

Energy Bill

Supplementary Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Department for Energy Security and Net Zero (“the Department”) to assist with scrutiny of the Energy Bill (“the Bill”).
2. This Memorandum describes powers in the Bill conferring power to make subordinate legislation and other delegated powers which were added or amended at the Committee stage in the House of Commons (second House).
3. This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced and supplementary Delegated Powers Memoranda on amendments to the Bill in the House of Lords.

New Chapter: Great British Nuclear

New Clause Great British Nuclear: Power of Secretary of State to issue directions and guidance to Great British Nuclear.

Power conferred on: Secretary of State

Power exercised by: Giving a direction or guidance

Parliamentary procedure: None

Context and purpose

4. Great British Nuclear (GBN) has been launched and is currently operating through an existing government company, British Nuclear Fuels Limited. The purpose of GBN is to facilitate delivery of the government’s programme of new civil nuclear projects. These amendments will ensure that GBN has the long-term mandate to carry out the role that government intends by setting out its role, together with necessary provisions relating to its operations, in legislation.
5. This clause confers power for the Secretary of State to give directions and guidance to GBN in connection with the furtherance of its objects. The directions may be specific or general in nature. GBN must comply with such directions and have regard to guidance given to it by the Secretary of State.
6. The government’s policy intention is that GBN will generally be operationally independent. However, given GBN’s broad and potentially shifting responsibilities over time it is considered necessary that the Secretary of State has a mechanism through which to direct and guide the strategic direction of GBN in line with government policy.

Justification for the power

7. GBN will be a government-owned company and as such will have broad general powers under the Companies Act 2006. The Bill, in setting out GBN's objects, stipulates that those general powers are to be exercised to facilitate the design, construction, commissioning and operation of nuclear energy generation projects in furtherance of government policy.
8. GBN's role is to drive delivery of government's ambitions for new nuclear. The specific nature and scope of these ambitions (e.g. how many projects, which technology etc.) may change over time. As new nuclear also has a very long lead time GBN is designed to be a flexible delivery vehicle that may undertake different activities and assume and relinquish responsibilities over time.
9. Therefore, instead of including specific functions, powers, duties and objectives for GBN in legislation or referencing particular policy documents GBN is required to have regard to, a power for the Secretary of State to direct and issue guidance to GBN is sought to ensure GBN's enduring role in delivering the government's policy. Specific references to particular guidance would risk limiting the effectiveness of the legislation due to it becoming outdated or unnecessarily restricting GBN's scope. The directions and guidance given by the Secretary of State – and the process attached to it – is intended to be in addition to and separate from any more general policy or guidance to which GBN is required to comply or have regard to as (subject to Cabinet Office classification) an NDPB.
10. Although the Secretary of State can use shareholder powers in relation to the company designated as GBN, having an explicit power of direction would require certain action to be taken or restricted with legal force under public law. This would provide a more transparent means through which the Secretary of State can focus GBN in its activities.
11. The Secretary of State will be required to first consult with GBN and such persons as the Secretary of State considers appropriate before issuing directions. This will ensure that such directions or guidance are only used where they are necessary and appropriate, respecting GBN's relevant expertise.
12. The clause also requires that all directions are laid before parliament and published and that guidance given to GBN in connection with this power is published. This will ensure appropriate levels of transparency.
13. There are numerous examples of similar powers to direct and give guidance, including where the arm's length bodies in question are companies such as in respect of the UK Infrastructure Bank (UK Infrastructure Bank Act 2023) and Strategic Highways Companies (Infrastructure Act 2015).
14. Example scenarios where this power may be used include:
 - a. **Shift in government policy for new nuclear:** There could be a move to focussing attention on a particular nuclear technology or a change in the stated ambition for nuclear generating capacity which would require GBN to focus on new areas of work, possibly to the exclusion of others, or to scale its operations up or down.

- b. **Intervention in the public interest:** The Secretary of State may direct GBN to take a specific action that is in the public interest, for example a focus on a particular type of technology.

