DATA PROTECTION AND DIGITAL INFORMATION BILL

Memorandum from the Department for Digital, Culture, Media & Sport to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

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

2. The Bill will be introduced in the House of Commons on 18 July 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

3. The Data Protection and Digital Information Bill makes provision for a variety of measures relating to personal data and other information, including digital information.

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

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

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

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

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

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

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

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

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

10. Part 2 of the Bill establishes a regulatory framework for the provision of digital verification services in the UK and enables public authorities to disclose information relating to an individual to trusted organisations providing such verification services.

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

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

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

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

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

16. Part 5 and Schedule 13 establishes a statutory corporation, with a new governance structure, to replace the Office of the Information Commissioner.

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

18. Schedule 12 enables standards relating to the processing of information ("information standards") in relation to the health and care sector to include information technology (IT) or IT standards, and enables information standards to be applied to providers of IT and related services. It does this by making clear that information standards published under section 250 of the Health and Social Care Act 2012 include standards relating to IT or IT services, and extending the persons to whom information standards may apply to persons who make available IT, IT services or information processing services in connection with the provision in, or in relation to, England, of health or adult social care.

C. DELEGATED POWERS

19. The Bill includes the following delegated powers.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

Justification for taking the power

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

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

Justification for the procedure

23. By virtue of new Article 6(8) UK GDPR (as inserted by clause 5(4)), the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations permit changes to fundamental lawful processing grounds. The affirmative procedure is also appropriate given that this power will permit direct amendments to DPA 2018 (and is therefore a Henry VIII power) so that new cases can be

added directly to Annex 1. Given that the effect of clause 5 is to introduce new lawful grounds that are exempt from the balancing of interests test, the procedure is consistent with existing regulation making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights) - and section 10(6) - power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data).

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

24. This clause inserts new Article 8A into the UK GDPR, which itself inserts a new Annex 2 into the UK GDPR. Annex 2 provides for a limited set of circumstances in which processing of personal data for a different purpose is treated as compatible with the original purpose without a specific law being required. New Article 8A(5) contains a regulation making power to amend Annex 2 by adding to or varying the provisions in the Annex or omitting provisions added by regulations made under Article 8A(5). The power can only be exercised where the Secretary of State considers that processing in these cases is necessary to safeguard an objective listed in Article 23(1)(c) to (j) of the UK GDPR. New Article 8A(7) sets out some specific provisions that may be made under the power.

Justification for taking the power

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

26. The power allows direct amendments of Annex 2 in order to ensure legislative coherence and clarity for the reader. Data controllers and data subjects will need to consult Annex 2 and provisions in the main body of the UK GDPR to understand the framework for processing personal data for a different purpose. Having to additionally consult statutory instruments to understand these rules would add an undesirable level of complexity. This approach of making direct amendments to DPA 2018 is consistent with existing regulation making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b) - powers to exempt from data subject rights - and section 10(6) - power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data). By way of limitation on the power, it does not permit conditions that were added by primary legislation to be omitted.

Justification for the procedure

27. By virtue of new Article 8A(8), as inserted by this clause, the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the new cases that can be added by regulations amount to exemptions from one of the key data protection principles (the purpose limitation principle in Article 5(1)(b) UK GDPR). The affirmative procedure is also appropriate given that this power will permit direct amendments to DPA 2018 (and is therefore a Henry VIII power) so that new cases can be added directly to Annex 2. The procedure is consistent with existing regulation making powers in DPA 2018 that permit exemptions from important principles and rights (eg. section 16(1)(b)- powers to exempt from data subject rights) and section 10(6)- power to add, vary or omit conditions added by regulations in relation to the processing of sensitive data).

Clause 7(6)(f): Power to require controllers to produce guidance about fees

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

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

    b. Specify what this guidance must include.

Justification for taking the power

29. The regulations will be subject to the negative resolution procedure, as already provided by section 53(5) DPA 2018 in respect of the delegated power currently conferred by that section. The power to make regulations pursuant to section 12(2) DPA 2018 in respect of controllers processing under the UK GDPR (which this provision is reading across to Part 3), is also subject to negative procedure.

Justification for the procedure

30. This is consistent with the overarching objective of achieving greater consistency across the legislation by aligning the language and definitions within the UK GDPR/Part 2 and Part 3 of the DPA 2018.

Clause 11(1): Power to clarify the meaning of "similarly significant effect" for automated decision-making

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

31. Article 22 of the UK GDPR sets out the conditions which apply to limited high-risk Artificial Intelligence AI scenarios under which solely automated decisions, including profiling, that produce legal or similarly significant effects on data subjects, may be carried out ('Article 22 processing'). Existing Article 22 restricts such activity to instances where necessary for entering into, or the performance of, a contract between a controller and a data subject, or where such activity is required or authorised by law, or where a data subject has provided explicit consent.

32. Clause 11 amends Article 22 of the UK GDPR to insert a new Article 22A-D into the UK GDPR which; expands the scope of existing Article 22 to all lawful bases for processing personal data to permit processing based on the vital interest, Article 6(1)(d) UK GDPR, and legitimate interest, Article 6(1)(f) UK GDPR. New Article 22A-C sets out; a "significant decision", as one that (i) produces legal effects concerning the data subject, or (ii) has a similarly significant effect (22A(1)(b)); sets out the restrictions on automated decision-making (Article 22B) and details the safeguards that must be applied when undertaking automated decision making (Article 22C). The Government requires a power to define and/or clarify the scope of new Article 22A(1)(b)(ii) ie. what constitutes a "similarly significant effect".

Justification for taking the power

33. The power is needed to enable the Government to provide the necessary flexibility in an evolving technology landscape to define and/or clarify the scope of new Article 22A-C. It will ensure the scope of the new Article 22A(1)(b)(ii) can be amended as necessary to keep pace with the fast-moving advances and adoption of technologies relevant to automated decision-making. This is needed to ensure that the circumstances in which the specific safeguards for Article 22 UK GDPR apply are clear, and can be updated in line with societal expectations of what constitutes a significant effect in a data protection context.

34. The regulation making power will enable the government to define and/or clarify the scope of new Article 22A(1)(b)(ii) in the future in two ways by (i) a direct amendment to new Article 22A in order to ensure legislative coherence and clarity for the reader and/or (ii) secondary legislation to elaborate on what is set out on the face of of new Article 22A(1)(b)(ii) itself. This will ensure that (i) data controllers have greater clarity in respect of the scope of this provision so that they can implement the corresponding restrictions including in relation to the use of special categories of personal data set out in new Article 22B, and apply the requisite safeguards as set out in new Article 22C when undertaking automated decision-making including profiling that falls within scope of new 22A(1)(b)(ii).

Justification for the procedure

35. By virtue of new Article 22D(1) and (2) as inserted by this clause 11, the regulations are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations permit changes to Article 22A directly.

Clause 11(1): Power to make regulations to change safeguards for automated decision-making

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

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

38. New Article 22C of clause 11 will simplify and consolidate these safeguards that now apply across all processing conditions in which Article 22 processing is carried out. These include (i) the right to be provided with information with respect to significant decisions taken using solely automated processing; (ii) to make representations about such decisions; (iii) to obtain human intervention on the part of the controller in relation to such decisions and (iv) to contest such decisions.

39. New Article 22D creates a new regulation making power for the Secretary of State to (i) add new safeguards; (ii) vary safeguards listed in Article 22C in order to provide flexibility to elaborate on the details in regulations and (iii) omit provisions added by regulations made under Article 22D(3) and 22D(4)(a).

40. While this power is a new power for the purposes of the new clause, it replicates and adds to the existing powers contained in section 14(7-8) DPA 2018 which is to be repealed by the new clause.

Justification for taking the power

41. The power is necessary to allow the Secretary of State to add new or vary safeguards by either (i) a direct amendment to new Article 22C in order to ensure legislative coherence and clarity for the reader or (ii) by secondary legislation that would elaborate on existing (and future) safeguards set out in new Article 22C or omit safeguards added by regulations made under new Article 22D(3) and 22D(4)(a); this sort of detail is more appropriate for inclusion in secondary legislation. This power will protect data subjects against risks to their rights and freedoms in light of rapid advancement in technology where significant decisions are taken using solely automated decision-making and given that such developments may also inform the Government's future views on how the existing safeguards ought to be applied or what it would take for a controller to appropriately implement those safeguards,

provide more specificity on what controllers are required to do to satisfy those requirements. The power is limited to the above and importantly will not allow the Secretary of State to remove the existing safeguards in new Article 22C.

