

PUBLIC AUTHORITIES (FRAUD, ERROR AND RECOVERY) BILL

Memorandum from the Department for Work and Pensions to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared by the Department for Work and Pensions (“DWP”) and Cabinet Office for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Public Authorities (Fraud, Error and Recovery) Bill (“the Bill”).
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains, in each case, why the power has been taken, the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

3. The Bill is intended to safeguard public money and protect the economic well-being of the country by reducing public sector fraud, error and debt. The Bill makes provisions to better identify, prevent and deter public sector fraud and error and enable the better recovery of money (debt) owed to the taxpayer where public money has been stolen or overpaid.
4. The Bill introduces new powers to enable the Public Sector Fraud Authority (“PSFA”) to investigate public sector fraud outside of tax and social security (responsibility for which belong to His Majesty’s Revenue and Customs (“HMRC”) and DWP respectively) using its expertise to act on behalf of other parts of government. The Bill also introduces new powers to improve DWP’s ability to address fraud and error in the social security system.
5. The Bill includes safeguards, reporting mechanisms and oversight provisions to ensure the appropriate, proportionate and effective use of the powers. The Bill also makes provision for the oversight of investigations conducted by both DWP and PSFA to ensure these are carried out in line with guidance and any relevant codes of practice.
6. Part 1 of this Bill provides powers for the Minister for the Cabinet Office (“Minister”), via the PSFA, to tackle fraud against the public sector, and introduces arrangements for the oversight of these powers to drive their effective use and ensure they are not misused. The Cabinet Office will use these powers on behalf of other departments and wider public bodies. This will result in more money being recovered, more robust action being taken against those commit fraud against the public sector, and an increased deterrent to potential fraudsters.

7. The measures in Part 1 of the Bill will:
- a. Provide for the PSFA becoming a statutory body and the ability for the Minister for the Cabinet Office to transfer functions in the Bill (as per the powers below) to be exercised by the PSFA.
 - b. Give Authorised Officers (“AOs”) within PSFA information sharing and gathering powers. This includes a power to compel the production of information from information holders; issue a financial civil penalty for failure to comply with the request for information; and receive, disseminate and share criminal offence data between government departments.
 - c. Give Authorised Investigators (“AIs”) powers to apply to a court for search warrants and production orders and powers to seize and retain evidence, such as documents and electronic devices, enter premises with a warrant issued by a court, and search for and seize evidence and deal with the evidential chain thereafter.
 - d. Enable the Minister to recover a recoverable loss identified through PSFA investigation. For these purposes a recoverable loss is identified as either:
 - i. a payment made as a result of fraud or error that the Minister has investigated or confirmed during the course of an investigation in respect of suspected fraud against a public authority, and the public authority is entitled to recover; or
 - ii. any other amount that a public authority is entitled to recover in respect of fraud.

The Minister can exercise the recovery powers to recover a recoverable amount either with the consent of the liable person or following a judgment in the Minister’s favour. The Minister may also use the recovery powers to recover a civil penalty under Chapter 5, but only once the time for appealing the penalty has passed without an appeal being brought or where an appeal against a penalty has been finally determined.

- e. The recovery powers include the ability to recover such an amount directly from an individual’s earnings via a Deduction from Earnings Order, and directly from bank accounts via Lump Sum Direct Deduction Orders (“LSDDOs”) for specified amounts and Regular Direct Deduction Orders (“RDDOs”) for regular deductions.

- f. Introduce a framework of civil penalties for fraud that the PSFA can impose, as an alternative mechanism to dealing with fraud cases via criminal prosecution.
 - g. Create a new oversight function for use of the powers in the Bill to help build trust in Government and to ensure the correct and appropriate use of the powers.
- 8. Part 2 of the Bill makes provision for new powers for DWP to identify and address overpayments arising from fraud and/or error in the social security system. It will also make provision to improve DWP's recovery of debt from those no longer receiving benefits or in Pay As You Earn ("PAYE") earnings. Part 2 of the Bill makes provision to:
 - a. Introduce reforms to existing investigation powers DWP routinely uses. This includes reforms to compel information from all third-party information holders (subject to exemptions) in support of criminal investigations, creating a clear, single, legal framework. The Bill brings any DWP related payment (including grants or National Insurance number related fraud), not just benefit payments, into scope of a criminal investigation. The Bill also makes provision to allow DWP to make and receive requests via a digital portal.
 - b. Require banks and other financial institutions ("Banks") to examine their own data sets to help identify where incorrect benefit payments may be being paid to help establish if eligibility rules are not being met, through the new Eligibility Verification Measure ("EVM"). The Bill makes provision for important safeguards on these powers, including the requirement to consult on and publish a statutory Code of Practice, as well as a duty for the Secretary of State to appoint an independent to provide oversee the use of the powers.
 - c. Provide new powers to DWP's serious and organised fraud investigators when investigating serious and organised crime. These powers make provision for trained and authorised investigators to apply to a court for warrants of search and seizure and obtain production orders; enter and search premises with a warrant and to seize evidence; use reasonable force, if necessary, in the exercise of such powers; and make an application to the court to deal with seized evidence appropriately.
 - d. Broaden existing debt recovery powers to enable the recovery of debt more effectively and fairly from those who are not in receipt of benefit or PAYE earnings who can, but currently do not, make repayments. This brings DWP's debt recovery powers broadly in line with those of HMRC

and the Child Maintenance Service. The Bill makes provision for debt recovery directly from bank accounts through RDDOs and LSDDOs without a court order. The Bill also makes provision to disqualify a person from holding a driving licence, subject to court approval and where the liable person's licence is not essential to their ability to earn a living or where suspension of a driving licence would not be appropriate.

- e. Change to the Administrative Penalty ("Ad Pen") regime so it can be offered for a wider range of DWP payments, not just benefit payments, and removal of the loss of benefit when an Ad Pen is accepted by a benefit claimant.
 - f. Provide for DWP to appoint an "independent person" to carry out reviews of the functions under sections 109A-G of the Social Security Administration Act 1992, which is amended by this Bill.
9. Part 3 makes general provisions relating to the application and limitations of the Bill, the extent of the Bill, the commencement of the Bill and the short title.
10. To support its policy objectives, the Bill includes 22 delegated powers. Many of these build on or have precedents in existing powers and frameworks in legislation. There are seven Henry VIII powers across the Bill. There are three Henry VIII powers in Part 1 (although two of them sit within Schedule 2 but pertain to Part 1): the first to uprate the amount of penalties in line with changes in the value of money; the second which allows the Minister to make provision in relation to the exercise of functions on Schedule 2 at such time as the PSFA is established as a statutory body; and the third which allows the Minister to change the name of the PSFA as a statutory body if required. There are four Henry VIII powers in Part 2: the first to change the maximum amounts of penalties that can be levied on Banks for non-compliance with the requirements under the EVM; the second to amend the list of benefits within the scope of the EVM; the third to change the maximum amounts of penalties that can be levied on a Bank for non-compliance with the requirements under the debt recovery powers; and the fourth power to make consequential provisions.
11. The Bill is structured in three Parts and six Schedules. Part 1 and Schedules 1 to 2 concern the powers of the Minister (for the PSFA). Part 2 and Schedules 3 to 6 pertain to Secretary of State (for the DWP). Part 3 contains general provisions. The Bill confers delegated powers on the Minister and the Secretary of State. The powers detailed in this document will ensure that DWP's and the Minister's framework for combatting fraud, error and debt remains up to date. This is complex legislation, and it is crucial that it is responsive to the changing financial and technical landscape and can be adapted without needing to revisit primary legislation.