Justification for the procedure

15. The Department considers that giving directions or guidance would be an executive, rather than legislative, function. It therefore believes that no parliamentary procedure is required, though directions will be laid before parliament and published and guidance will be published for transparency.
16. The circumstances in which this power would be used are likely to be highly context-specific and would generally be matters of policy rather than law. There are appropriate safeguards in place around the use of the power, such as the requirement to consult GBN and such other persons as the Secretary of State considers appropriate, ensuring GBN's position as an expert body is adequately respected. The Secretary of State would also be required as a matter of public law to take GBN's and others' representations in response to consultation in relation to the proposed direction into account.

New Clause Great British Nuclear: Transfer Scheme (Compensation)

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary procedure: Negative

Context and purpose

17. As part of designating a company as GBN, and as its activities evolve over time, property, rights and liabilities may need to be transferred to it from other relevant public bodies, companies and/or their subsidiaries, including between a former and proposed GBN company. Consequently, property, rights and liabilities currently held by these bodies must be transferred to GBN. Additionally, there may be future scenarios where GBN assumes or relinquishes involvement in particular civil nuclear generation projects, necessitating the transfer of property, rights and liabilities to or from it. The Bill includes power for these transfers to be effected by transfer schemes made by the Secretary of State. The Bill also specifies that the transferor may be compensated by the Secretary of State or any relevant transferee.
18. Moreover, within this context, there are scenarios whereby the transfer scheme can override agreements with third parties that might otherwise prevent or restrict a transfer.
19. It is therefore possible that third parties (other than a transferor) may suffer loss or damage in consequence of the Secretary of State's exercise of the transfer scheme powers. Where this is the case, it is appropriate that they too should be compensated.

20. This clause sets out that if the Secretary of State and the person entitled to compensation fail to reach an agreement on compensation, an independent valuer must be appointed to determine the compensation. In the absence of an agreement on valuer, the Secretary of State can appoint a valuer on behalf of both parties. There are a number of aspects of this determination which the Secretary of State may provide for in regulations. These are set out at paragraph 8(5) of Schedule 7 to the Bill which will apply equally to regulations made in connection with transfer schemes relating to GBN by virtue of subsection (5) of this clause and include matters such as the procedure to be followed by the valuer, and the matters to which the valuer must have regard, or assumptions which the valuer must apply.

Justification for the power

21. The matters which will make up the content of the regulations pertain to technical and procedural aspects; providing detailed rules for the valuer's task. These matters will need to be discussed with potential valuers to ensure that the regulations are fit for purpose. The requirements might also change over time, and need to adapt according to the normal business practice amongst providers of independent valuation services. Allowing the Secretary of State to update these requirements over time will ensure that the valuation procedure remains fair, that it continues to provide good value for money for government, and that it properly reflects how valuers carry out their services.

Justification for the procedure

22. The government considers that the negative resolution procedure is appropriate, given this regulation will be the result of thorough due diligence review and sensitive commercial negotiations that require extensive technical input. This due diligence process is anticipated to be significant in volume and market sensitive in nature. Since the government cannot disclose third-party information used in developing these regulations, the negative resolution procedure ensures a balanced approach to address these complexities.

23. For an example of regulations relating to compensation being subject to the negative procedure, even in sensitive circumstances, see sections 37 and 64(3) of the Commonhold and Leasehold Reform Act 2002.

New Clause Great British Nuclear: Transfer Scheme (Taxation)

Power conferred on: HM Treasury

Power exercised by: Statutory instrument

Parliamentary procedure: Negative (Commons only)

Context and purpose

24. As part of the designation of a company as GBN and as its activities evolve, various property, rights and liabilities may need to be transferred to it from other relevant public bodies, companies and/or their subsidiaries, including between a former and newly designated GBN company. This will require that property currently owned by such other bodies be moved into the ownership of GBN.
25. There may also, in future, be circumstances in which GBN assumes or relinquishes involvement in particular civil nuclear generation projects, which means that property, rights and liabilities need to be transferred to or from it. The Bill includes powers for these transfers to be affected by transfer schemes made by the Secretary of State. Such transfer schemes may result in tax liabilities on the Secretary of State (as a potential transferee under the scheme) or on other parties to the transfer scheme, or on those who are otherwise affected by the transfer scheme.
26. It may be appropriate to vary how such tax liabilities apply, to ensure value for money for government, allow the most efficient structure to be adopted for the transfer, and protect against inadvertent imposition of tax liabilities on persons who are not best placed to take on the burden of those liabilities.

