

DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

DATA PROTECTION BILL

Memorandum by the Department for Digital, Culture, Media and Sport and the Home Office

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Digital, Culture, Media and Sport (“DCMS”) and the Home Office. The Bill was introduced in the House of Lords on 13 September 2017. It identifies the provisions of the Data Protection Bill (the “**Bill**”) which confer powers to make delegated legislation and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.
2. The descriptions of the powers are arranged in the order that they appear in the Bill. Schedules are addressed in order of the clauses giving effect to them.
3. The Bill contains 37 individual regulation- or rule-making powers. There are a further seven powers in respect of codes of practice or similar.
4. DCMS and Home Office have considered the use of powers in the Bill as set out below and are satisfied that they are necessary and justified.

Overview of the Bill

5. The Bill contains seven Parts.
6. The Bill makes new provision to regulate data processing in the United Kingdom, bringing our laws up to date and, in so doing, repealing the Data Protection Act 1998 (“**DPA**”). Specifically, the Bill makes provision to:
 - supplement Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of data and the free movement of such data (the “**GDPR**”); and

- implement the law enforcement directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (“**LED**”).
7. The GDPR is a directly applicable EU regulation that will apply to the UK from 25 May 2018. Subject to limited exceptions (for example, in relation to household and personal processing), it regulates all data processing within scope of EU law, other than data processing for law enforcement purposes regulated by the LED. The LED must be transposed by Member States into domestic law by 6 May 2018. Chapter 2 of Part 2 of the Bill supplements the GDPR by exercising certain derogations and discretions given to Member States.
 8. Chapter 3 of Part 2 of the Bill extends the application of the GDPR to all data processing in the UK which is out of scope of EU law, other than data processing regulated by Parts 3 (law enforcement) and 4 (UK intelligence services). This is defined in the Bill as the “applied GDPR”. This extension is necessary because not all data processing activities, for example national security, foreign policy, or defence and some immigration activities are regulated by the EU. Some changes are made to the GDPR in Schedule 6 in order to reflect the fact that this is purely a domestic regime and the EU institutions do not have any role in this processing. The derogations and discretions set out in Chapter 2 are also extended to the applied GDPR scheme. Any regulation-making power in Chapter 2 of Part 2 of the Bill may be extended to the applied GDPR (Chapter 3 of Part 2 of the Bill).
 9. Part 3 of the Bill provides for one standardised regime for all law enforcement processing carried out by a competent authority; that is a law enforcement body. Part 3 therefore implements the provisions of the LED and further regulates all domestic law enforcement processing by competent authorities which is outside the scope of EU law. Part 4 of the Bill regulates data processing by the UK intelligence services. This regime is based on the draft modernised Council of Europe Convention for the protection of individuals with regards automatic processing of personal data (“**Convention 108**”).

10. Parts 5 and 6 sets out the role and enforcement powers of the Information Commissioner (the “**Commissioner**”) under each of the data processing regimes in the GDPR and Parts 2, 3 and 4 of the Bill.
11. Part 7 contains a number of supplemental provisions, including in clause 169 general provision about the making of regulations under the Bill. Amongst other things, clause 169 requires the Secretary of State to consult the Commissioner before making regulations under the Bill (subject to the limited exceptions specified in subsection (2)).

PART 2: GENERAL PROCESSING

Clause 6(1)(c) and (2): Power to amend the definition of “public authority” and “public body”

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

12. The terms “public authority” and “public body” are used throughout the GDPR to outline the obligations on those bodies which differ from other data controllers and processors. However, the GDPR does not include a definition of those terms. Instead, the Commission has confirmed that Member States are to use their national law definition. The DPA, as amended by the Freedom of Information Act 2000 (“**FOIA 2000**”), defines the term using the definition in section 3 of FOIA 2000 and section 3 of the Freedom of Information Scotland Act 2002 (“**FOISA 2002**”).
13. This approach has been maintained in clause 6 which provides a definition of the terms “public authority” and “public body” for the purposes of the GDPR, by reference to that provided in the FOIA 2000 and FOISA 2002.
14. However, there may be circumstances in which the definition of “public authority” in the FOIA 2000 and FOISA 2002 may not be appropriate for the purposes of the

GDPR. As such, two regulation-making powers have been included allowing the Secretary of State:

- a. (in subsection (1)(c)) to add a body to the definition; and
- b. (in subsection (2)) to add or remove bodies from the definition in the FOIA 2000 or FOISA 2002 for the purposes of the GDPR.