C. DELEGATED POWERS

12. This Bill includes the following delegated powers:

Part 1: PSFA

Clause 9: Incidents etc

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and purpose

13. This clause addresses oversight of Police law enforcement powers used by the Cabinet Office's AIs in relation to offences under the purview of the Cabinet Office. This clause inserts a new section 26G into the Police Reform Act 2002, which empowers the Minister for the Cabinet Office to make regulations conferring functions on the Director General in relation to the Cabinet Office's AIs carrying out permitted powers under the Police and Criminal Evidence Act 1984 ("PACE").

Justification for taking the power

14. PSFA will need to confer functions to the Director General relating to powers conferred under PACE. This extends to conducting reviews and investigations. The regulations will make provisions as to payment for these services and also permit the lawful disclosure of sensitive files and information relating to the exercise of the aforementioned functions and powers. As this regulation making power enables accountability of those exercising law enforcement powers, it is in the public interest and the interests of those subjected to these powers for there to be an independent mechanism to review and investigate serious cases of misconduct and those deemed necessary by the Secretary of State.

Justification for the procedure

15. PSFA considers that the negative procedure would be appropriate because this is the procedure which applies to the regulations made under Part 2 of the Police Reform Act 2002 by virtue of section 105 of the Police Reform Act 2002. Furthermore, there exists strong precedent for utilizing this procedure to confer functions on the Director General. This is not a novel power, and this procedure has been used on more than one occasion for other government departments and agencies who have been conferred the same or similar powers in the past. As this power operates as an important safeguard to hold those exercising law

enforcement powers to account, it is in the public interest and in the interests of those subject to these powers.

Clause 37(1) and (2): Regulations in relation to direct deduction orders

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure (clause 37(9))

Context and purpose

16. Clause 37(1) enables the Minister to, by regulations, make further provision about direct deduction orders. Clauses 17 to 36 of Part 1 sets out the process of how the new bank account deduction powers are to be exercised administratively. Under clause 37(2) the proposed delegated power, the regulations may, among other things, make provision about:
- a. **‘How notices and orders are to be given by the Minister’ and ‘how notices and information are to be given to the Minister’** under Part 1. Regulations under this power will make additional provision for how a bank must comply with an information notice or notify the Minister that it cannot comply. These provisions are likely to include how and where responses to notices must be sent and how soon after receiving the request the bank must comply (or notify it cannot comply).
 - b. **‘Calculations regarding a direct deduction order’**. This will allow the Minister to make regulations about the calculation of deduction amounts for both RDDOs and LSDDOs. Regulations may include details of which amounts are to be taken into account when assessing whether a deduction order should be made in calculating which payments a liable person or joint account holder are required to make on a regular basis, and establishing whether deduction values would cause hardship when trying to meet essential ordinary living expenses. For context, an RDDO requires the bank to make regular, specified deductions from the liable person’s bank account to repay the recoverable amount.
 - c. **‘The duties of banks in relation to direct deduction orders, including before a deduction is made’**. This will enable the Minister to make regulations on how quickly a bank must respond to an information notice request and will allow the time period to be adjusted (if necessary) following engagement and feedback from the banks.
 - d. **‘The costs which the bank may recover by virtue of section 24 or from the Minister’**. This will enable the Minister to make regulations

regarding which costs a bank may take into consideration when calculating its own administrative costs reasonably incurred in complying with a direct deduction order and the ability for the banks to recover costs from the Minister, where they have been unable to recover them from the liable person. A direct deduction order may include an amount to cover the costs a bank may reasonably have incurred in complying with that order.

- e. **‘The interaction between direct deduction orders and similar orders under any other enactment’**. This provision deals with what should happen where a bank receives one or more deduction or freezing orders from other government departments or by court order in relation to the same account, to provide legal clarity on how any conflict should be resolved. This may also provide how the bank should inform the originating authority of such orders (including the Minister) of any conflict.

Justification for taking the power

- 17. The justification for taking the proposed delegated power is as follows:
 - a. ‘How notices and orders are to be given by the Minister’ and ‘how notices and information are to be given to the Minister’. This power is intended to be used to respond to changes in the legislative and banking spheres and to technological abilities and needs. It also allows how and when notices are to be updated in line with further feedback and consultation from the banks. Equally, the Minister needs to be able to create new requirements as to the form and delivery of notices, orders and bank statements, to ensure that none of the parties involved are unreasonably inconvenienced by the introduction of new IT systems or modes of communication. These are practical issues which do not create or impose significant new duties or rights on parties, and as such it is appropriate they be exercised judiciously by regulation as required rather than subject to fixed and inflexible statutory rules which may quickly fall out of step with operational and technological requirements. The regulations made under this power would have only a prospective, not retrospective, effect.
 - b. ‘Calculations of a direct deduction order’ and ‘reasonable living expenses’. The power to make further provision about how a direct deduction order is calculated allows the Minister to ensure that the amount of deductions remain appropriate in the future. For example, it may be necessary to review how these deductions are calculated in line with inflation so that any amounts deducted are not attenuated over time. Furthermore, setting out how deductions will be limited to prevent a

liable person from suffering hardship in meeting essential living expenses will add clarity to the policy, and will allow flexibility in the future as and when what constitutes “essential living expenses” changes. It is therefore not appropriate in this circumstance to have a rigid and immovable policy, the Minister must be able to update how calculations are to be made and in establishing the question of hardship to ensure that the powers keep up with an ever evolving landscape. The concept of hardship is also defined in regulations elsewhere in Social Security law, and fairness between groups may require one definition to be revised in line with the other from time to time. It would therefore not be appropriate to have a rigid definition of what constitutes “essential living expenses”, as what constitutes an essential living expense now, may look vastly different in ten years’ time.

- c. ‘The duties of banks in relation to direct deduction orders, including before a deduction is made’. This power does not allow the Minister to prescribe further substantive obligations on banks in relation to information notices; rather, it allows more detailed provision to be made (and later adjusted) to determine how the bank must comply. Such detail is likely to include the period during which a bank must comply with an information notice, what the bank should do if it requires further information to comply with an order, and the method of delivery of information (including, potentially, any security standards the bank must apply to protect the account holder’s personal data during transmission to the PSFA). These provisions are likely to change over time, due to technological and industry developments and following ongoing consultation with the banking sector, such that it would not be practical to provide an exhaustive list on the face of the Bill.
- d. The ‘costs which the bank may recovery by virtue of section 24 or from the Minister’. The power to specify which administrative costs and the amount allows the Minister to ensure they are reasonable and proportionate. The caps on fees banks are allowed to charge will need to be capable of being efficiently changed from time-to-time, to ensure that they stay broadly in line with inflation and business costs while never being too high as to themselves cause unfairness or hardship on a liable person. This is the type of detail which should not be in primary legislation, otherwise there is a risk fees will remain inappropriately fixed indefinitely where an amendment would not be priority in Parliamentary business. The purpose of the cap is to protect liable persons from unfairly high fees, while ensuring banks are reimbursed for their genuine costs. We also anticipate that over time the banks’ costs may decrease, especially where the functions involved become computerized and automated by the banks. The power also includes that the Minister may

make provision about the costs incurred by the bank which may be recoverable from the Minister. This is to ensure that banks are not unfairly prejudiced by incurring costs that cannot be recovered from the liable person. The regulations made under this power would have only a prospective, not retrospective effect.