Justification for the power

27. The variation of how relevant tax applies will need to be adapted to the actual scheme or schemes which may be made under the transfer scheme powers set out in the Bill. It would not be appropriate to put the tax variation on the face of the Bill before it has become apparent how the transfers are likely to be structured and what tax issues may arise. It may also be necessary for the Treasury to amend the variation over time.
28. It is not uncommon for variations to tax liabilities to be drafted by way of power for the Treasury, as here. Examples include paragraph 4 of Schedule 5 to the Investigatory Powers Act 2016 and section 25 Public Bodies Act 2011.

Justification for the procedure

29. The government considers that the Commons-only negative resolution procedure is appropriate, given that the Treasury will be well placed to determine the technical details and policy drivers of what taxes should apply to the relevant transfers. The resulting SI would most likely be technical and focused on internal government administration and is unlikely to justify lengthy parliamentary scrutiny.

New Clause Great British Nuclear: Pension arrangements in connection with Great British Nuclear

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary procedure: Negative

Context and purpose

30. Within the nuclear and electricity sector there are special pension protections for certain employees which give them the right to continued membership of a defined benefit (DB) pension scheme (DB scheme). Similar protections apply in other sectors and for employees of local or central government. Where those employees are subject to a compulsory transfer of employment, those protections require their new employer to continue to provide them with a DB Scheme.
31. The designation of a company as GBN and GBN's anticipated long-term role are likely to result in transfers of employment of employees who are currently active members of a DB scheme, some of whom will have special pension protections and some of whom may not. It is therefore likely that changes to DB Schemes will be required over time in connection with the transfer schemes for the designation of GBN and subsequent transfer schemes in connection with its activities. Similarly, there are likely to be employees who are active members of defined contribution/money purchase (DC) pension schemes who will be impacted which may require changes to such DC schemes.
32. As part of any such transfer of employees, it is important to separate the pension arrangements of GBN and any new employer of employees who are the subject of a transfer scheme (including determining how any historic DB liabilities should be apportioned) whilst ensuring that employees' accrued DB pension benefits are not adversely impacted (for example, by the loss of the employees' final salary link). It is also important that future service benefits can be required to be broadly the same immediately after the transfer for employees with existing pension protections or those who may benefit from any future changes in pensions policy. Resolving issues around the pension arrangements of transferring employees should not be unnecessarily delayed or disturbed by the process of setting up new pension schemes, changing existing schemes or by requiring any third-party consents.
33. Broad powers are therefore required to allow the Secretary of State to make provision to facilitate the participation of GBN and any related entities in pension schemes which are currently in existence for transferring employees. In addition, to ensure durable pensions arrangements the powers to allow the Secretary of State to make provision for the following are required:
 - a. the division of the relevant pension schemes into different sections;

- b. the participation of existing and new employers in those different sections;
 - c. the allocation of DB assets and rights between those sections (and for the valuation of assets and rights in that context); and
 - d. the transfer of assets and rights from the newly created sections to another pension scheme.
34. These provisions will ensure that the pension arrangements will take into account both the requirements of GBN and associated entities and also the DB pension liabilities of the employees and former employees which may remain the responsibility of a transferor.

Justification for the power

35. The pensions and employment arrangements regarding the designation of a company as GBN and for any future transfer schemes relating to GBN can only be properly determined as part of the overall structuring of each respective transfer scheme and cannot be determined in advance. Provision will need to be made taking into account the detail of the relevant DB and DC pension schemes themselves, and the decisions on how employees and property will transfer to the receiving entity as well as how, where appropriate, the historic DB pension liabilities will be apportioned between the transferring and receiving entities.
36. The detailed provision of these matters can only be made once the due diligence process associated with any transfer scheme has taken place in the future. Any immediate due diligence needed can only take place once powers within the Bill are secured as government can only rely on voluntary disclosure by the relevant parties otherwise prior to this. Further, any speculative information gathering undertaken at this stage would become out of date and therefore of limited use. Consequently, this process must wait and be carried out once legislation has passed and as GBN's activities develop and evolve. Given GBN's anticipated long-term role, there are then likely to be a number of transfer schemes which are made over time of varying natures, and with different parties involved, each of which will require due diligence around the pensions position.
37. The legislation will provide that the Secretary of State must ensure that relevant employees are, in all material respects, no worse off in terms of their pensions provision immediately after the exercise of the power. Before the power is exercised, the relevant pension scheme trustees and principal employers must be consulted. The proposed power is modelled on the ISOP pension provisions in Schedule 8 to the Energy Bill, and the power in section 96 Transport Act 2000 is to some extent a precedent for taking this kind of delegated power.