42. This replaces the existing power provided for in section 14(7-8) DPA 2018 to add or amend safeguards.

Justification for the procedure

43. By virtue of this clause which inserts Article 22A-D into the UK GDPR, these regulations are subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects. The affirmative procedure is also appropriate given that this power will permit direct amendments to primary legislation (and is therefore a Henry VIII power) so that new safeguards to be added/varied directly to Article 22C.

Clause 11(3): Power to clarify the meaning of "similarly significant effect" for automated decision-making under Part 3 DPA 2018

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

45. Clause 11 repeals sections 49 and 50 DPA 2018, replacing them with new sections 50A-D. These new sections align the approach in Part 3 of the DPA with that being provided for in the new Articles 22A-D in the UK GDPR, reflecting the broader aim to ensure consistency across the data protection regimes where possible. As already detailed above for the equivalent UK GDPR provisions, these reforms will more clearly set out what amounts to a "significant decision", provide restrictions on automated decision-making using sensitive personal data and details the safeguards that must be applied when undertaking automated decision making. New section 50D(1) provides the Secretary of State with a power to make Regulations which can clarify the scope of section 50A(1)(b)(ii), enabling further detail to be provided on what constitutes a "significant effect".

Justification for taking the power

46. The power is needed for the same reasons detailed above for the equivalent power in the UK GDPR. It will enable the government to define and/or clarify the scope of section 50A(1)(b) in the future by both (i) a direct amendment to section 50A on the face of the Bill itself via a Henry VIII power in order to ensure legislative coherence and clarity for the reader and/or (ii) regulations allowing the flexibility to elaborate on what is set out in section 50A in secondary legislation. This will ensure that data controllers have greater clarity in respect to the scope of this provision so that they can implement the corresponding restrictions in respect to the use of sensitive personal data set out in new section 50B and apply the requisite safeguards as set out in section 50C when undertaking automated decision-making, including profiling, that falls within scope of 50A(1)(b).

Justification for the procedure

47. Regulations under the power in new section 50D(1) are subject to the affirmative procedure. This level of scrutiny is considered appropriate given that the regulations permit changes to the scope of 50A directly.

Clause 11(3): Power to make regulations to change safeguards for automated decision-making under Part 3 DPA 2018

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

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

50. Section 50D(3) creates a new regulation making power for the Secretary of State to (i) add new free-standing safeguards and (ii) to vary safeguards listed in 50C in order to provide flexibility to elaborate on the details in regulations (iii) omit provisions added by regulations made under 50D(3).

Justification for taking the power

51. The power is needed for the same reasons detailed above for the equivalent power in the UK GDPR. It will enable the Government to ensure that the required safeguards remain up to date and reflect possible advancements in technology where significant decisions are taken using solely automated decision-making. Such developments may impact on how the existing safeguards ought to be applied or what it would take for a controller to appropriately implement those safeguards. The power is limited, and importantly will not allow the Secretary of State to remove the existing safeguards in new clause 50C.

52. We also note that the Secretary of State already has a power under section 50(4) and (5) of the DPA 2018 to add or amend safeguards for significant decisions based solely on automated processing.

Justification for the procedure

53. The power in clause 50D(3) to make regulations is subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects. The affirmative procedure is also appropriate given that this power will permit direct amendments to primary legislation (and is therefore a Henry VIII power) so that new safeguards can be added directly to clause 50C.

Clause 22(2): Power to amend safeguards for processing for research etc purposes

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

54. There are existing safeguards in place to protect the rights and freedoms of data subjects when their data is being processed for research purposes. This includes processing for scientific research, historic research, archiving in the public interest and processing for statistical purposes. These are currently contained in Article 89(1) of the UK GDPR as supplemented by section 19 DPA 2018. Under these safeguards, organisations are required to put in place technical and organisational measures, such as pseudonymisation, to protect the rights of data subjects when they are processing for research purposes. There is also a prohibition on processing for research purposes if processed in such a way that causes substantial damage or distress to the data subject. Processing that supports measures or decisions with respect to a particular individual unless the processing is for approved medical research as set out in section 19(4) DPA 2018 is also prohibited. There is an existing power in section 19(5) DPA 2018 to allow the Secretary of State to change the meaning of approved medical research by regulations.

55. Clause 22(2) will move and combine the existing safeguards in section 19 DPA 2018 and Article 89 UK GDPR for research, archiving and statistical purposes (referred to as RAS purposes) into a new Chapter 8A of the UK GDPR for greater clarity. Article 84B will set out what these safeguards are and Article 84C will make further provision as to when these requirements are met. This clause also creates a new Henry VIII power in Article 84D for the Secretary of State to make further provision as to when the requirement for appropriate safeguards is met under Article 84B. This power will allow the Secretary of State to add, vary or omit parts of Article 84C. The purpose of the power is to ensure that safeguards for RAS purposes are kept up to date as technology changes. While this power is a new power for the purposes of the new clause, it replicates and adds to the existing powers contained in s 19(5) which is to be omitted by the new clause.

Justification for taking the power

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

Justification for the procedure

57. Regulations under new Article 84D will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter what safeguards are in place to protect the rights and freedoms of data subjects. The affirmative procedure is also appropriate given that this power will permit direct amendments to primary legislation (and

is therefore a Henry VIII power) so that new safeguards can be added directly to Article 84C.

Clause 25(2): Power to specify which competent authorities may be issued with designation notices for joint processing with the intelligence services

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

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

Justification for taking the power

60. This power is needed to ensure that the Secretary of State can specify which competent authorities can apply for and be subject to a designation notice. It is recognised that it is unlikely to be necessary for notices to be issued to some of the competent authorities listed in Schedule 7, so it was important to have the ability to restrict the new notice provisions to a more limited range of "qualifying competent authorities". Listing qualifying competent authorities in the DPA 2018 itself was considered, but ultimately such an approach was rejected as it is more appropriate to consider whether a competent authority should be capable of being subject to a notice based on up-to-date information, rather than attempting to pre-empt such considerations by listing on the face of the legislation. It is also recognised that the list at Schedule 7 to DPA 2018 could be subject to further change, so creating a restrictive list of qualifying competent authorities at this stage may mean it becomes out of date. The regulation making power ensures that the Secretary of State can keep under review which competent authorities should be regarded as qualifying.

Justification for the procedure

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

Clause 28(2): Power to designate a statement of strategic priorities

Power conferred on: Secretary of State

Power exercised by: Statement of Strategic Priorities

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

Context and Purpose

62. This clause inserts new sections 120E to 120H into the DPA 2018 which provide a power for the Secretary of State to designate a statement setting out the Government's strategic priorities relating to data protection (a statement of strategic priorities). The statement must be laid before Parliament and may not be designated if within the 40 day period after laying either House of Parliament resolves not to approve it (see new section 120G(2)). The Information Commissioner must have regard to a designated statement of strategic priorities when carrying out functions under the data protection legislation (excluding carrying out functions in relation to a particular person, case or investigation). The Information Commissioner must also publish an explanation of how the Commissioner will have regard to the designated statement of strategic priorities when carrying out these functions (new section 120F(3) and include a review of this in the Commissioner's annual report to Parliament (clause 28(3)).

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

Justification for taking the power

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

Justification for the procedure

65. The Government considers that the statement of strategic priorities should be subject to a parliamentary procedure akin to the negative resolution procedure before it can be designated by the Secretary of State. This is considered to provide the appropriate level of parliamentary scrutiny for this type of statement because whilst the statement is intended to provide helpful context for the Information Commissioner and the Commissioner will be required to have regard to the priorities set out in the statement, there is no requirement to act in accordance with them.