- e. 'The interaction between direct deduction orders and similar orders under any other enactment'. Where similar recovery powers with equivalent effects may be enacted in the future, or court procedural rules around deduction or freezing orders may change, the Minister will be able to provide clarification as to, amongst other things, where priority might lie between the exercise of multiple powers on the same account to create consistency and certainty. Rules on the above are likely to require detailed provisions which need to be changed from time to time in a manner not possible if fixed on the face of the Bill.

Justification for the procedure

- 18. The Minister considers that the negative procedure is the appropriate procedure due to the likely uncontroversial nature and effects of the exercise of the powers in question. These are matters which may require relatively quick amendments, which may be inconsistent with the affirmative procedure, and deal mostly with points of procedural rather than substantive legislative change. As a result, the Minister has limited discretion in how the power can be exercised. In the circumstances it is considered that the negative resolution procedure is appropriate.
 - a. 'How notices and orders are to be given by the Minister' and 'how notices and information are to be given to the Minister'. It is considered that the negative procedure will afford the appropriate level of parliamentary scrutiny. As above these are a procedural issue and will not impose a significant change in the duties on any party. The power to introduce regulations via the negative procedure will ensure that how notices/information/orders are given by the Minister can be implemented effectively as and when societal and technological changes come to fruition. It is therefore considered that adopting the affirmative procedure would impede the Minister's ability to adapt to fast changing circumstances. As a key part of this power, the Minister must consult with banks before making any regulations ensuring that key parties, who these regulations may affect, are engaged in the process.
 - b. 'Calculations regarding a direct deduction order'. In relation to the power to make regulations in respect of calculating the amounts under a direct deduction order in all cases the Minister must be certain that any deduction will not cause a liable person hardship in meeting essential

living expenses (clause 22(1)(a)). “Essential living expenses” has a relatively narrow meaning, and any regulations that departed from the ordinary meaning of the language would clearly be ultra vires. Furthermore, existing regulations elsewhere in social security legislation provides such detail, including regs 116(2) and (3) of the Universal Credit Regulations 2013. Where the definition may be changed in the 2013 Regulations from time-to-time, to meet changes in societal need and to reflect consultation with relevant stakeholder groups, it may be unfair not to provide a similar or same change in the Regulations under this Bill. Providing a consistent procedure for both, which allows for such a revision to be given effect quickly, would help prevent unfairness which might otherwise arise between claimant and debtor groups if only one set of Regulations required the more time-consuming affirmative procedure to have effect. Given the ability of the Tribunals to provide an effective safeguard on the application of the Regulations in practice, and in light of that wider context, we consider the affirmative procedure here would be unnecessary.

- c. Furthermore, the procedure is considered appropriate as the amounts to be calculated in relation to a regular direct deduction order through regulations will never be able to make provision which leads to the amount of deduction surpassing the 40% rate of deduction in respect of fraud or 20% in respect of non-fraud. The Minister may only make regulations as to how the amounts are to be calculated, which as above is required to ensure the calculations are fit for purpose at the present time. This will further help to ensure that a regular direct deduction order will not cause the liable person, any other account holder or a person within subsection 22(2) to suffer hardship in meeting essential living expenses and be otherwise fair in all circumstances. It will therefore allow the Minister to react flexibly to change how calculations are made as circumstances change, which the affirmative procedure will not necessarily allow for.
- d. ‘The duties of banks in relation to direct deduction orders, including before a deduction is made’. It is considered that the negative procedure will afford the appropriate level of parliamentary scrutiny. Whilst the power may change the duties of the banks, there is a requirement to consult with them to ensure that the regulations are appropriate and that any concerns raised can be addressed in the regulations. There will be a need to update the duties of banks as time progresses as part of ongoing consultation as to the operation of the powers. The duty to consult is an important safeguard in ensuring that the regulations are fit for purpose, and it is therefore considered that the affirmative procedure

is not necessary as the relevant interested parties will be consulted as part of the process.

- e. The 'costs which the bank may recover by virtue of section 24 or from the Minister'. In relation to the bank's administrative costs, it is important that they are reasonable and proportionate given they would be paid by the liable person as part of the whole value to be deducted. As the power is limited to allowing the Minister to make provision on banks' costs, for example to ensure the amounts which can be deducted by the costs remain appropriate in the future as costs may increase or decrease in line with inflation. As a result, it is considered that the negative procedure will afford an appropriate level of parliamentary scrutiny. As noted above, there will also be a duty to consult with banks before making regulations on the bank's administrative costs, which will ensure that their concerns are taken into account before any regulations are put in place, thus ensuring that the key parties are engaged in the process.
- f. 'The interaction between direct deduction orders and similar orders under any other enactment'. The negative procedure will allow the appropriate level of parliamentary scrutiny here as the power is not substantially affecting how a direct deduction order operates. The power is simply used to ensure that where a conflict between orders arises, clarity can be provided as to the interaction between similar orders. There may be a need for the Minister to respond proactively when conflicts arise, which the affirmative procedure would not necessarily allow for.

Clause 37(3): Definition of banks

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure (clause 37(8))

Context and purpose

- 19. This power would allow the Minister to add to the definition of a bank (or equivalent financial institution). Banks are defined in clause 36(1), to be read alongside other enactments listed in clause 36(2). This power would allow the Minister to add to the list at clause 36(2) in applying clauses 17 to 36 to other types of person who provide financial products or services. This is to ensure bank and payment accounts which are regulated under new or different legislative frameworks in the future are expressly in scope of direct deduction orders, provided institutions under

such other enactments meet the broad definition stated on the face of the Bill at subsection (1). This is required to account for future developments within the finance industry, which has witnessed significant change in the last ten years with the development of fintech and cryptocurrencies.

Justification for taking the power

20. The finance industry has witnessed significant change in the last ten years, with the development of fintech and cryptocurrencies. This delegated power will enable legislation to remain relevant in a changing industry. This power allows the Minister to expand the categories of regulated financial institutions which were always intended to be in scope, but which may in the future be regulated as different kinds of entities to those currently in scope. The power is properly contained, due to a fixed definition at clause 36(1) which will limit the scope of any expansion of the enactments to which clauses 17 to 36 can be applied. Ensuring future banking solutions are in scope would ensure the definition does not become outdated, contrary to the intention of the Bill (and ultimately Parliament's intention), and potentially prevent unfairness arising between organisations which provide traditional bank accounts and those providing online financial products and services, and/or between liable persons whose accounts are in scope and those who could evade by using equivalent accounts which were out of scope by technicality only.

Justification for the procedure

21. The affirmative procedure is considered appropriate, as it is believed a higher level of parliamentary scrutiny will be required when considering changes to the definition of banks. This is to ensure that the proposed widening of the scope does not exceed the broad definition on the face of the Bill, and to ensure that any change is appropriate. As above, the power is intended to be used as a future proofing tool, as and when technological advancements in the banking sector are made, particularly in the sphere of cryptocurrencies or assets. There is also a requirement to consult with banks before making regulations ensuring that the relevant stakeholders are engaged with.

Clause 38: Deduction from earnings orders

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

22. Clause 38(3) states that the Minister is able to by regulations make further provision about the meaning of ‘earnings’ for the purposes of a deduction from earnings order. This may include any appropriate provisions in determining what constitutes ‘earnings’ in the future; for example, stock options in the context of corporate fraud. For context, a deduction from earnings order is an order requiring an employer to make deductions from the liable person’s earnings to give to the Minister.