Justification for the procedure

38. The government considers that the negative resolution procedure is appropriate, given that the regulations have the potential to be highly technical requiring actuarial expertise once the full evidence is available. There is potential for this evidence to include granular information on pensions, access to which may need to be necessarily restricted. The regulations will be, in essence, the technical working out of the key principle of protecting existing scheme member rights set out in primary legislation, or which might be set out in future legislation where there are changes in pensions policy.

New Part: Hydrogen Pipeline Projects: Regulated Asset Base Model

New Clause: Designation; and New Clause: Designation: Procedure

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary procedure: None

Context and purpose

39. This power enables the Secretary of State to designate a person in relation to a hydrogen pipeline project which is being, or is proposed to be, undertaken by (or on behalf of) the person. This requires consent from the person with the related hydrogen transport pipeline project. A designation attaches to a single pipeline project, though a person may be designated more than once e.g. in relation to different hydrogen pipeline projects. The overarching purpose of this power is to provide a process for the identification, by the Secretary of State, of hydrogen pipeline projects considered suitable for receiving the benefit of support by way of economic regulation, namely a Regulated Asset Base (RAB). A RAB is a method of funding future projects, providing support for their design, construction, commissioning, and operation. A hydrogen pipeline project is defined for the purpose of the new Part.
40. The concept of “designated person” is used to limit how a number of delegated powers in this Part can be used. For example, the power of the Secretary of State to grant, extend or restrict a gas transporter licence as conferred by section 7(2) of the Gas Act 1986 (“GA 1986”) can only be used if the relevant licence is granted to a designated person. There are also limits on the designation itself and new clause (Revocation or lapse of designation) sets out how such designations may come to an end.

Justification for taking the power

41. The Department considers this power is necessary as the designation unlocks the remainder of the new Part which, in turn, facilitates use of the RAB to support hydrogen pipelines projects.
42. Furthermore, the power is considered necessary as the Secretary of State will need to be able to consider individual projects, on a case-by-case basis, to determine whether RAB support is appropriate. Such determinations cannot be made effectively in advance of this Bill and are not considered well suited for legislation. This approach is similar to gas transporter licencing where the construct and limitations of gas transporter licences are set out in the GA 1986 but decision on who should be licenced sits with the Authority.
43. Subsection (2) of new clause (Designation) sets clear parameters for the circumstances in which designation may take place. Subsection (3) of new clause (Designation: procedure) expressly provides for what the notice of

designation must include and this includes the reasons for, and conditions on, the designation. This approach is broadly similar to gas transporter licencing where the construct and limitations of gas transporter licences are set out in the GA 1986 but decision on who should be licenced sits with the Authority.

44. This approach to designation follows a clear precedent by way of section 2 of the Nuclear Energy (Finance) Act 2022 which uses a similar approach for nuclear projects. In that Act the Secretary of State's designation also, in turn, unlocks provisions in the rest of the Act and ultimately the availability of RAB funding.
45. The decision on designation may be made by Secretary of State at the same time as decisions on whether to award a parallel revenue support contract to the relevant project under Part 2 of the Bill. The Department considers increases the appropriateness of designation being delegated to the Secretary of State, noting the restrictions in subsection (2) of new clause (Designation).