66. There is precedent for the use of this procedure for Government strategic priority statements. For example, the same procedure is applied to the statement of strategic priorities which may be designated under section 2A of the Communications Act 2003 by virtue of section 2C(5) of that Act. This parliamentary procedure also applies to the statement which the Secretary of State may publish under section 2A of the Water Industry

Act 1991 setting out strategic priorities and objectives for the Water Services Regulation Authority (see section 2A(6) of that Act).

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

Clause 29(2): Power to require the Information Commissioner to prepare codes of practice for data processing

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

69. Clause 29 replaces section 128 DPA 2018 with new section 124A, restating the Secretary of State's existing power to make regulations requiring a new code of conduct to be produced and requiring consultation with the Secretary of State and other relevant persons on the code. It also provides that where a new code of practice is required by regulations, that code of practice will be subject to the same parliamentary approval process, requirements for publication and review and have the same legal effect as other codes of practice issued under section 121 to 124. This is intended to remedy the discrepancy between codes of practice issued under section 121 to 124 and those that may be required by regulations.

70. As for other codes of practice, codes issued under new section 124A will also be subject to new requirements inserted into the DPA 2018 by clauses 30 and 31 to establish a panel to consider the code, prepare an impact assessment on the code and to submit the code to the Secretary of State for approval.

Justification for taking the power

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

Justification for the procedure

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

Clause 30(2):Power to disapply/modify requirements for panels to consider code of practice

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and Purpose

73. This clause inserts new section 124B into the DPA 2018 which requires the Information Commissioner to establish a panel to consider a code of practice which is prepared under section 121 to 124A of the DPA 2018 and submit a report on the code to the Commissioner. The panel should be made up of individuals with relevant expertise and those who are most likely to be affected by the code. The Information Commissioner is required to publish a statement identifying the members of the panel and the process for selection. The Commissioner is also required to make arrangements for members of the panel to consider the code with one another and prepare and submit a report on the code to the Commissioner. After the report has been submitted, the Commissioner must make any alterations to the code that are considered to be appropriate in light of the report and publish the code in draft along with the report (or a summary of it). Where a recommendation in the report has not been accepted by the Commissioner, an explanation of why it has not been accepted should be published. Subsection (11) of new section 124B allows the Secretary of State to disapply or modify the requirements of new section 124B in the case of a code which the Commissioner is required to prepare under regulations made under new section 124A (as such this is a limited Henry VIII power). This is because, whilst we anticipate that the panel consultation requirements will ordinarily apply to a new code prepared under new section 124A, it may not be feasible or proportionate for all of these requirements to apply to every new code of practice which the Secretary of State requires the Commissioner to prepare under this section. For example, it may be that due to the nature of the matter covered by the code it would not be appropriate for an external panel of experts to consider the code or it may not be appropriate to identify individual panel members.

Justification for taking the power

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

Justification for the procedure

75. The negative resolution procedure is considered to be appropriate for regulations made using this power as the regulation making power may only be used to disapply or modify the new section 124B requirements in relation to codes of practice required by regulations made under section 124A and those regulations will also be subject to the negative resolution procedure. In addition, only the requirements in new section 124B relating to a panel consultation on a new code of practice may be disapplied or modified. Where such powers are used, the code would continue to be subject to scrutiny through requirements in new section 124A(4) of the DPA 2018 to consult the Secretary of State and other relevant persons on the code, requirements in new section 124C to prepare and publish an impact assessment on the code and requirements in new section 124D to submit the code to the Secretary of State for approval. The code of practice would also continue to be laid before Parliament and subject to a parliamentary procedure akin to the negative resolution procedure in accordance with section 125(3) of the DPA 2018.

Clause 39(2): Power to require controllers to notify Information Commissioner of the number of complaints received
Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

76. This clause inserts new section 164B into DPA 2018, which includes a power to set the threshold for the number of complaints a data controller must receive in order to trigger a requirement to notify the Information Commissioner (of the number of complaints made to it under new section 164A). Section 164A will require data controllers to respond to and make enquiries into the subject matter of complaints from data subjects relating to an infringement of the processing of their personal data. New section 164B(2) provides that a controller may be required to make a notification to the Commissioner only in circumstances specified in the regulations. If a controller does not comply with such requirements, the Commissioner will be able to impose a penalty fine of the standard maximum amount, which is £8.7 million or 2% of the total annual worldwide turnover in the preceding financial year, whichever is higher.

77. The Government would initially like data controllers to voluntarily report the number of complaints they receive annually so that the Commissioner can monitor how well data controllers are dealing with and responding to complaints. This clause creates new section 164A that requires data controllers to respond to and make enquiries into the subject matter of complaints and a separate requirement (clause 165A) that allows the Information Commissioner not to investigate complaints. As part of the Government's overall data

reform package, it is keen for the Information Commissioner to take a more risk-based approach to low-level complaints and, where possible, to devote less resources to them in favour of more upstream, preventative regulatory activity. This power should help to facilitate that.

Justification for taking the power

78. Regulations made under this power will provide that a controller is required to make a notification to the Commissioner only where a specified number of complaints have been made or only in other circumstances specified in the regulations. Flexibility is required because the threshold will be different for different controllers and the Government needs to decide what circumstances to specify and at what level to set the number of complaints. The Government is not in a position to decide at this stage because it initially wishes to set out a non-legislative route to encourage controllers and organisations to self-report their complaints volumes on a voluntary basis, and then commence the threshold in secondary legislation if the non-legislative route does not give DCMS the results it wants (e.g. if insufficient numbers of data controllers report on their complaints). Flexibility is also needed so that a controller (or certain categories of controller) can be required to make a notification to the Commissioner in all circumstances (not only where more than a specified number of complaints had been received or some other specified circumstances had arisen). This is because controllers who process a large quantity of personal data may be required to always make a notification (regardless of the number of complaints they receive).

Justification for the procedure

79. By virtue of clause 164B(5), this power is subject to the negative procedure. The negative procedure is appropriate as any regulations made under this power will enable the SoS to set the threshold for the reporting requirement/specify other circumstances in which a controller can be required to notify the Commissioner; and these may need to be amended from time to time. Although controllers could be fined for non-compliance, they will simply be required to provide a figure to the Commissioner so this is not an onerous burden. The negative procedure therefore affords the appropriate level of parliamentary scrutiny for this.

Clause 47(1): Power to prepare the digital verification services (DVS) trust framework

Power conferred on: Secretary of State

Power exercised by: Document

Parliamentary Procedure: None

Context and Purpose

80. Clause 47(1) confers a duty on the Secretary of State to prepare and publish a document setting out the rules that digital verification services organisations must follow when providing verification services under Part 2. Under subsection (3) of clause 47 the Secretary of State must consult the Information Commissioner and anyone the Secretary of State thinks appropriate when preparing this document. Under subsection (4) the requirement to consult can be satisfied by the consultation being undertaken before the coming into force of the clause. The Secretary of State must carry out a review of the DVS trust framework at least every 12 months and in doing so must consult the Information Commissioner and anyone the Secretary of State thinks appropriate The Secretary of State may revise and

republish the DVS trust framework following such a review or following an informal review. The DVS trust framework or a revised version of the framework comes into force when it is published unless a different commencement date is specified. Different commencement times for different purposes can be specified in the DVS trust framework and it can include transitional provisions and savings. Clause 48 requires the Secretary of State to establish and maintain a register of organisations providing digital verification services. Clause 48(4) provides that where an organisation holds a certificate from an accredited conformity assessment body certifying that the digital verification services provided by the organisation comply with the DVS trust framework and the organisation makes a proper application to be included in the register and pays the required fee, the Secretary of State must include that organisation in the register unless the organisation has already been removed from the register for specified period under clause 52 and is seeking to be re-registered during that period.

Justification for taking the power

81. The DVS trust framework document will set out in detail the rules and technical industry standards that digital verification services organisations are required to follow when providing verification services. The document will also cover such matters as technical guidance to facilitate interoperability between organisations providing digital verification services; industry standards and best practice for encryption and cryptographic techniques, quality management systems, information management, information security, risk management, fraud management; guidance for dealing with fraud, service delivery or data breaches; guidance for dealing with complaints and disputes and record keeping and record management. Since the DVS trust framework will be concerned with complex technical industry standards as well as administrative matters, it would not be appropriate to set out this type of detail in legislation. Accredited conformity assessment bodies will be responsible for certifying organisations against the DVS trust framework and will provide the necessary expertise. Under clause 51 if the organisation no longer holds a certificate from an accredited conformity assessment body certifying that they are providing digital verification services in accordance with the framework, the Secretary of State must remove the organisation from the register. Under clause 52 if the organisation is failing to provide digital verification services in accordance with the DVS trust framework, the Secretary of State has the power to remove the organisation from the register.