Justification for taking the power

23. The justification for taking the power is to ensure that the Minister has flexibility in the future to adjust the meaning of ‘earnings’ to be in line with socio and economic changes. Once the Minister has begun to use the deduction from earnings order powers it may become apparent through usage that the meaning of ‘earnings’ needs to be updated to make these powers more effective. The regulation power is not unfettered in that the deduction from earnings order power may only be used to recover funds from a person that is employed by an employer; the power does not allow deductions to be made outside of this remit. This is all to ensure that the meaning of ‘earnings’ is fit for purpose at any given time.

Justification for the procedure

24. The negative procedure will allow the appropriate level of parliamentary scrutiny here as the power does not substantially affect how a deduction from earnings order operates, it is simply a technical point aiming to address how ‘earnings’ are defined now, and in the future. This will give the Minister capability to adjust the meaning dependent on the circumstances of the time to ensure that the meaning is always fit for purpose. Therefore, there may be a need for the Minister to respond proactively when changes arise that affect what constitutes ‘earnings’, which the affirmative procedure would not necessarily allow for. On this basis, it is considered that the negative procedure is appropriate.

Clause 41(6), (7) and (8): Amount of deductions

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (clause 41(6))

Parliamentary Procedure: Negative procedure (clause 41(8))

Context and purpose

25. Clause 41(6) states that the Minister is able to make regulations about the calculation of amounts to be deducted from a liable person’s net earnings via a deduction from earnings order. This may include any appropriate provisions to establish whether proposed deductions will cause hardship in meeting essential

living expenses. For context, a deduction from earnings order is an order requiring an employer to make deductions from the liable person's earnings to give to the Minister.

Justification for taking the power

26. The power to make provision as to how a deduction from earnings order is calculated allows the Minister to ensure these values remain appropriate as wages increase or decrease over time. For example, it may be necessary to review these figures in line with inflation so that any amounts deducted are not attenuated over time or conversely, cause hardship. Furthermore, setting out in regulations how deductions will be limited to prevent a liable person hardship in meeting essential living expenses will add clarity to the policy, and will allow flexibility in the future as and when what constitutes 'essential living expenses' changes.

Justification for the procedure

27. By virtue of clause 41(6) the Minister may by regulations make provision about the calculation of amounts to be deducted from a liable person's earnings and paid to the Minister in accordance with a deduction from earnings order. These regulations are subject to the negative procedure under clause 41(8). This is considered appropriate as the amount to be calculated through Regulations will never be able to surpass the 40% rate of deduction for fraud and 20% for non-fraud cases of the liable person's net earnings defined on the face of the Bill in clause 41(3)(a) and (b) providing a key safeguard. This will also help ensure that it will not cause the liable person or a person within subsection 41(2) hardship in meeting essential living expenses and be fair in all other circumstances.

Clause 42(3) and (4): The employer's administrative costs

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (clause 42(3))

Parliamentary Procedure: Negative procedure (clause 42(4))

Context and purpose

28. Clause 42(3) states that the Minister is able to make regulations regarding an employer's administrative costs reasonably incurred in complying with a deduction from earnings order made under clause 38(1). For context, a deduction from earnings order requires the employer to make deductions (either a specified amount or determined by a supplied method) from the liable person's earnings and to pay the amount to the Minister instead.

Justification for taking the power

29. The power to make provision about employers' costs allows the Minister to ensure they are and remain reasonable and proportionate, including in the future as costs may increase or decrease in line with inflation.

Justification for the procedure

30. By virtue of clause 42(3) the Minister is given the power to make regulations in the future regarding an employer's administrative costs reasonably incurred in complying with a deduction from earnings order. These regulations are subject to the negative procedure under clause 42(4). On the face of the Bill, employers must comply with a deduction from earnings order (clause 39(3)). It is accepted that employers may incur administrative costs in complying with these orders. These administrative costs should be reasonable and proportionate given they would be paid by the liable person as part of the whole value to be deducted. As the power is limited to allowing the Minister to make provision on employers' costs, for example to ensure the amounts which can be deducted by the costs remain appropriate in the future as costs may increase or decrease in line with inflation. As a result, it is considered that the negative procedure is considered to afford an appropriate level of parliamentary scrutiny.

Clause 55(4) and (5): Amount of penalty for failing to comply with requirements

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (clause 55(4))

Parliamentary Procedure: Negative procedure (clause 55(5))

Context and purpose

31. Clause 55 allows an AO to give a penalty notice to a person for a failure to comply with a requirement imposed by, or under, Chapter 2 (Investigatory powers) or Chapter 4 (Methods of recovery). Clause 55(1) provides that penalties related to a failure to comply with a requirement to provide information imposed by or under Chapter 2 or Chapter 4 must be an amount calculated by reference to a daily rate of £300. Clause 55(2) provides that any other penalty for a failure to comply with a requirement imposed by or under Chapter 2 or Chapter 4 must be a fixed amount of £300. The power in clause 55(4) allows the Minister to amend the amounts mentioned in subsections 55(1) and (2) for the time being to reflect a change in the value of money. The Committee's attention is drawn to this area as it is a Henry VIII power.

Justification for taking the power

32. The power to amend the figures in clause 55(1) and (2) allows the Minister to ensure that the penalties are calculated using appropriate sums which reflect a change in the value of money. This is a relatively standard uprating power and will allow the Minister to ensure that penalties are appropriately punitive and are not devalued over time.

Justification for the procedure

33. The power can only be used to amend the sums so as to reflect a change in the value of money. As a result, the Minister has limited discretion in how the power can be exercised. In the circumstances it is considered that the negative resolution procedure is appropriate.

Clause 60(6), (7) and (8): Appeals

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (clause 60(6))

Parliamentary Procedure: Negative procedure (clause 60(8))

Context and purpose

34. Clause 60 provides a right of appeal for a person who receives a penalty notice. The power in clause 60(6) allows the Minister to make further provision about appeals. Clause 60(7) specifies that the regulations may, among other things, provide for appeals to be heard at the same time as proceedings to recover a recoverable loss.

Justification for taking the power

35. This is a new regime and it is considered necessary for the Minister to take this power so that the appropriate procedural provisions, for example to streamline the appeal process, can be made.

Justification for the procedure

36. The power is subject to the negative procedure under clause 60(8). The power allows for the Minister to make procedural provision in relation to appeals but cannot be used to amend the substantive right of appeal set out in subclause (1). In the circumstances it is considered that the negative resolution procedure is appropriate.

Clause 65(4) and (5): Independent review: further provisions

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (clause 65(4))

Parliamentary Procedure: Negative procedure (clause 65(5))

Context and purpose

37. Clause 65 allows the Minister to give directions on the period to be covered by a review to the independent person appointed to carry out those reviews under clause 64. Clause 65(4) gives the Minister a power to confer functions on the independent person if required.

Justification for taking the power

38. This power allows the Minister to update the functions of the independent reviewer as required to ensure that there is proper oversight of the use of the powers and the exercise of the functions in the Bill.

Justification for the procedure

39. The power is subject to the negative procedure under clause 65(5). The power allows for the Minister to confer functions but only so far as it allows compliance with how the independent review will be carried out. In the circumstances it is considered that the negative resolution procedure is appropriate.
40. Clause 71 sets out the procedure for regulations under Part 1 of the Bill that are to be made by statutory instrument.

Paragraph 6 of Schedule 2: Appointment of members: eligibility

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (Schedule 2, Part 2, paragraph 6(1))

Parliamentary Procedure: Negative procedure (Schedule 2, Part 2, paragraph 6(3))

Context and purpose

41. The power allows the Minister to set out the criteria that must be met by any members of the PSFA once it has been established as a new statutory body.

Justification for taking the power

42. The PSFA may be established as a new statutory body. At that time, the Minister may wish to be able to impose criteria on board members to ensure that they have the requisite skills. This provision allows the Minister to be able to decide what those criteria should be at the time.