Justification for the procedure

46. This power is exercised by notice and the procedure for the issue of a notice is engaged by subsection (1) of new clause (Designation: procedure), where the Secretary of State must publish a statement setting out the procedure that they expect to follow and how they expect to determine the relevant conditions have been met. There is precedent for this approach in section 3(1) of the Nuclear Energy (Financing) Act 2022 which dealt with a very similar issue and near identical approach to procedure.
47. As set out in the justification for taking the power, the decision to designate is one that will need to be made on a case-by-case basis as relevant projects put themselves forward. The Department does not consider this, nor the procedure, well suited to being on the face of legislation. The more appropriate course appears to be designation by notice – consistent with the Nuclear Energy (Financing) Act 2022. The Department considers that the need to publish the notice - including reasons - and the parameters within which use of this power operates enable sufficient transparency and oversight so as to justify use of notices.

New Clause: Revocation of designation

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary procedure: None

Context and purpose

48. The powers set out in this new clause (Revocation of designation) are the natural counterpart to the power for the Secretary of State to designate by notice. It ensures the Secretary of State is able to undo that designation by notice, though only if the specific grounds for doing so, as set out in the clause, are met. There is precedent in a power of this nature in section 5 of the Nuclear Energy (Financing) Act 2022, though the conditions differ to ensure they are appropriate for specific nature of designating a hydrogen pipeline project.

Justification for taking the power

49. This power is needed to ensure that designation remains appropriate and relevant. The power mirrors that for the initial designation and ensures Secretary of State may revoke a designation, though only in specific circumstances.
50. The power is limited to the circumstances set out in subsections (1), namely that the conditions for designation in subsection (2) of new clause (Designation) cease to be met, Secretary of State determines that a condition to which the designation is subject has not been met, or that the person concerned has consented. To be without this power, projects could continue to be entitled to a RAB even if the Secretary of State considered it inappropriate e.g. if the relevant project(s) were no longer likely to be value for money.
51. The power is also constrained by subsection (4) which clarifies that revocation of a person's designation in relation to a hydrogen pipeline project does not affect anything done in relation to the licence by the Secretary of State under or by virtue of this Part while the person was designated in relation to the project. For example, a modification of a condition in a gas transporter licence whilst the designation was in place would not be automatically removed if the designation was revoked.
52. In light of the above, use of notice – consistent with that for designation in the first place – appears the most appropriate course. As for the power to designate, the Secretary of State will need to be able to consider individual projects, on a case-by-case basis. Such determinations cannot be made effectively in advance and are not considered well suited for legislation.

53. There is also precedent in respect of the ability to revoke notices as set out in both section 5 of the Nuclear Energy (Financing) Act 2022 and regulation 4(7)(b) of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013.

Justification for the procedure

54. This power is exercised by notice. The powers needed to enact designation will also be by notice, with this package of measures being sufficiently reviewed in parliament in this Bill and therefore not requiring any further parliamentary scrutiny before they are used.

New Clause: Grant, extension or restriction of gas transporter licence by Secretary of State

New clause: Modification of gas transporter licence by Secretary of State

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary procedure: None

Context and purpose

55. Powers are needed to allow the Secretary of State to grant, extend, modify and restrict gas transporter licences only following the successful designation of a person in relation to a hydrogen pipeline project. These licence powers are what enable Secretary of State to ensure the gas transporter licence appropriately accounts for the use of hydrogen and facilitates the RAB support to which the designation relates. The power is at the heart of this new Part and ensures the hydrogen transport RAB can operate.

56. Any licence granted by the Secretary of State has effect for all purposes as if it had been granted by the GEMA.

Justification for taking the power

57. These power are necessary to allow the Secretary of State to grant, extend, modify or restrict gas transporter licences. As explained above, this is the necessary consequence of designation and ensures the RAB regime is able to operate as this will be done through the licence conditions themselves.