Justification for the procedure

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

Clause 56(1): Power to prepare and publish a code of practice about the disclosure of information

Power conferred on: the Secretary of State

Power exercised by: Statutory Code of Practice

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

Context and Purpose

83. This clause requires the Secretary of State to prepare and publish a code of practice about the disclosure of information by public authorities. It provides that a public authority must have regard to the code of practice in disclosing information relating to an individual for the purposes of enabling an organisation to provide digital verification services for the individual under clause 54.

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

Justification for taking the power

85. The code will provide guidance to public authorities on disclosing information to an organisation for the purpose of providing digital verification services to an individual. The code does not create any new legal obligations and is not legislative in nature.

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

Justification for the procedure

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

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

Clause 59(1): Power to make arrangements for third party to exercise functions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

Justification for taking the power

89. The clauses in Part 2 establish a new regulatory framework for digital verification services to secure the reliability of digital verification services. As the digital identity market develops and grows, the Department considers the Secretary of State should be able to delegate functions under this Part to another person if it becomes appropriate to do so. The

Secretary of State would wish to retain flexibility in relation to which functions it would be appropriate to delegate to another person and flexibility as to the identity of the person with whom arrangements are to be made. The Secretary of State's functions and the restrictions on the exercise of those functions are set out on the face of the Bill.

Justification for the procedure

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

Clause 62(1)-(3): Power to require suppliers of goods or services to provide their customers with improved access to their transactional data (smart data schemes)

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

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

Context and Purpose

91. Part 3 of the Bill implements a Government commitment, made further to a public consultation in 2019, to obtain powers to introduce "smart data schemes" in specific markets across the economy. The objective is to improve data portability (beyond the limited right to data portability in the UK GDPR, where it applies) between suppliers, their customers and third parties authorised by the customer to help overcome information asymmetry between suppliers and their customers, to enable customer access to data in "real time" and facilitate better use of customer data for instance to enable customers to compare deals and switch suppliers.

92. Part 3 of the Bill comprises several clauses containing regulation-making powers. They need to be considered as a "whole" and the explanation of this clause 62, while focusing on this clause 62, seeks to explain Part 3 more generally. There are, however, more specific explanations of clauses 64, 67 (enforcement) 70 (fees) and 71 (levy) below but those explanations should be read having regard to the explanation provided in these paragraphs for this clause 62.

93. The "principal" power in subsection (1) of this clause 62 allows the Secretary of State or the Treasury, by regulations, to require suppliers of goods, services and digital content specified in the regulations and other persons holding the relevant data (collectively, "data holders") to provide customers or their authorised representatives with access to customer data. Customers (see clause 61(3)) may include both consumers and business customers (in relation to business customers, the regulations are most likely to apply to small and medium enterprises which face many similar disadvantages arising from their ability to access to data as those faced by consumers). Customer data (clause 61(2)) includes data relating to the goods, services or digital content provided to the customer and the price paid. It is intended that the regulations will require the provision of data to customers' authorised representatives, but it is considered prudent for the powers to allow for provision of data directly to customers in the future.

94. Subsections (2) and (3) provide "ancillary" powers which ensure that the "principal" power in subsection (1) can be effective. Subsection (2)(a) confers a power to require suppliers to collect and retain data, to ensure they have specific and accurate data to hand for disclosure. Subsection (2)(b)confers a power to provide for rectification of inaccurate data (beyond the UK GDPR rectification right). Subsection (3) confers a power to allow the authorised representative to exercise the customer's rights in relation to the supplier (action initiation).

95. Clause 63 illustrates how the regulation-making power may be used. That includes provisions for the following purposes: requests to access data (subsection (2)); authorisation of third parties to access data on the customer's behalf (subsection (3)); how and when the data may be accessed or provided (subsection (4)); collation and retention of records relating to provision of and access to data (subsection (5)); imposing obligations on third parties to assist the supplier in complying with its obligations (subsection (6)); onward processing and disclosure of the data (subsection (7)); making customers aware of their data rights (subsection (8)); complaints and disputes resolution (subsections (9) and (10)) Other ancillary clauses include clauses dealing with: the approval of persons who may be authorised to receive data on a customer's behalf (clause 66); enforcement (clauses 67, 68 and 69) which are explained in more detail below); powers to enable the charging of fees (clause 70), and the imposition of a levy (clause 71) |(both of which are also explained below) and a spending authority (clause 72).

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

Justification for taking the power

97. As in 2013, the Department considers that regulation-making powers in the context of access to customer data are appropriate because of the need for flexibility in determining how legislative requirements might be applied and the technical nature of the regulations. It is envisaged that the regulations will be used to introduce data access requirements in the context of specific kinds of goods, services and digital content. Before regulations are made, the regulation-maker will be required to have regard to the interests of data holders and their customers, the effect on small businesses, innovation and competition (clause 62(4)) and (other than minor amendment regulations) consult persons likely to be affected by the regulations and relevant sectoral regulators (clause 74(6)). Whether regulations are made and, if they are, the provisions that are appropriate will therefore depend on the context concerned. A regulation-making power allows the Government to act to require data provision where that is needed but facilitates the tailoring of that legislation to the needs of the sector to which it applies.

98. It is not intended to alter fundamentally the scope of the powers compared with ERRA, in terms of the activities to which they may apply. The regulation-making powers will allow regulations to be made in the context of the provision of goods, services or digital content specified in the regulations, which is intended to replicate the scope of ERRA section 89(2)(d) (the reference to digital content is added to reflect Part 1 of the Consumer Rights Act 2015). However, the ERRA powers are no longer adequate to enable the introduction of regulations with all the features required to be effective. Since 2013, the Government's

understanding of what is required for a successful "smart data scheme" has evolved because of the open banking scheme, which was introduced by order of the Competition and Markets Authority (CMA) under its competition powers in Part 4 (market studies and market investigations) of the Enterprise Act 2002 following a CMA market study in relation to competition within the retail banking market. The open banking scheme enables customers to share their bank and credit card transaction data securely with trusted third parties who can provide them with applications and services. The clause also follows recently enacted powers in Part 4 of the Pension Schemes Act 2021 (which amends the Pensions Act 2004 and the Financial Services and Markets Act 2002) for pensions dashboards, an electronic communications service for individuals to access information about their pensions.

99. Key changes (as compared with ERRA) include:

    a. Action initiation (see clause 62(3)): this allows an authorised representative to act on the customer's behalf in relation to the relevant supplier further to receipt of the data: for instance, the regulations might provide for the representative to access the customer's account and make a payment or to negotiate an improved deal on the customer's behalf. This proposal is based both on the experience in Australia, where action initiation (write access) provisions have been introduced to realise the full potential of smart data use cases, such as enabling more efficient switching of suppliers, and on the read and write access standards adopted under the UK's open banking scheme, and is critical to allow customers to be able to achieve tangible benefits from the improved access to their data.

    b. Technical requirements (clauses 62(4)(b) and (7)(a) and 74(1)(f)): this is to allow the regulations to make provision by reference to specifications and technical requirements published by a specified person. This is essential to allow for rapid updating of IT and security related requirements in relation to the provision of data, for example the use of application programming interfaces (APIs) and reflects the recently enacted pensions dashboards powers (see section 238A(5)(a) of the Pensions Act 2004).

    c. Assistance: given that the provision of goods, services and digital content, and the processing of data in relation to it, can involve multiple parties, in addition to a flexible definition of "data holder" (clause 61(2)), clause 63(6) introduces an express power to require other persons to assist the supplier in complying with the regulations.

    d. Data processing (see clause 63(7): it is considered prudent to introduce powers, not contained within ERRA, to impose obligations on the processing and further disclosure of data should the Government consider this necessary to protect the interests of customers.

    e. Enforcement (see clauses 67, 68 and 69): the ERRA powers are inadequate to allow for effective enforcement of smart data schemes; the enforcement provisions are explained separately below .

    f. Funding (see clauses 70 and 71): it is intended that the regimes introduced by regulations should be "self-funding" which is not achievable under ERRA; the relevant clauses are explained in more detail below. There is also a back-stop spending authority to allow the Government to provide financial assistance to persons exercising functions under a smart data scheme, but it is not anticipated that the Government will make regular use of this authority (clause 72).

g. Several ancillary provisions are introduced including powers to require data holders to publish information to make customers aware of their rights (clause 63(8)) and for complaint and dispute resolution provisions (clause 63(9) and (10)).

h. Confidentiality and data protection: Part 3 introduces specific provisions, reflecting the pensions dashboards provisions in section 238B(6) and (7) of the Pensions Act 2004, on the relationship of the regulations with data protection legislation (clause 73).