Justification for the procedure

43. The power is subject to the negative procedure under paragraph 6(3). It allows the Minister to ensure the PSFA is set up as a statutory body in the best way possible but does not impact on how the PSFA will be set up. In the circumstances it is considered that the negative resolution procedure is appropriate.

Paragraph 21(1), (4) and (5) of Schedule 2: Transfer of functions etc

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (Schedule 2, Part 3, paragraph 21(1))

Parliamentary Procedure: Affirmative procedure (Schedule 2, Part 3, paragraph 21(5))

Context and purpose

44. Paragraph 1 of Schedule 2 provides for the establishment of the PSFA as a body corporate and Part 2 of Schedule 2 makes provision on the constitution etc of that body. Paragraph 21(1) of Schedule 2 gives the Minister the power to make regulations providing that the functions in Chapters 2 to 6 of Part 1 of the Bill are to be exercisable by the PSFA or its authorised officers. The Minister can make provision as to how Part 1 of the Bill applies to the PSFA and also has the power to issue directions to the PSFA concerning the exercise of its functions. Paragraph 21(4) provides that regulations made under this paragraph may amend Part 1 of this Bill and also amend any provision which is amended by Part 1. The Committee's attention is drawn to this as it is a Henry VIII power.

Justification for taking the power

45. The power in paragraph 21 is ancillary to the establishment of the PSFA as a body corporate by paragraph 1. On the commencement of paragraph 1, it will be necessary to make provision on the transfer of functions and on application of Part 1 in relation to the PSFA. It is likely also to be necessary to amend Part 1, for example to replace references to "the Minister" with "the PSFA" to reflect the change in responsibilities. This scope of the power is typical of delegated powers which allow for the transfer of functions by way of secondary legislation.

Justification for the procedure

46. Given that the power can be exercised to make regulations which amend primary legislation and to do so in relation to the establishment of a new body corporate which is being transferred functions for the first time, it is considered appropriate for the additional scrutiny of the affirmative procedure to apply.

Paragraph 22 of Schedule 2: Transfer of functions etc

Power conferred on: the Minister for the Cabinet Office

Power exercised by: Regulations (Schedule 2, Part 3, paragraph 22(1))

Parliamentary Procedure: Negative procedure (Schedule 2, Part 3, paragraph 22(3))

Context and purpose

47. Paragraph 1 of Schedule 2 provides for the establishment of the PSFA as a body corporate and Part 2 of Schedule 2 makes provision on the constitution etc of that body. Paragraph 22(1) of Schedule 2 gives the Minister the power to change the name of the PSFA as a statutory body. The Committee's attention is drawn to this as it is a Henry VIII power.

Justification for taking the power

48. The power in paragraph 22 is ancillary to the establishment of the PSFA as a body corporate by paragraph 1. It allows the new body to be renamed if required as and when it is established. Any change of name will only take place when the powers in paragraph 21 are being exercised to establish the PSFA as a new statutory body. This scope of the power is typical of delegated powers which allow for the transfer of functions by way of secondary legislation.

Justification for the procedure

49. Given that the power can only be exercised once the statutory body has been established and then is only ancillary to those regulations, it is considered appropriate for the negative procedure to apply.

Part 2: DWP

Clause 74: Eligibility Verification Measure

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative procedure for regulations under paragraphs 2(1)(b) and 19(2) of Schedule 3B (clause 74(3)), and negative procedure for regulations under paragraph 12 of Schedule 3B.

Context and purpose

50. This clause amends the Social Security Administration Act 1992 by inserting a new section 121DB and Schedule 3B into that Act – Schedule 3B is found at Part 1 of Schedule 3 of this Bill. Schedule 3B makes detailed provision regarding the power of the Secretary of State to require persons to provide information for the purposes of identifying, or assisting in identifying, incorrect payments of certain benefits. Schedule 3B contains the following delegated powers:

- a. **Adding to the types of person to whom an eligibility verification notice can be given:** In paragraph 2(1)(b) of Schedule 3B there is a power, via regulations, to add to the definition of a financial institution. This is required to account for future developments within the finance industry and to enable the legislation to remain relevant to the changing industry which has witnessed significant change in the last ten years, including with the development of fintech and cryptocurrencies. DWP does not restrict the type of account into which benefits may be paid and relevant capital could be held in a range of types of accounts, so it is important that there is some flexibility to adapt to these changes. Paragraph 2(3) of Schedule 3B makes it clear that any description of person under sub-paragraph (1)(b) is restricted to types of person who provide accounts which are, or correspond to, relevant accounts (including accounts relating to cryptoassets or any similar asset).
- b. **Changes in penalty amounts:** There is a power, via regulations, in paragraph 12 of Schedule 3B to amend the rates of penalties set out in Part 2 of Schedule 3B to reflect a change in the value of money. In Part 2 there is a power, where the Secretary of State considers that a Bank has failed to comply with an eligibility verification notice (“Notice”) within the time specified in the Notice and without a reasonable excuse, to impose a fixed penalty on that Bank. The fixed penalty may not exceed £1000. There is also a power in Part 2 for the Secretary of State to impose a daily rate penalty on a Bank if a fixed penalty notice has been issued and their failure to comply with the relevant Notice is continuing. The rate of a daily rate penalty may not exceed £40. The Secretary of State may apply to the First Tier Tribunal (“Tribunal”) for an increased daily rate penalty. The Tribunal has the power to increase the daily rate penalty where a Bank has continued to fail to comply with the Notice for more than 30 days from the date the daily rate penalty first became payable. The Tribunal may not determine a daily rate penalty that exceeds £1000. Furthermore, there is a power for the Secretary of State to impose penalties where the Secretary of State considers that a Bank has provided inaccurate information following receipt of a Notice, either deliberately or negligently; or if a Bank shares prohibited information with the Secretary of State, without reasonable excuse. The limit for

such a penalty is £3000. The Committee's attention is drawn to the power in paragraph 12 as it is a Henry VIII power.

- c. **Power to alter the list of relevant benefits within the EVM:** In paragraph 19 of Schedule 3B there is a definition of "relevant benefit" for the purposes of the EVM which includes Universal Credit, Employment and Support Allowance and Pension Credit. There is a power under paragraph 19(2) to make regulations to add, or remove, types of benefit to, or from, this definition and the Committee's attention is drawn to this as it is a Henry VIII power.

Justification for taking the powers

51. The justifications are set out according to powers in the new Schedule 3B:

- a. **Adding to the types of person to whom a Notice can be issued:** While the scope of the power will not extend beyond financial institutions, the intention is that the power should be capable of requiring data from any financial institution into which a benefit could be paid, and relevant capital held. The finance industry has witnessed significant change in the last ten years, with the development of fintech and cryptocurrencies. This delegated power will enable the Secretary of State to expand the categories of regulated financial institutions in the future, if necessary. Ensuring future banking solutions are in scope will help to ensure the definition does not become outdated, contrary to the intention of the Bill (and ultimately Parliament), and potentially prevent unfairness arising between organisations which provide traditional bank accounts and those providing online financial products. This power is appropriately limited. Paragraph 2(3) restricts any extension of 'types of person' to only those who provide financial products and services.
- b. **Changes in penalty amounts:** The power to amend the figures allows the Minister to ensure that the penalties are calculated using appropriate sums which reflect a change in the value of money. This is a relatively standard uprating power and will allow the Minister to ensure that penalties are at an appropriate level and are not devalued over time. Similar provisions are included in comparable legislation for this reason, e.g. Schedule 23 to the Finance Act 2011, paragraph 41(1).
- c. **Power to alter the list of relevant benefits within the EVM:** This power is required because incorrect benefit payments have the potential to occur in any DWP benefit and the benefits payable change over time. Benefits that DWP administers all have specific eligibility criteria that will determine whether, and how much, a person can receive. This means inaccuracies can occur in any payment DWP makes and the rate of

inaccuracies can fluctuate within different benefits over time. For example, Pension Credit saw a rise in overpayments from £330m in 2022/23 to £520m in 2023/24, with overpayment rate due to capital increasing from 2.9% to 3.7%. The power is intended to focus initially on those benefits where there is evidence of substantial incorrect payments due to capital fraud or error, but if there is evidence in future that incorrect payments have increased in another benefit line, the intention would be to include this benefit within the scope of the power. State Pension will be explicitly excluded from the power and, as such, cannot be added through regulations.