Grant, extension or modification

58. The grant, extension or modification of a gas transporter licence is what will allow Secretary of State to ensure the licence incorporates bespoke hydrogen provisions which facilitate the operation of the RAB support model for the benefit of the appropriate project concerned.
59. In respect of grant or extension the power enables this by empowering Secretary of State through the existing licence powers granted to the Authority under the GA 1986. The way this is achieved is by enabling the Secretary of State to use existing powers in the GA 1986 that were previously only available to the Authority. This power opens up section 7(2) and (4) of the GA 1986 to specific use by Secretary of State in respect of designated persons and their hydrogen pipeline project(s).
60. In respect of modification, this power is comprehensively set out in new clause (Modification of gas transporter licence by Secretary of State) and the scope of modifications is also glossed by the description in new clause (Scope of modification powers) to clarify what modifications may include and how the modification may be used. Furthermore, there are procedural protections in new clause (Procedure etc relating to modifications), specifically a duty to consult the holder of the licence, the Authority and such other persons as Secretary of State considers appropriate.
61. These restrictions are considered important to reflect the unique role of Secretary of State modifying a licence in this way. This power is essential to ensure that existing holders of gas transporter licences can apply for RAB support in respect of hydrogen pipeline projects and that the RAB can operate within the context of their existing licence. It is anticipated that some existing pipelines assets will be suitable for hydrogen use and, as such, modification (in addition to grant and extension) is a fundamental part of enabling existing and new industry to access the support needed to deploy hydrogen infrastructure.
62. Without this power, the Secretary of State would not be able to assign RAB support to selected hydrogen transport projects. The power is very much at the heart of the new Part. There is precedent for similar powers, in addition to section 7 of the GA 1986 which is directly used by this new Part, this approach is broadly similar to the licence modification powers set out in section 6 of the Nuclear Energy (Financing) Act 2022.
63. In addition to the public law protections that apply to a Secretary of State decision of this nature, the powers are subject to a have regard duties, setting out a clear list of wider implications relevant to the decision to use each power that must be taken into account. This approach has precedent in section 6(4) of the Nuclear Energy (Financing) Act 2022.

Restriction

64. This power will also allow the Secretary of State to restrict a licence that is or was previously held by a designated person, if the restriction relates to the person's designation ceasing to have effect. This is a necessary part of ensuring this new Part operates effectively with the new concept of designation and how it interacts with existing licence-holders already operating under the GA 1986 regime. This is achieved, similar to grant and extension, by opening up section 7(4A) of the GA 1986 to use by the Secretary of State as if they were the Authority. This is necessary as without this power it is unclear what, and when, will happen in respect of licencing when designation ceases for a specific person.

Justification for the procedure

65. The procedure to be applied for use of these powers in each case, is non-Parliamentary but is well established under the GA 1986 or precedent.
66. Subsection (4) of new clause (Grant, extension or restriction of gas transporter licence by Secretary of State) specifically clarifies that elements of the relevant procedures in the GA 1986 will apply to Secretary of State use in such a ways that Secretary of State should be considered to be the Authority (and in some cases vice versa) to ensure the appropriate procedural protections apply. The Department considers it most appropriate for essentially the same procedures that apply to the Authority granting, extending or restricting licence – namely by notice – apply to the Secretary of State as well.
67. In respect of modifications, the new clauses aim to reproduce sufficient procedural protections, including through consultation requirements, a have regard duty and scope limitations, and is closely aligned with precedent by way of section 6 of the Nuclear Energy (Financing) Act 2022.
68. Parliament will have approved the overall duties which the Secretary of State will be bound by in carrying out their functions whilst granting, extending or restricting licences, and the Department considers it would be a disproportionate use of Parliamentary time for Parliament to subsequently approve individual licence grant decisions. The additional steps that the Secretary of State must undertake prior to using these powers, as detailed above, also ensure a robust process is followed prior to licences being granted, extended or restricted.

New Clause: Applications for grant etc of gas transporter licence

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary procedure: Negative Procedure

Context and purpose

69. This power is needed to ensure the Secretary of State may set out in regulations to procedure for dealing with relevant applications (e.g. those for grant etc as described above).
70. The regulations to which this power relate will therefore provide the detail of the process relating to applications.

Justification for taking the power

71. The procedure to which this power relates will be detailed and will need to be flexible. It is not well suited to being on the face of the Bill and will need to be updated over time.
72. It is clearly evidenced from similar support regimes (such as contracts for difference under the Energy Act 2013) that learning from each allocation of support may need to be incorporated in the design of the process. Ensuring the procedure is set out in regulations, particularly those subject to the negative procedure, will ensure that Parliamentary time is not disproportionately taken up with tweaks and improvements to the process itself.
73. The Department therefore considers it most appropriate to have the procedure set out in regulations, with the scope of nature of those regulations clearly established on the face of the Bill. This ensures appropriate Parliamentary oversight of what may be done, and industry certain on process, but avoids an undue burden on Parliament for finer points of procedural detail that ultimately relate to powers of Secretary of State that are to be exercised by notice.