100. As a corollary, Part 3 introduces significant safeguards on the making of regulations some of which were not included in ERRA. Aside from the Parliamentary scrutiny of regulations (which is addressed below), the regulation-making powers now require:

a. Substantive preconditions (see clause 62(4)): in deciding whether to make regulations, the regulation-maker must consider a number of specified matters. This applies to all regulations: by contrast, the statutory preconditions for exercise of the ERRA powers do not apply in the case of regulations under section 89(2)(a)-(c) (supply of gas or electricity, mobile phone services and provision of current accounts and credit card facilities) and only apply in the case of other goods or services (section 89(2)(d)) (see section 89(7)) (as a result of the application of the conditions, and affirmative scrutiny, to all first regulations about a particular description of customer data, the distinction between the goods and services in subsections (a)-(d) of section 89(2) is not replicated in the new powers).

b. Consultation (see clause 74(6)): there is a requirement of consultation of persons likely to be affected by the regulations and sectoral regulators on all regulations which are subject to affirmative scrutiny.

c. Periodic review (see clause 75): there is a requirement for a periodic review of regulations, against the substantive preconditions, at least every five years and Ministers must publish the outcome of that review and report it to Parliament. This is intended to ensure that smart data schemes are kept under review and is designed to align, in practice, with any review under sections 28 to 32 (secondary legislation: duty to review) of the Small Business, Enterprise and Employment Act 2015 where they apply.

Justification for the procedure

101. The affirmative resolution procedure is required in the case of the first regulations making provision under clause 62(1)-(3) about a particular description of customer data (see clause 74(3)(a)). This is designed to ensure that Parliament has an opportunity to debate the regulations whenever a smart data scheme, or provision of the kind in clause 64(1)-(3), is first introduced. By contrast, the ERRA powers only require the affirmative resolution procedure in the case of regulations to which section 89(2)(d) applies or for regulations containing enforcement provisions.

102. Subsequent regulations must also be subject to the affirmative resolution procedure (see clause 74(3)(c)-(e)) where those regulations:

a. make the requirements of existing regulations more onerous;

b. contain enforcement or investigatory provisions;

c. contain or amend any revenue-raising provisions;

d. amend or repeal primary legislation: clause 74(2) contains Henry VIII powers for the amendment or repeal of primary legislation in the case of provisions about the handling of complaints, dispute resolution, appeals and provisions under clause 74(1)(h) (incidental, supplementary, consequential, transitory, transitional or saving provision provisions) the purpose of these powers being to enable regulations to extend, adapt or apply existing statutory complaints, disputes and appeals processes for the purpose of a smart data scheme.

103. It is, however, considered appropriate for other amendment regulations, which are relatively minor, to remain subject to negative Parliamentary scrutiny.

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

Clause 64(1) & (2): Ancillary power to require suppliers of goods or services to provide their customers with access to contextual information about their goods and services (smart data schemes)

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

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

Context and Purpose

105. Subsection (1) ensures that suppliers of goods, services or digital content which are required to provide customer data may also be required to provide, or publish, wider information about the goods, services and digital content they provide. This may include data on the availability of the supplier's goods or services (for instance, geographic coverage), tariffs, key contractual terms and data on customer feedback. The existing ERRA powers are restricted to customer data but availability of wider business data is necessary to allow customers and their representatives to contextualise the customer data provided to them. Publication or provision of this data will also allow customers, or prospective customers, to assess whether they might be able to obtain a better deal with another contract or supplier. It is intended that the provision of business data under this clause 64 will be used with the same regulations as the provision of customer data under clause 62.

106. This clause substantively mirrors the power to require provision of customer data and, in substance, is intended as an ancillary right for customers. As with customer data, subsection (2) provides a power to require suppliers to collect and retain specific kinds of data. Clause 65 illustrates how the regulation-making power may be used and substantially mirrors clause 63.

Justification for taking the power

107. The power is taken because consistent, clear and usable contextual information is considered necessary to allow customers, and their authorised representatives, to make effective use of their customer data. The provision or publication of wider business information will also assist customers in comparing alternative deals.

Justification for the procedure

108. The power to make regulations relating to business data is subject to the same parliamentary procedures in the same cases as those proposed for customer data as explained earlier in the context of clause 62 (the statutory requirements are contained in clause 74). The Department for Business, Energy & Industrial Strategy, which has policy responsibility for smart data, considers that this level of scrutiny, the statutory conditions for making regulations and the requirements of consultation and periodic review provide appropriate safeguards, constraints and scrutiny on use of this power.

Clause 67(1): Enforcement of smart data schemes

Power conferred on: Secretary of State and the Treasury

Power exercised by:Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

109. This clause 67(1) provides powers for the enforcement provisions of the smart data regulations.

110. Enforcement will be by a public body identified in the regulations (subsection (1)). The regulations may provide for more than one enforcer and, if so, for the relationship between them (subsection (11)).

111. The regulations may confer investigatory powers on the enforcer (subsection (3)) but these are subject to restrictions in clause 68 (an enforcer may not enter a private dwelling without a warrant and there are restrictions on the information that the regulations may require a person to provide an enforcer notably to maintain the privileges of Parliament, to maintain legal privilege and, subject to exceptions, to protect against self-incrimination).

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

113. In the case of infringement of the regulations, or of a failure to comply with a compliance notice or the provision of false or misleading information, the regulations may provide for an enforcer to impose a financial penalty (subsection (6)). An enforcer's powers to do so are subject to the safeguards in clause 69: inter alia, that clause provides that the amount of a financial penalty must be specified in, or determined in accordance with, the regulations (subsection (2)); it imposes procedural safeguards requiring an enforcer to issue guidance as to the exercise of any discretion provided by the regulations (subsection (3)(a)), and to provide persons on which the enforcer proposes with notice of the proposed penalty and an opportunity to make representations (subsection (3)(b)-(e)).

114. The regulations may contain review and appeal rights (clause 67(7) and must do so in the case of the imposition of a financial penalty (clause 69(3)(f) and (g)).

115. An enforcer may also publish a statement that the enforcer considers that a person is not complying with the regulations or a compliance notice (clause 67(4)(c)) (this would allow "naming and shaming" in, for instance, persistent or egregious cases).

116. Clause 67(5) also allows for the creation of offences for the provision of false or misleading information or preventing an enforcer from accessing information or other material . These are designed to reflect broadly sections 144 and 148(2) DPA 2018.

117. For completeness, clause 66 allows a decision-maker to revoke or suspend the approval of a person to access data on behalf of customers (clause 66) which functions as a sanction in the case of non-compliance where an authorised representative is permitted to access data.

Justification for taking the power

118. The Department for Business, Energy and Industrial Strategy considers the sanctions as appropriate and proportionate to deal with infringements of, and incentivise compliance with, the regulations. The ERRA powers (see section 90) provide for the issue of compliance orders or notices which are not, by themselves, considered a sufficient mechanism to achieve effective enforcement of the regulations. The safeguards on the exercise of the powers have been designed by reference, in particular, to the enforcement provisions of DPA 2018.