Justification for the procedure

52. The justifications are set out according to powers in the new Schedule:
- a. **Adding to the types of person to whom a Notice can be issued:** The affirmative procedure is appropriate for any additions or amendments to the definition of a financial institution in scope of the legislation. Limiting the initial scope to Banks, as defined in the Bill, is an important safeguard to ensure the power's proportionate use. Additional parliamentary scrutiny by the affirmative procedure is considered appropriate if this definition were to change. This is to ensure that the proposed widening of the scope does not exceed the broad definition on the face of the Bill, and to ensure that any change is appropriate. This additional scrutiny is also anticipated to be welcomed by the financial industry given the potential effect of amendments on the financial industry.
 - b. **Changes in penalty amounts:** The power can only be used to amend the sums, so as to reflect a change in the value of money. As a result, the Minister has limited discretion in how the power can be exercised. In the circumstances, it is considered that the negative resolution procedure is appropriate.
 - c. **Power to alter the list of relevant benefits within the EVM:** Clearly defining the benefits in scope of the power is an important limitation on its use and an important safeguard. Therefore, DWP considers that the affirmative procedure is appropriate for any additions or changes to the benefits in scope of the power. DWP would only seek to add benefits where there is evidence of increased incorrect payments in a benefit, sufficient to justify bringing that benefit into scope. The additional scrutiny of the affirmative procedure is appropriate given the potential effect of the amendments on benefits claimants, as the addition of more benefits will bring more claimants into scope. A Henry VIII power

ensures that there will be a single list of benefits set out in legislation which aids transparency.

Clause 75: Eligibility verification (independent review)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

53. Clause 75 inserts a new section 121DC into the Social Security Administration Act 1992. This section requires the Secretary of State to appoint an independent person to review the exercise of the Secretary of State's functions in relation to the Eligibility Verification Measures. Section 121DC(7) allows the Secretary of State, by regulations, to confer functions on a person for the purposes of securing compliance with subsections (1) to (6), i.e. to enable necessary functions to be conferred on a person so that the obligations regarding independent review may be met.

Justification for taking the power

54. This power allows the Secretary of State to update the functions of the independent reviewer, as required, to ensure that there is proper oversight of the use of the powers and the exercise of the functions relating to the Eligibility Verification Measures.

Justification for the procedure

55. The power is subject to the negative procedure. The power allows for the Secretary of State to confer functions, but only in order to enable compliance with the requirements pertaining to independent oversight in relation to the Eligibility Verification Measures. In the circumstances, it is considered that the negative resolution procedure is appropriate.

Clause 82(1): Entry search and seizure incidents etc in England and Wales

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

56. This clause addresses independent oversight of Police law enforcement powers used by DWP's authorised investigators in relation to offences under the purview of DWP. This clause inserts a new section 26H into the Police Reform Act 2002, which empowers the Secretary of State to make regulations conferring functions on the Director General of the Independent Office for Police Conduct ("IOPC") in relation to DWP's authorised investigators carrying out permitted powers under PACE.

Justification for taking the power

57. DWP will need to confer functions on the Director General to investigate serious complaints relating to powers exercised by DWP authorised investigators under PACE. The regulations will make provisions as to payment for this service and also permit the lawful disclosure of sensitive files and information relating to the exercise of the aforementioned functions and powers. As this regulation making power enables accountability of those exercising law enforcement powers, it is in the public interest and the interests of those subjected to these powers for there to be an independent mechanism to review and investigate complaint cases relating to cases of serious harm or death where there has been recent contact with DWP using these powers and those deemed necessary by the Secretary of State.

Justification for the procedure

58. DWP considers that the negative procedure would be appropriate because this is the procedure which applies to regulations made under Part 2 of the Police Reform Act 2002 by virtue of section 105 of the Police Reform Act 2002. Furthermore, there exists strong precedent for utilizing this procedure to confer functions on the Director General. This is not a novel power, and this procedure has been used on more than one occasion for other government departments and agencies who have been conferred the same or similar powers in the past. As this power operates as an important safeguard to hold those exercising law enforcement powers to account, it is in the public interest and in the interests of those subject to these powers.

Clause 87: Independent review

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

59. Clause 87 introduces new sections 109I and 109J into the Social Security Administration Act 1992. Section 109J(1) allows the Secretary of State to give directions on the period to be covered by a review to the independent person appointed to carry out those reviews under section 109I. Section 109J(4) gives the Secretary of State a power to make regulations to confer functions on the independent person if required.

Justification for taking the power

60. This power allows the Secretary of State to update the functions of the independent reviewer as required to ensure that there is proper oversight of the use of the powers and the exercise of the functions in the Bill.

Justification for the procedure

61. The power is subject to the negative procedure. The power allows for the Secretary of State to confer functions but only so far as it allows compliance with how the independent review will be carried out. In the circumstances it is considered that the negative resolution procedure is appropriate.

Clause 90: Recovery from bank accounts

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative procedure for regulations under paragraphs 24(3) of Schedule 5 (new Schedule 3ZA), and negative procedure for all other regulations under paragraph 24.

Context and purpose

62. The Social Security Act 1992 will be amended to insert a section 80B and Schedule 3ZA – found at Schedule 5 of this Bill – which will provide new bank account deduction powers to be exercised administratively. The new Schedule 3ZA sets out in detail the framework and procedures involved. It will include the following delegated power to make regulations:

- a. **General provisions** (paragraph 24): The Secretary of State will have a power to make regulations concerning the operation of notices and direct deduction orders generally including, *inter alia*:
 - i. **Delivery, compliance and conflicts** (sub-paragraphs (2)(a)-(b), (f) and (h)): provisions regarding the giving of and compliance with information notices and direct deduction orders, including the method(s) and formats to be used by

the Secretary of State to give information notices to Banks, and by Banks to return the requested information; the length of time Banks have to comply with their duties; and what actions the Banks must take when unable to comply with a notice or order. Where appropriate, the Secretary of State must consult with representative Banks and others before making the first set of regulations under this power or, once regulations are made, any significant revisions to them. Finally, provision informing what should happen where a Bank receives one or more deduction or freezing orders from other government departments or by court order in relation to the same account, to provide legal clarity on how any conflict should be resolved. This may also provide how the Bank should inform the originating authority of such orders (including the Secretary of State) of any conflict.