Justification for the procedure

74. The Department considers this the appropriate procedure given this relates to the application process for the grant etc of a licence which are themselves done by notice (as explained above). The heavy focus on procedural elements lends this power to negative procedure and avoid an undue burden on Parliamentary time.

New Clause: Information and advice

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary procedure: Affirmative on first use, Negative thereafter

Context and purpose

75. Information flows within the licensing regime under the GA 1986 will be essentially to the efficient and effective operation of the RAB support model.
76. To facilitate and support the operation, monitoring and evaluation of the RAB, a number of information flows will need to be unlocked between various parties and advice sought from different entities. This power ensures those information flows can be established through regulations, giving the parties' involved sufficient certainty on treatment of the information while enabling the regime to be flexible and updated as improvements are needed.

Justification for taking the power

77. The Department considers the power to make regulations appropriate balancing the flexibility required to set out the relevant information and advice flows in future with sufficient certainty to those affected.
78. It is not currently possible to set out the detail of this element of the regime on the face of the Bill, but it is considered that it is appropriate to place it in legislation given the protections and certainty required for the parties involved. It is also likely that it will need to be updated in light of lessons learned and developments in the market in a way that is better suited to regulations than Primary legislation.

Justification for the procedure

79. We consider that it is appropriate for the first set of regulations made under this power to be subject to the affirmative resolution procedure, and subsequent regulations to be subject to the negative resolution procedure. This reflects the potential importance of the initial intervention and for Parliament to have appropriate oversight of how information is being treated. However, once the first regulations have been made, the Department considered that such intensive parliamentary scrutiny is disproportionate as further changes are to be expected but are anticipated to be technical and incremental, reflecting developments within the hydrogen market, and unlikely to give rise to issues of broader interest.

New Clause: Secretary of State directions to the GEMA

Power conferred on: Secretary of State

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

80. This new Part introduces a new role for Secretary of State in the context of the GA 1986 which has previously been occupied by the Authority. To account for both the new role of Secretary of State in this Part and the new deployment of hydrogen at scale, this power is needed as a backstop to ensure the Authority can be directed to act for the purpose of promoting value for money in connection with a hydrogen pipeline project (or in connection with hydrogen pipeline projects generally).

Justification for taking the power

81. The power is necessary to ensure the purpose of this Part can be given effect not only by Secretary of State but by the actions of the Authority, should it be necessary to direct the Authority to this effect. This direction power can only be used to ensure there is parity of purpose for very specific circumstances regarding the value for money of a hydrogen pipeline project.

82. The power is broadly based in precedent, for example the direction power under section 92 of the Energy Act 2013 where Secretary of State may direct the Office of Nuclear Regulation in certain circumstances. There is also precedent for a Secretary of State direction to the Authority within the GA 1986 itself, such as under section 33BC(9B).

Justification for the procedure

83. The direction power is non-legislative so no Parliamentary procedure is attached. The absence of wider procedure is consistent with the precedents cited above.

New Clause: Repeal of Part

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary procedure: Affirmative Procedure

Context and purpose

84. The Department envisages a transition to an enduring regime whereby government subsidy is no longer required and RABs could be maintained and allocated by Ofgem without the need for government strategic intervention. We do not consider it likely that we will require the powers in this new Part permanently and this new clause (Repeal of Part) will ensure a check is placed on longevity of the powers and ultimately enabled them to be repealed.

Justification for taking the power

85. Decisions as to an appropriate end date for the Part will depend on various factors and, in particular, will be subject to how the hydrogen market develops. This is a nascent market not yet deployed at scale anywhere in the world so there is significant uncertainty over timeframes and the shape of support that the industry will need in the future.
86. Allowing the Secretary of State a power to determine a future end date for these powers strikes an appropriate balance between acquiring necessary powers to support the early stages of the hydrogen economy, against taking powers that should rightfully sit with the regulator. This therefore ensures that these powers will be taken on a temporary basis, but the end date can be defined at a suitable future date after assessing the development of the hydrogen market when it begins to expand. This prevents a notional deadline being set which may inadvertently limit when the Secretary of State can use the powers described here to benefit the hydrogen economy.
87. There is precedent for providing for this by way of regulations in respect of carbon dioxide transport and storage – please see clause 16 and paragraph 1 of Schedule 1 to the Energy Bill.