Justification for the procedure

119. All regulations containing enforcement provisions must be subject to the affirmative resolution procedure and public consultation (clause 74(3)(d) and (6)). They are also subject to mandatory periodic review as described for clause 62. The requirement for the affirmative resolution procedure mirrors section 91(3)(b) of ERRA.

120. Regulations under this clause are also subject to mandatory periodic review (clause 75), including the provision of a report to Parliament (clause 75(5)), as described for clause 62.

Clause 70(1): Power to allow charging of fees in smart data schemes

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

121. This clause 70(1) allows for regulations to provide that data holders, decision-makers, enforcers and other persons on whom duties are imposed or functions conferred by the regulations may require other persons to pay fees for the purpose of meeting expenses incurred (or to be incurred) by virtue of the regulations (subsections (1) and (2)).

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

123. The amount of fees, or maximum amounts, must be specified in or determined in accordance with the regulations in the interests of certainty (subsection (4)). The regulations may allow for increases (subsection (5)) (that might be used, for example, to cater for inflation). Where a person has a discretion to determine the amount of a fee, that person must be required to publish information about the determination of that amount (subsection (6)).

Justification for taking the power

124. The principal objective of this clause 70, together with clause 71, is to ensure that smart data schemes are “self-funding” and revenue-neutral to the exchequer with enforcers and

decision-makers able to recover the cost of the performance of their functions, which cannot be achieved by the ERRA powers.

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

Justification for the procedure

126. All regulations under this clause 70 are subject to the affirmative resolution procedure and public consultation (clause 74(3)(d) and (6))). It is considered that Parliament must have the opportunity to debate any regulations made under this clause bearing in mind the range of persons the clause might allow to impose, or require to pay, fees, the financial burden on those required to pay and the nature of the provisions that may be made under the clause.

127. Regulations under this clause are also subject to mandatory periodic review (clause 75), including provision of a report to Parliament (clause 75(5)), as described for clause 62.

Clause 71(1): Power to impose a levy on suppliers of goods or services to which a smart data scheme applies

Power conferred on: Secretary of State and the Treasury

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

128. The clause 71(1) allows regulations to impose, or provide for a specified public body to impose, a levy on data holders for the purposes of meeting expenses incurred by decision-makers and enforcers (subsection (1)(a)). Subsection (1)(b) allows the regulations to specify how funds raised may or must be used (this might allow a body collecting the levy to retain some or all funds or require it to provide funds to another body).

129. If the regulations provide for a specified public body to impose the levy, the regulations must provide how the rate of the levy and the period in which it is payable are to be determined (subsection (3)).

Justification for taking the power

130. The objective of this clause 71, together with clause 70, is to ensure that smart data schemes are “self-funding” and revenue-neutral to the exchequer which cannot be achieved by the ERRA powers.

Justification for the procedure

131. All regulations under this clause 71 are subject to the affirmative resolution procedure and public consultation (clause 74(3)(d) and (6)). It is considered that Parliament must have the opportunity to debate any levying of monies in the exercise of the powers of this clause.

132. Regulations under this clause are also subject to mandatory periodic review (clause 75), including provision of a report to Parliament (clause 75(5)), as described for clause 62.

Clause 79(3): Power to provide exceptions to cookie consent requirements

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

133. Current regulation 6 of the PEC Regulations sets out rules on the confidentiality of "terminal equipment" such as computers, mobile phones, wearable technology, smart TVs and connected devices, including the Internet of Things. Regulation 6(1) prohibits an organisation from storing information or gaining access to information stored in the terminal equipment of an individual, unless the individual is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and the individual has given consent.

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

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

Justification for taking the power

136. The government believes a new power is necessary as this is an area where technological advancements are constantly happening and it is necessary to have a power to amend regulation 6 to keep pace. The power will ensure that the Government is able to make changes to the exceptions to regulation 6(1) in the light of experience of how the exceptions operate in practice.

Justification for the procedure

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

Clause 79(3): Power to set requirements on suppliers and providers of information technology to enable users of technology to automatically consent or object to cookies when visiting websites

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

138. The Government wishes to reduce the friction caused by numerous cookie consent pop ups, banners etc that are used on websites and apps to request user consent to cookies and similar technologies. There are various changes being made via the Bill that remove the need for consent to some forms of cookies and similar technologies that have a low impact on privacy. These changes mean that consumers can direct more of their time and attention to making important decisions about the use of cookies and other technology that may have a material effect on their privacy.

139. The Government considers that the overall impact of the changes described above could be enhanced if users can express their privacy preferences through software (including browsers) and device settings. This would potentially remove the need for consent pop-up notices on each website or service, allowing individuals to express their privacy preferences on a single occasion and to have control over how these preferences are applied.

Justification for taking the power

140. At present, the technological options for expressing consent preferences in this way are limited and further work needs to be done with technology providers to increase the range of options available. The Government considered including the detailed requirement for those in scope of Regulation 6 PECR to respect consent/non-consent preferences indicated via software, device etc settings on the face of the Bill and delaying commencement. However, this option is not being pursued as we do not think primary legislation is the place to set out detailed technical specification, when technology is evolving in this area.

141. It has therefore been decided to introduce a power for the Secretary of State to make regulations providing that a person, for example browser or device suppliers, may not supply Information technology (IT) unless the IT meets requirements specified in the regulations. When IT is readily available and enables a user to automatically consent or object to cookies, the government will then exercise the power conferred by regulation 6A so as to move to an opt-out model for websites that meet certain conditions such as not containing information directed at children.

Justification for the procedure

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

Clause 83(1): Power to exclude use of electronic communication for the purposes of democratic engagement from direct marketing provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

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

145. The power confers on the Secretary of State to provide an exception from a direct marketing provision where "communications activity" is carried out for the purposes of democratic engagement by certain persons or organisations defined in the clause.

Justification for taking the power

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

Justification for the procedure

147. These regulations will be subject to parliamentary scrutiny under the affirmative procedure. There is also a consultation requirement. Before making the regulations the Secretary of State is also required to consider the effect the regulations may have on the privacy of individuals. This is considered appropriate given that many people who responded to the consultation wanted electronic communications sent by political parties for the purposes of democratic engagement to be covered by the direct marketing rules in PECR.

Clause 85(13): Power to amend fixed monetary penalty

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

148. The Bill introduces a new duty on a provider of a public electronic communication service or network to notify the Commissioner of any reasonable grounds the provider has for suspecting that a person is contravening or has contravened any of the direct marketing regulations in the course of using the service. The aim is to enable the Information Commission to better target its enforcement activity against nuisance marketing

communications. The obligation to report is accompanied by a fixed penalty of £1,000 for failure to comply with any aspect of the reporting requirement.

149. The Bill will include a power for the Secretary of State to amend details of the reporting obligation, in particular those organisations subject to the obligation and the types of communication in scope, to ensure that it keeps pace with technological developments. The power will also enable the Secretary of State to increase the amount of the fixed penalty.

Justification for taking the power

150. The Government considers this power necessary to ensure that the legislation remains in line with the current state of technology so as to enable the Information Commission to effectively target its enforcement actions in future, and to ensure that the amount of the fixed penalty remains appropriate and dissuasive.

Justification for the procedure

151. These regulations will be subject to the affirmative procedure. This is considered appropriate given the exercise of the power could alter the scope of the duty and the monetary value of the fixed penalty for failure to comply.

Clause 86(4): Power to amend fixed penalty amount

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

152. Under regulation 5A PECR, if a data breach occurs the “service provider” (a provider of a public electronic communications service) must notify the Information Commissioner within 24 hours, and also the user concerned if the breach is likely to adversely affect their privacy without undue delay. Failure to do so incurs a fixed penalty of £1000 under regulation 5C PECR.

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

154. It has been decided to include a power in the PECR for the Secretary of State to change the fixed penalty amount set in regulation 5C PECR.

Justification for taking the power

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

156. However, the reporting requirements under PECR and UK GDPR whilst similar are not identical. Articles 33 and 34 UK GDPR have a wider scope relating to controllers/ processors, whilst PECR relates to public electronic communication service providers (which is mainly telecommunications and internet providers). Therefore it is not necessary to bring PECR's penalty in line with UK GDPR right now as the Government is satisfied that the £1000 fixed penalty is presently sufficient due to the Information Commissioner's effective relationship with the telecommunications sector. This current effectiveness may change in future as technology and practices evolve and so flexibility is needed to ensure the fixed penalty amount remains proportionate and dissuasive.