- ii. **Definition of hardship** (sub-paragraph (2)(c)(i)): The power will provide that the Secretary of State can specify factors which must or must not be considered when determining 'hardship' (where deductions must be calculated so as not to cause hardship).
- iii. **Calculations of amount(s) to be taken** (sub-paragraph (2)(c)(ii)): The Bill provides for a power for the Secretary of State to make further regulations about the calculation of amount to be deducted and paid to the Secretary of State under a regular direct deduction order. Specifically, this will be the categories of transactions or amounts which are paid into the account, or categories of expenditure from the account, which DWP can or cannot take into consideration when calculating the deduction amount.
- iv. **Maximum rates of regular deductions** (sub-paragraph 2(d)): A power will allow the Secretary of State to prescribe the maximum rates of regular deductions from an account (as a percentage of income into the account) in fraud and non-fraud cases, provided neither exceed 40%.
- v. **Changes in penalty amounts** (sub-paragraph 2(e)): There is a Henry VIII power to amend, by regulation, the rates of penalties which can be applied against a Bank for non-compliance with its duties, set out in schedule 3ZA. This can only change the value of the penalty from £500, as set out on the face of the Bill, to reflect a change in the value of money.

- vi. **Bank's reasonable costs** (sub-paragraph (2)(g)): Where the Bill allows Banks to recover (by deduction) the costs reasonably incurred in administering the direct deduction orders in the form of fees, the Secretary of State will set (and maintain) in regulations the maximum fees which Banks can charge the liable person. Provision can also be made for Banks to charge capped fees to DWP in certain circumstances, which might include where the Banks incur reasonable expense in complying with information notices but no deduction from the liable person is possible or incur costs while being unable to make a required deduction due to lack of funds in the account.
- b. **Definition of Banks** (paragraph 24(3)): Banks are defined in paragraph 23(1), to be read alongside other enactments listed in sub-paragraph (2). There is a power via regulations to add to the definition of a financial institution. This is required to account for future developments within the finance industry and to enable the legislation to remain relevant to the changing industry which has witnessed significant change in the last ten years, including with the development of fintech and cryptocurrencies.

Justification for taking the powers

63. **General provisions:** This power is intended to be used to respond to legislative, banking and technological developments, including in response to ongoing consultation with the banking industry. The provisions deal with practical issues which may clarify obligations under the power, but not create or impose new duties or rights, and as such it is appropriate they be exercised judiciously by regulation as required rather than subject to fixed and inflexible statutory rules which may quickly fall out of step with operational and technological requirements. The regulations made under this power would have only a prospective, not retrospective, effect. Justifications for the individual provisions are set out below:
- a. **Delivery, compliance and conflicts:** DWP needs to be able to create new requirements as to the format and exchange of notices, orders and bank statements, to ensure that neither DWP nor the Banks or account holders are unreasonably inconvenienced by the introduction of new IT systems or modes of communication, and any exchanges are compatible and secure. These requirements are likely to change over time in light of technological developments and operational experience, and may be required to ensure, for example, that data is shared securely. Other aspects of Banks' compliance, such as the time they reasonably need to be able to comply, need to be set in law to determine when a penalty would be applicable, but those rules will need to be adjustable over time to reflect technological, operational and regulatory

changes in the banking sector. Further provision may also be needed about how and when, practically, a Bank must notify DWP it is unable to comply. Where similar recovery powers with equivalent effects may be enacted in the future, or court procedural rules around deduction or freezing orders may change, it will be necessary for DWP to easily provide clarification as to, amongst other things, where priority might lie between the exercise of multiple powers on the same account to create consistency and certainty. Rules on all of the above are likely to require detailed provisions which need to be changed from time to time, after consultation with the banking industry, in a manner not possible if fixed on the face of the Bill.

- b. **Definition of hardship:** DWP has concluded there can be no single, definitive meaning of the phrase which would not require revision in the future. Hardship will almost always be fact-specific on a case-by-case basis. We note that a similar phrase is used in the Finance Act (No. 2) 2015 without definition, and is considered frequently by the courts in (non-debt related) driving disqualification proceedings, again without a clear definition. DWP is satisfied that “hardship” will generally be obvious on the facts, according to the ordinary meaning of the words. The meaning of “hardship” will also change over time in response to various economic, political and social factors (e.g. inflation, cost of living changes, taxation regimes, or significant events including pandemics). The purpose of the regulation-making power, therefore, is to enable DWP to mandate certain factors (non-exhaustively) which will always be relevant (e.g. the needs of those who are reasonably and financially dependent on the liable person) or which it would be reasonable not to consider “hardship”. Defining such factors may assist in providing some consistency and clarity to DWP, tribunals, liable persons and their advisers in what will be considered, while ensuring the phrase (on the natural meaning of the words) can be applied fairly and justly on the facts of the case. The concept of “hardship” is also defined in regulations elsewhere in social security law, and fairness between groups may require one definition to be revised in line with the other from time to time.
- c. **Calculations of amount(s) to be deducted:** It is appropriate for the Secretary of State, based on operational experience of the use of the power and various legal and social developments which may arise from time to time, to determine in regulations the nature of the sums in an account which their officials can or cannot take into consideration. These might include, for example, excluding the liable person’s received child maintenance payments, specifying a minimum sum which must be disregarded to account for food and utility bills, or specifying that

deductions to be paid to other parties should be considered in the calculations. We do not consider such a list can be exhaustive, such that it would be sensible to include one in primary legislation.

- d. **Maximum rates of regular deductions:** specifying in law a maximum rate of deductions at any given time provides greater certainty to the possible parties involved as to how any deductions might operate, before calculations are made. It is sometimes appropriate for DWP to lower the permissible deduction rates for a period to account for the wider economic context (e.g. during recessions or in response to high levels of inflation), or to set rates differently according to the kind of benefit which was overpaid or to differentiate fraud and non-fraud debts. This will allow, amongst other things, DWP to ensure the rates of deductions are similar to or in line with changes made to rates of deduction from benefits or earnings. Specifying caps (other than the fixed maximum of 40%) on the face of the Bill removes any flexibility to adjust these rates to changing economic, policy and operational factors. It is appropriate to specify these in regulations where there is a safeguard on the face of the Bill (must not exceed 40%). There will be no retrospective effect, as changes to the maximum rate which can be deducted will have prospective effect only.
- e. **Changes in penalty amounts:** This is a relatively standard uprating power intended to ensure the deterrent effect of the penalty is not lost where there is a change in the value of money (i.e. inflation). Such simple uprating would not justify a statutory amendment through Parliament. The regulations made under this power would have only a prospective, not retrospective, effect.
- f. **Bank's reasonable costs:** The caps on fees Banks are allowed to charge will need to be capable of being efficiently changed from time-to-time, to ensure that they stay broadly in line with inflation and business costs while never being too high as to themselves cause unfairness or hardship on a liable person. This is the type of detail which should not be in primary legislation, otherwise there is a risk fees will remain inappropriately fixed indefinitely where an amendment would not be a priority in Parliamentary business. The purpose of the cap is to protect liable persons from unfairly high fees, while ensuring Banks are reimbursed for their genuine costs. We also anticipate that over time that Banks' costs may decrease, especially where the functions involved become computerised and automated by Banks. We therefore propose that the Secretary of State will be under a duty to make and maintain these regulations, to regulate the costs Banks can charge to ensure the fees levied are proportionate to both the debt and the

exercise of the power at any given time. The provision regarding fees to be paid by DWP, rather than the liable person, allows flexibility in the future to allow for any unreasonable financial burden placed on Banks which cannot practically be recovered by them from the liable person to be passed to DWP instead. The regulations made under this power would have only a prospective, not retrospective effect.