Justification for the procedure

88. We note that the effect of this power is to switch off provisions in this new Part. As a result, in this particular instance, the affirmative resolution procedure is considered most appropriate.

New Clause: Power to modify Gas Act 1986 in relation to hydrogen

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary procedure: Affirmative Procedure

Context and purpose

89. The hydrogen economy is in its infancy and will take time to establish at scale. While hydrogen is already a gas for the purpose of the GA 1986, the implications of this at scale cannot be fully tested without transport and storage projects being operationalised. As a result, there is some uncertainty as to whether every provision applying to natural gas in the GA 1986 will technically work for hydrogen or whether unforeseen problems will arise that require a provision be disapplied or modified in respect of its application to hydrogen.
90. This power is therefore necessary to ensure that provisions of the GA 1986 do not inadvertently prevent the hydrogen economy from establishing. The Department considers it necessary to ensure that the deployment of, and significant investment in, hydrogen projects is not wasted as a result of unforeseen technicalities under the GA 1986 that could be disapplied or modified in a straightforward way to incorporate the specific technical requirements of hydrogen.

Justification for taking the power

91. The Department considers this a limited and appropriate use of such a power, being the sort of use that Henry VIII powers are meant for. Given the highly technical and granular approach to regulation set out in the GA 1986 it is not possible to assure that hydrogen will be able to operate under that Act until projects are being implemented at scale. As such, any changes that may be needed cannot be put on the face of the Bill. If a problem is identified at the stage of implementation it will need to be addressed swiftly in order to ensure projects are not adversely affected and that hydrogen's role as a key technology for the UK's net zero ambitions is not put in jeopardy.
92. In light of the drafting of the GA 1986, any such changes are expected to be technical within the framing of the GA 1986 and specific to hydrogen which is why the power is being clearly limited in both scope and application. An example is found in section 7(3) and (3A) of the GA 1986 which relates to 'unbundling' requirements deemed necessary as part of ensure a fair natural gas market environment. It is not anticipated that this will create a problem for the hydrogen economy at this stage, but until entities are producing and supplying at scale it will not be clear if that will remain the case. The power can therefore be used to simply switch off, or appropriately modify, the unbundling requirements as they would apply to hydrogen only.

93. The justification for this power is also very specific to the unique role of hydrogen. The existing GA 1986 regime was primarily designed around natural gas and was established nearly 40 years ago. The possibility of using hydrogen as part of major utility is recent by comparison. While the Department considers it appropriate to utilise the GA 1986 regime for hydrogen, there is inherent uncertainty in use of a regime designed in a different era and for a different type of gas. This unique position is reflected both in the approach to this new Part and the specific need for this power to ensure that unforeseen issues do not affect the effectiveness of the new Part in a disproportionate manner.
94. The power is therefore carefully framed as only relating to the GA 1986 which has a very specific role in the regulation of gas. The power only permits regulations to ensure provision of the GA 1986 do not apply or apply with modification, and any such regulations can only be made in respect of the production, transportation, storage or use of hydrogen. The power also contains a purposive restriction in subsection (3) which is that it may only be exercised for the purpose of facilitating or promoting the production, transportation, storage or use of hydrogen.
95. In light of the above the Department considers this power the most appropriate and proportionate solution, with sufficient protection coming from the restrictions of both the single piece of legislation in scope and the clear limitations on use as set out in the new clause.

Justification for the procedure

96. The Department considers it appropriate that regulations made under this power should be subject to affirmative procedure. The Department also considers it important to ensure a procedural limitation is set in that before exercising the power the Secretary of State must consult both the Authority and such other persons as they consider appropriate. The Department considers that the combination of both this consultation requirement and use of the affirmative procedure to be adequate oversight given the nature and potential use of this power.