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

Justification for the procedure

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

Clause 89(1): Power to remove the current recognition of trust services and trust service products which are qualified under equivalent EU law

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

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

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

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

Justification for taking the power

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

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

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

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

Justification for the procedure

167. Although this power allows for amendment of the UK eIDAS Regulation (which is classed as retained direct principal EU legislation and so is treated in a similar way to primary legislation) it is appropriate that this power is subject to negative rather than affirmative procedure. This is on the basis that the power is not capable of altering the original policy underlying the UK eIDAS Regulation (standards and regulatory requirements for trust services within the UK) but instead is primarily limited to revoking provisions and removing related references, which were only necessary to insert within the UK eIDAS Regulation upon EU exit to ensure that the qualified trust service market within the UK could continue to operate.

168. So far as the power goes beyond the revocation of provisions and removal of references, in allowing for the amendment of Article 24A, this is to wind down the provision only, and is not capable of altering the fundamental policy behind Article 24A (recognition of EU trust services). Nor does the power to amend Article 24A allow for a widening of the scope of the provision, as there is no power to add an assumption to Article 24A(2) in order to recognise any element of EU qualified trust services which is not recognised currently.

Clause 90(2): Power to specify that certain overseas trust service products shall be treated as equivalent to qualified trust service products under the UK eIDAS Regulation (New Article 45A(1) of the UK eIDAS Regulation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

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

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

Justification for taking the power

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

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

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

174. Recognising specified overseas trust service products through a delegated assessment of equivalent reliability, allows for future proofing in an area where technological advances will mean that in future there may be further and new elements of overseas trust service

frameworks which are relevant to consider in ensuring equivalent reliability of end trust service products.

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

Justification for the procedure

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

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

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

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

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

Clause 90(2): Power to specify that certain overseas electronic signatures and seals shall be treated as equivalent for the use of online public services, to their counterparts under Articles 27(1) and (2), and 37(1) and (2) of the UK eIDAS Regulation (new Article 45B(1) and 45B(2) of the UK eIDAS Regulation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

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

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

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

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

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

Justification for taking the power

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

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

wider trade negotiations, where the UK wishes to allow for the interoperability of trust service products.

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

189. Recognising specified overseas electronic signatures and seals through a delegated assessment of equivalent reliability, allows for future proofing in an area where technological advances will mean that in future there may be further and new elements of overseas trust service frameworks which are relevant considerations in ensuring equivalent reliability.

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

Justification for the procedure

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

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

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

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

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

Clause 91(4): Power to designate overseas authorities with which the Information Commissioner can share information, give assistance, or otherwise cooperate with

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Procedure

Context and Purpose

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

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

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

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

Justification for taking the power

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

201. A delegated power is therefore necessary in order to allow for information sharing and cooperation between the Information Commissioner and overseas regulatory and supervisory bodies at a point in future, once mutual recognition agreements concerning trust service products with other countries have been entered into, and/or specified overseas trust service products are recognised within domestic law through the exercise of the new regulation making powers under Articles 45A and 45B.

Justification for the procedure

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

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

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

Clause 92: Power to disclose information to improve public service delivery to undertakings

Power conferred on: The appropriate national authority

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

206. Section 35 of the Digital Economy Act 2017 ('DEA') contains delegated powers to (i) specify data sharing objectives, and (ii) specify public authorities that can share data for a specified objective by amending Schedule 4 to the DEA (a Henry VIII power). These

powers are subject to the affirmative procedure and, under section 44(4) DEA, a duty to consult various bodies including the Information Commissioner, the Commissioners for Her Majesty's Revenue and Customs, appropriate national authorities and other persons considered appropriate.

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

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

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

210. The use of the information sharing power is underpinned by the Code of Practice which contains guidance setting out best practice and the procedures and practices to be followed by specified persons.

Justification for taking the power

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

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

213. It is not considered appropriate to go back to Parliament to change primary legislation every time such adjustments are required. Given the relative breadth of the power to share information under section 35 it is considered important that there be tightly controlled limits on the delegated power to specify persons, in particular it is recognised that there must be limits around the nature of the bodies that could be included in these lists. Therefore, there are a number of constraints on this delegated power.

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

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

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

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

Justification for the procedure

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

Clause 93(1): Power to implement international agreements on sharing information for law enforcement purposes

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

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

221. This clause provides the Secretary of State with the power to make regulations to implement the technical detail of any such international agreements.

Justification for taking the power

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

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

Justification for the procedure

224. In the circumstances, the negative procedure is appropriate. The technical detail, including IT specification, flowing from the overarching agreements does not require the maximum level of scrutiny of Parliament. The regulations will mostly be for the benefit of frontline officers and the relevant international partners, providing them with clarity and a

framework to follow when sharing data. Parliament would likely be neutral about the content of the detailed technical specifications.

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

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

Clause 96(2): Power to set out requirements in relation to signing a birth or death register

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

Justification for taking the power

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

Justification for the procedure

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

Clause 105(5): Amendment of duty of board to issue guidance

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

Power exercised by: Code of Practice

Parliamentary Procedure: None

Context and Purpose

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

231. Clause 105 amends the existing requirement in subsection (2) of section 63AB of the Police and Criminal Evidence Act 1984 for the board to issue guidance to a requirement to issue one or more codes of practice about the erasure of personal data from a database listed in subsection (1), about the destruction of DNA profiles and the destruction of other material which biometric data contained in a database listed in subsection (1) is derived.

Justification for taking the power

232. Clause 105 will require the Board to oversee the national fingerprint database and enable it to oversee other biometric databases as required in the future. In exercising this function the Board needs to set out the policy and procedures police forces must comply with in order to meet the requirements of relevant data protection legislation, including how biometric data should be stored, accessed and deleted on the database. This ensures consistency in procedures across policing. The clause will require the Board to issue codes of practice for this purpose,

Justification for the procedure

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

Clause 105(11): Power to extend the remit of the Board over biometrics databases

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

235. Clause 105 amends section 63AB of PACE to require the Board to oversee the database of fingerprints which have been taken from any person under a power conferred by Part 5 of PACE or taken by the police in connection with the investigation of an offence. The clause also changes the name of the Board to the Forensic Information Database Strategy Board.

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

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

Justification for taking the power

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

Justification for the procedure

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

Clause 106(1): Power to make consequential amendments

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure (if it does not amend primary legislation), otherwise affirmative procedure

Context and Purpose

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

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

Justification for taking the power

242. 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 in the Bill.

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

Justification for the procedure

244. If regulations under this clause do not repeal, revoke or otherwise amend primary legislation they will be subject to the negative resolution procedure (by virtue of subsection (4)). If regulations under this clause amend or repeal provision in primary legislation they will be subject to the affirmative resolution procedure (by virtue of subsection (3)) 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 111(1): Power to commence provisions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and Purpose

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

Justification for taking the power

246. 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, and enable businesses and other organisations adequate time to undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

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

Clause 112(1): Power to make transitional provision

Power conferred on: The Secretary of State

Power exercised by: Regulations

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

Context and Purpose

248. This clause confers a power on the Secretary of State to make regulations making transitional, transitory, or saving provisions in connection with the coming into force of any provision of the Bill. It includes a power to amend or repeal a provision of Schedule 21 DPA 2018 (Further transitional provision etc) and Part 2 of Schedule 7 to this Bill (Consequential and transitional provision), and it is therefore a Henry VIII power. Although some transitional, transitory, and saving provisions are included within the Bill itself, further such provisions may be required, and those that are included within the Bill may need to be amended depending on whether and how the Bill is amended during the Parliamentary process.

Justification for taking the power

249. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation (principally DPA 2018) and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 213 DPA 2018. It is necessary to include a Henry VIII power to amend Schedule 21 DPA 2018 and Part 2 of Schedule 7 to this Bill, because Schedule 21 contains existing transitional provisions relating to the transition between previous regimes, which will need to be removed or amended to ensure a smooth transition from the current regime to the new one, and Part 2 of Schedule 7 to this Bill contains transitional provisions which seek to provide that smooth transition, but may need to be amended depending on whether and how the Bill is amended during the Parliamentary process. The Henry VIII power is strictly limited to only amending Schedule 21 DPA 2018 and Part 2 of Schedule 7 to this Bill.