64. **Definition of Banks:** While the scope of the power will not extend beyond financial institutions, the intention is that the power should be capable of requiring information and deductions from any financial institution in the UK in which a liable person may hold their capital, including savings. The finance industry has witnessed significant change in the last ten years, with the development of fintech and cryptocurrencies. This delegated power will enable the Secretary of State to expand the categories of regulated financial institutions in scope if necessary in the future. Ensuring future banking solutions are in scope helps ensure the definition does not become outdated, contrary to the intention of the Bill (and ultimately Parliament), and potentially prevent unfairness arising between organisations which provide traditional bank accounts and those providing online solutions, and/or between liable persons whose accounts are in scope and those who could evade by using equivalent accounts which were out of scope by technicality only.
65. This power is appropriately limited. Paragraph 23(1) restricts any extension of ‘types of person’ to only those who provide financial products and services.

Justification for the procedure

66. **General provisions:** DWP considers that the negative resolution procedure is appropriate due to the likely uncontroversial nature and effects of the exercise of the powers in question. These are matters which may require relatively quick amendments, which may be inconsistent with the affirmative procedure, and deal mostly with points of procedural rather than substantive legislative change.
67. In particular:
- a. **Delivery, compliance and conflicts; calculation of amount(s) to be deducted; Bank’s reasonable costs:** Where regulations may clarify or alter the obligations of the Banks or set the maximum amount Banks may charge the liable person for making deductions, the powers should not confer substantive new obligations or amend the provisions set out on the face of the Bill. These provisions also require the Secretary of State to consult with appropriate representative bodies before these regulations are made (paragraph 24(5)).
 - b. **Definition of hardship:** While the definition of “hardship” constitutes an important legislative safeguard, we consider the scope of making further provision of “hardship” would be well-contained. “Essential living needs”

has a relatively narrow meaning, and any regulations that departed from the ordinary meaning of the language would clearly be *ultra vires*. Furthermore, existing regulations elsewhere in social security legislation provides such detail, including regs 116(2) and (3) of the Universal Credit Regulations 2013. Where the definition may be changed in the 2013 Regulations from time-to-time, to meet changes in societal need and to reflect consultation with relevant stakeholder groups, it may be unfair not to provide a similar or same change in the regulations under this Bill. Providing a consistent procedure for both, which allows for such a revision to be given effect quickly, would help prevent unfairness which might otherwise arise between benefit claimant and debtor groups if only one set of regulations required the more time-consuming affirmative procedure to have effect. Given the ability of the tribunals to provide an effective safeguard on the application of the regulations in practice, and in light of that wider context, we consider the affirmative procedure here would be unnecessary.

- c. **Maximum rates of regular deductions:** Changes to the maximum rates of deductions through regulations will not be able to surpass the 40% rate defined on the face of the Bill, providing a key safeguard. Regulations already provide the maximum rate of deductions through other forms of deductions, and it would be beneficial to ensure those can be updated (where appropriate to do so) alongside the new direct deduction order power. The negative procedure would be most appropriate to allow for that.
- d. **Changes in penalty amounts:** In relation to the power to amend the rates of penalties (the Henry VIII power) the power can only be used to amend the sums to reflect a change in the value of money. As a result, the Secretary of State has limited discretion in how the power can be exercised. In the circumstances it is considered that the negative resolution procedure is appropriate.

68. **Definition of Banks:** DWP considers that the affirmative procedure would be appropriate for any additions or amendments to the definition of a financial institution in scope of the legislation. Limiting the initial scope to Banks, as defined in the Bill, is an important safeguard to ensure the power's proportionate use. Additional parliamentary scrutiny of the affirmative procedure is considered appropriate if this definition were to change. This is to ensure that the proposed widening of the scope does not exceed the broad definition on the face of the Bill, and to ensure that any change is appropriate. This additional scrutiny is also anticipated to be welcomed by the financial industry given the potential effect of amendments on the financial industry.

Clause 91: Disqualification from driving

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

69. The Bill amends the Social Security Administration Act 1992 by inserting into that Act a new section 80C and new Schedule 3ZB (as found in Schedule 6 of the Bill). These provisions will allow DWP to apply to a court for a court order disqualifying a debtor from driving where they have failed, without good reason, to repay the money owed. The Schedule makes detailed provision for how and when those orders can be made.
70. It contains a single regulation-making power, at paragraph 7(4) of new Schedule 3ZB, for the Secretary of State to make regulations for the purposes of assisting the court's determination of relevant factors, such as whether the liable person has an essential need for a driving licence. This power would not constrain the court, but rather make provisions to allow (for example) access to certain information or the provision of evidence, or include other procedural elements about the provision, service and form of evidence as may be required.

Justification for taking the powers

71. This power does not change what considerations the court can consider. The regulations would simply specify what steps must be taken to allow the court to have the necessary information and evidence available to it that it can properly assess the matters. Again, these requirements may change because of operational experience and stakeholder consultation, and it would be impossible for an exhaustive list to be provided on the face of the Bill. We do not consider that this power will have retrospective effect, as the information or evidence in question should already be available to one or both of the parties.

Justification for the procedure

72. DWP considers that the negative resolution procedure is appropriate due to the very limited nature and effect of the regulations these powers would permit. The power can be used to determine minor procedural details which support the aims and effect of the provisions contained in the Bill in ways which do not risk prejudicing the rights of others or providing controversial results, such that the active consent of Parliament is necessary.
73. There are no Henry VIII powers contained in the driving disqualification power.

Clause 96(4): Offences (non-benefit payments)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Negative procedure

Context and purpose

74. Clause 96(4) amends section 121DA(5) of the Social Security Administration Act 1992 (interpretation of Part 6) and delegates to the Secretary of State the power to prescribe that certain payments will be non-benefit payments for the purposes of new sections 71ZI, 71ZJ and 71ZK (as introduced by clause 88) and new sections 111A(1H), 112(1ZA) and (1G), and section 115A(1B) and (1C).

Justification for taking the powers

75. One of the overarching purposes of the Bill provisions, is to be able to react and respond to fraud in a timely way (and also to recover fraudulent payments). Under clause 96(4), the Secretary of State will specify the non-benefit payments the provisions are to apply to. The types of payments may evolve over time, as new or different types of payments are introduced, or become subject to fraudulent activity. It is appropriate to delegate this power to maintain an ability to respond quickly and to ensure that DWP adapts to changing practices in the future.

Justification for the procedure

Regulations made under clause 96(4) will be subject to the negative resolution procedure. In the case of the anticipated regulations, the content is likely to be technical, insofar as it will describe and identify specific types of payments. This level of detail is more usually set out in regulations than in primary legislation. That is considered appropriate because it is envisaged the types of payments that will be listed, are likely to need to change over time and to be updated as and when they come to light. As the regulations are to prescribe non-benefit payments which have been the subject of fraud, their inclusion in a list set out in regulations is not expected to be controversial. For that reason, the negative resolution procedure is considered to be the appropriate level of scrutiny.

Clause 100: Power to make consequential provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Any regulations which amend primary legislation are subject to the affirmative procedure, any other regulations made under the section are subject to the negative procedure

Context and purpose

76. The Secretary of State has the power to make consequential provision in connection with this Bill or regulations made under it. Regulations made under this power may amend primary legislation, as such this is a Henry VIII power.

Justification for taking the powers

77. The purpose of this power is to enable the Secretary of State to amend existing legislation to ensure that this Bill works alongside all existing legislation. It is not possible to establish in advance all consequential provisions that may be required; a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force.

Justification for the procedure

78. DWP considers that the affirmative resolution procedure should apply where the power is exercised to amend an Act of Parliament. DWP considers that the negative resolution procedure is appropriate in all other cases.

Department for Work and Pensions

21 January 2025