. The power is not being amended but will now apply to the expanded range of hearings prescribed in section 51(3).

Justification for taking the power

300. Section 55(2)(b) of the Criminal Justice Act 2003 already provides that "Criminal Procedure Rules may in particular make provision … as to the arrangements or safeguards to be put in place in connection with the operation of live audio links and live video links" for the types of hearings currently listed in section 51. The extension of this power is required for consistency so that the expanded range of hearings in which live links will be able to be used can be incorporated into the Criminal Procedure Rules. Rules provide a more flexible method of responding to changing circumstances and different types of hearing may require discrete sets of rules. The power is required so that provision can be made efficiently for procedure for the new list of criminal hearings, as they currently are for hearings set out in the existing section 51.

Justification for the procedure

301. The substance of the measures is set out in the Bill and the rules will be entirely procedural in nature. The current power of the Criminal Procedure Rule Committee to make Criminal Procedure Rules is subject to the Lord Chancellor "allowing the rules" and negative Parliamentary process - see section 72 of the Courts Act 2003. It is therefore considered that the negative procedure is most appropriate level of Parliamentary scrutiny for this expanded rule-making power, as the content of the Rules for live links will be similar to that in the current Criminal Procedure Rules and the extension of the power in section 55 is entirely procedural. In addition, COVID-19 has had a significant adverse impact on the criminal courts; efficient and effective live links are essential in ensuring the criminal courts continue to operate and return to full capacity, further justifying the negative procedure for purely procedural provisions to be made.

Clause 166(1) and Schedule 19, paragraphs 1(2), 2(2), 2(3) and 3 – new section 85A of the Courts Act 2003, new sections 29ZA of the Tribunals, Courts and Enforcement Act 2007, new sections 12ZA and 32A of the Employment Tribunals Act 1996 and new section 15A of the Enterprise Act 2002: Power to specify proceedings in relation to which directions for transmission may be made

Power conferred on:	*Lord Chancellor (with concurrence of Lord Chief Justice or Senior President of Tribunals)*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Affirmative resolution*

Context and purpose

302. The measures replace the temporary modifications made by Schedule 25 to the Coronavirus Act 2020 to the Courts Act 2003 and Tribunals, Courts and Enforcement Act 2007 ("public participation in proceedings conducted by video and audio") with provision enabling the court in specified proceedings to make a

direction that the proceedings be transmitted to enable persons to watch or listen them. Subsection (6) of the new section 85A of the Courts Act 2003 inserted by clause 166(1) gives the Lord Chancellor, acting with the concurrence of the Lord Chief Justice, power by regulations to specify proceedings in which the court's power to direct transmission may be exercised. Similar provision in respect of tribunals, and specified proceedings in tribunals, is made (the power in this case being exercisable by the Lord Chancellor with the concurrence of the Senior President of Tribunals) by Part 1 of Schedule 19.

Justification for taking the power

303. Rather than extending the power to direct transmission to all proceedings in all courts and tribunals, or providing for a closed list of proceedings in specified courts or tribunals in which the court or tribunal may direct transmission, these provisions allow for an incremental approach, operating by agreement with the senior judiciary via the Lord Chief Justice (or, for tribunals, the Senior President of Tribunals), so that the list of proceedings in which the power to direct transmission may be exercised can be changed if and when appropriate in the light of developments including experience with the use of that power. Such an approach also provides a more flexible method of responding to changing circumstances.

Justification for the procedure

304. The incremental approach provided for is similar to that provided for enabling recording and broadcasting of proceedings in courts and tribunals under section 32 of the Crime and Courts Act 2003. While the power to direct transmission will not be exercisable so as to authorise broadcasting to the public (which remains the province of orders under section 32), there are similarities between the two which make it appropriate to adopt for the new power the same Parliamentary procedure as that adopted in section 32.

PART 13: FINAL PROVISIONS

Clause 172(1): Power to make consequential amendments

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution*

Context and purpose

305. Clause 172(1) confers a power on the Secretary of State to make consequential provision for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation.

Justification for taking the power

306. The powers conferred by this clause are wide, but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions made by or under the Bill. But there are various precedents for such provisions, including section 23(2) of the Counter-Terrorism and Border Security Act 2019. The Bill already includes some changes to other enactments as a consequence of the substantive provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. There could be an impact on the public perception of the criminal justice system if a provision is missed. This could undermine the administration of justice and would need immediate rectification. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation.

Justification for the procedure

307. If regulations made under this power do not amend or repeal primary legislation, they will be subject to the negative resolution procedure (by virtue of clause 172(6)). The affirmative procedure is not considered necessary or suitable for any applicable amendments which might be made to secondary legislation by virtue of this clause as any applicable orders and regulations will have no impact or very little impact on rights and will be administrative or procedural in nature. If regulations made under this power do amend or repeal provision in primary legislation, they will be subject to the affirmative resolution procedure (by virtue of clause 172(5)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 174(10): Channel Islands, Isle of Man and British overseas territories.

Power conferred on: *Her Majesty*

Power exercisable by: *Order in Council*

Parliamentary procedure: *None*

Context and purpose

308. Section 384 of the Armed Forces Act 2006 contain standard powers to allow some or all of the provisions of that Act to be extended to one or more of the Channel Islands, the Isle of Man and British overseas territories (except Gibralta). Clause 174(10) provides that this power may also be exercised in relation to any amendments to that Acts made by the Bill.

Justification for the power

309. It is appropriate that primary legislation is not required to extend the amendments made by this Bill to the Armed Forces Act to the Crown Dependencies or British overseas territories (except Gibraltar). The extension of

the provisions to the Crown Dependencies or British overseas territories would occur only with the agreement of those jurisdictions' authorities, and would be the means by which the Bill could be extended without those jurisdictions being required to legislate for themselves. A similar extension of the section 384 of the Armed Forces Act 2006 power was included in section 21 of the Armed Forces Act 2016.

Justification for procedure

310. As with the original powers in the Armed Forces Act 2006, the power as extended by clause 174(10) is not subject to any parliamentary procedure. This reflects the customary position for Orders in Council extending provisions of an Act to the Crown Dependencies or British overseas territories.

Clause 175(1): Commencement powers

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*None*

Context and purpose

311. Clause 175(1) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.

Justification for the power

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

Justification for the procedure

313. As is usual with commencement powers, regulations made under clause 175(1) are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 175(6): Power to make transitional, transitory or saving provision

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*

Parliamentary procedure: *None*

Context and purpose

314. Clause 175(6) confers on the Secretary of State power to make such transitional, transitory or saving provisions as they consider appropriate in connection with the coming into force of the provisions in the Bill.

Justification for the power

315. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 183(9) of the Policing and Crime Act 2017.

Justification for the procedure

316. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure.

Home Office / Ministry of Justice
9 March 2021