Justification for the procedure

250. 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.

251. Although the power includes a Henry VIII power, it is limited to only amending two schedules which themselves contain transitional provisions, in order to give effect to the transition between regimes which Parliament will have approved. Thus it will not permit wider changes to any other aspects of the DPA 2018. This is the same position as in relation to the equivalent transitional, transitory and saving power in section 213 DPA 2018 which is also subject to the negative procedure.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

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

Justification for taking the power

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

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

Justification for the procedure

256. The existing regulation making power under section 17A DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 4 of Schedule 6 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used.

Schedule 6, paragraph 8: Power to specify standard contractual clauses by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

257. The UK GDPR currently provides for three mechanisms under which personal data can be transferred overseas. The first of these mechanisms is set out above. The second of these mechanisms allows personal data to be transferred, in the absence of adequacy regulations, where appropriate safeguards are in place. Appropriate safeguards may be

provided, among other methods, by the use of standard contractual clauses which the Secretary of State has laid by way of regulations.

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

Justification for taking the power

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

Justification for the procedure

260. The existing regulation-making power in section 17C DPA 2018 is subject to the negative resolution procedure and the power as restated in paragraph 8 of Schedule 6 will be subject to the same procedure. Negative resolution is considered sufficient scrutiny given the clear parameters, set out in primary legislation, within which this power can be used.

Schedule 6, paragraph 8: Power to make provision about further safeguards by regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

Justification for taking the power

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

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

Justification for the procedure

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

Schedule 6, paragraph 9(5): Power to specify where a transfer is taken to be necessary or not necessary for the public interest

Power conferred on: Secretary of State

Power exercised by: Regulations

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

Context and Purpose

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

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

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

Justification for taking the power

268. This restates a power of the Secretary of State which already exists in the current legislation.

Justification for the procedure

269. The existing regulation-making power in section 18(1) DPA 2018 is subject to the made affirmative resolution procedure where the Secretary of State has made an urgency statement in respect of them; otherwise it is subject to the affirmative resolution procedure. The power as restated in Article 49(4A) of the UK GDPR will be subject to the same procedure.

Schedule 6, paragraph 10: Power to restrict transfers for the public interest

Power conferred on: Secretary of State

Power exercised by: Regulations

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

Context and Purpose

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

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

Justification for taking the power

272. This restates a power of the Secretary of State which already exists in the current legislation.

Justification for the procedure

273. The existing regulation-making power in section 18(2) DPA 2018 is subject to the made affirmative resolution procedure where the Secretary of State has made an urgency statement in respect of them; otherwise it is subject to the affirmative resolution procedure. The powers as restated in new Article 49A of the UK GDPR will be subject to the same procedure.

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

275. This regulation-making power already exists in the current legislation in section 74A DPA 2018. This Bill will amend the provisions associated with the power to create a clearer regime for approving transfers to other countries, to reflect the way in which the UK approaches such determinations. The changes being made to this power in Part 3 of the

DPA 2018 mirror the changes being made to the equivalent power in the UK GDPR (paragraph 4 of Schedule 5) already detailed above.

Justification for taking the power

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

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

Justification for the procedure

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

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

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and Purpose

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

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

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

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

Justification for taking the power

282. The provisions in the DPA 2018 as applied to PECR provide for different maximum fines depending on whether the person on whom the fine is to be imposed is an "undertaking". Having established in the DPA 2018 (and on the face of the Bill for application to PECR) a formula for calculating the maximum fine that may be imposed on an undertaking, it is appropriate to leave to regulations the secondary detail as to which legal persons are to be treated as being, or not being, an undertaking (which may range from commercial undertakings to different forms of public body), how to determine an undertaking's turnover (which may vary according to the nature of the undertaking) and how to define an undertaking's financial year.

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

Justification for the procedure

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

Schedule 12, paragraph 3: Power to publish standards

Power conferred on: Secretary of State

Power exercised by: Published standards

Parliamentary Procedure: None

Context and Purpose

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

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

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

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

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

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

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

Justification for taking the power

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

Justification for the procedure

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

Schedule 12, paragraph 8: Power to direct a public authority or to make arrangements for a person prescribed by regulations to exercise functions relating to monitoring and requesting compliance

Power conferred on: Secretary of State

Power exercised by: Regulations and directions

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

Context and Purpose

290. This provision enables the Secretary of State to direct a public authority to exercise the Secretary of the State's functions under section 251ZA of the HASCA 2012 (power to require information for the purposes of monitoring compliance with information standards) so far as they relate to information technology providers, and under section 251ZB (power to request information technology providers to comply with information standards). It also enables the Secretary of State to give directions about the exercise of those functions, including directions as to the processing of information obtained by exercising the functions. This provision also enables the Secretary of State to make arrangements for a person prescribed by regulations to exercise those functions.

Justification for taking the power

291. The Secretary of State would wish to retain operational flexibility in the exercise of the functions in question, and to retain the discretion to delegate, or to not delegate, them to another person, to revoke a decision to delegate and to ensure that the most appropriate person exercises the functions, the identity of which may fluctuate over time. Where the power to delegate functions is exercised, the Secretary of State would wish to retain operational flexibility in relation to the nature and extent of the arrangements. The power to direct a public authority about the exercise of the functions in question is necessary in order to cover matters such as how the functions are to be exercised. Thus, the directions would contain matters of detail in relation to which the flexibility to make amendments would be important so that they can be kept up to date. This would provide flexibility to cater to changing circumstances. The power to delegate functions thus allows for flexibility in relation to the performance of functions

Justification for the procedure

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

Schedule 12, paragraph 8: Power to establish accreditation scheme

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

293. This provision clause would enable the Secretary of State, by regulations, to establish an accreditation scheme that might be run by a specified body. The scheme would relate to information technology or information technology services. Subsections (3) and (4) set out the expected scope of the regulations, for example they may require the operator to set accreditation criteria by reference to information standards or to provide for the review of

decisions. The operator may also be required by the regulations to provide advice to applicants for accreditation. An accreditation scheme would be intended essentially to grant a quality mark to information technology and information technology services that meet specified criteria to enable information technology providers to demonstrate that that technology or those services meet the necessary quality standards. The operator of a scheme could have power under the regulations to determine the accreditation criteria or be permitted to charge a reasonable fee in respect of an application for accreditation.

Justification for taking the power

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

Justification for the procedure

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

Schedule 13, paragraph 2(3): Power to amend maximum number of members

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

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

Justification for taking the power

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

Justification for the procedure

298. The negative resolution procedure affords an adequate level of parliamentary scrutiny in the case of this Henry VIII power: it gives a narrow power to enable the Secretary of State to alter the maximum number of board members in the Schedule. It is necessary to include such a power in order to ensure that the newly constituted body can perform effectively under its new governance model. Section 1(7) and (8) of the Office of Communications Act 2002 sets a precedent for a power of this sort to be subject to the negative resolution procedure.

Schedule 13, paragraph 3(6): Power to set a maximum and minimum number of executive members by direction

Power conferred on: Secretary of State

Power exercised by: Directions

Parliamentary Procedure: None

Context and Purpose

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

Justification for taking the power

300. This clause should be read together with the provision in paragraph 2(3) of the Schedule, which requires the Secretary of State to make regulations in order to vary the overall maximum number of members of the board prescribed in statute. Within these parameters, which ensure a degree of parliamentary scrutiny of the overall number of board members, it seems appropriate to give some flexibility to the Secretary of State, if necessary, to determine by a simple direction the maximum and minimum number of executive members, so ensuring she can fulfil her strategic and financial responsibilities in relation to the Information Commission. The power to set a direction also supports the Secretary of State in fulfilling her statutory obligation to secure, so far as practicable, that the number of non-executive members is, at all times, greater than the number of executive members.

Justification for the procedure

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

Department for Digital, Culture, Media & Sport
18 July 2022