Justification for taking the power

15. These regulation-making powers are required in order to ensure that the definition of “public authority” and “public body” remains appropriate for the provisions which apply to those bodies under the GDPR, without the need for primary legislation to make limited amendments to the definition.
16. This is particularly important as sections 4 and 5 of the FOIA 2000 provides the Secretary of State with regulation-making powers to add or remove bodies from the list of “public authorities” and sections 4 and 5 of the FOISA 2002 provide Scottish Ministers with a similar power.
17. In addition, under paragraph 171 of Schedule 1 to the Wales Act 2017 (not yet in force) an exception has been included for “Public access to information held by a public authority” in respect of Welsh public authorities. Whilst the Welsh Assembly does not appear to have immediate plans to pass its own freedom of information legislation, it is possible that this may happen in due course, and should bodies be defined as “public authorities” for the purpose of that legislation they may need to be incorporated into the GDPR definition.
18. The Government considered whether the regulation-making power should permit amendment of the definition in its entirety, however, we concluded that a power to add or remove bodies from the existing definition rather than a wholesale change was sufficient to meet the aims outlined (albeit accepting that the power to add or remove bodies is not circumscribed by the clause). This is also consistent with those powers in the FOIA 2000 and FOISA 2002.

Justification for procedure selected

19. By virtue of clause 6(3), these regulations are subject to the affirmative procedure. This is considered appropriate given that the exercise of the power could alter the requirements on certain bodies under the GDPR.

Clause 9(6): Power to add, vary or omit conditions or safeguards applying to processing special categories of personal data and criminal convictions etc data

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

20. Clause 9 enables the processing of special categories of personal data under Article 9(2) of the GDPR, by way of derogation from the prohibition on the processing of these categories of data in Article 9(1). It also enables the processing of criminal convictions and offences data under Article 10, exercising the derogation contained in that Article.
21. Such processing may only be carried out under one of the processing conditions provided for in Parts 1 to 3 of Schedule 1 and subject to safeguards for the data subject contained both in individual processing conditions and in Part 4 of Schedule 1.
22. Clause 9(6) confers a power on the Secretary of State to make regulations to amend Schedule 1, by adding, varying or omitting conditions or safeguards. Such regulations may also make consequential amendments, where required, to clause 9 (for example, changes to subsections (2), (3) and (5) if a new Part is added to the Schedule).

Justification for taking the power

23. The power is based on the position in Schedule 3 to the DPA. Paragraph 10 of that Schedule provided powers for additional processing conditions for sensitive

personal data to be added by way of inclusion in a statutory instrument. This power was exercised five times, with a number of significant processing conditions being included in those statutory instruments.

24. The effects of the Data Protection Act (Processing of Sensitive Personal Data) Orders of 2000¹, 2002², 2006³ and 2009⁴ are reproduced in the Bill (the 2012 Order⁵ related to the Hillsborough Independent Panel and is no longer needed).
25. Paragraphs 2, 7 and 9 of Schedule 3 to the DPA provide powers to exclude the application of certain conditions in specified cases, or to provide that conditions were to be regarded as not satisfied unless specified further conditions are also satisfied. The power to amend or remove conditions is based on those powers, though it is drawn slightly wider. It is necessary to enable safeguards for data subjects to be added to or adapted, where it becomes apparent that the conditions and safeguards provided in Schedule 1 do not provide sufficient protection for data subjects, or where the conditions and safeguards need updating to deal with changing circumstances. Exercise of the power would be subject to Articles 9(b), (g), (h), (i) and (j) and 10 of the GDPR, which require, for example, that the safeguards provided are appropriate.
26. The power allows the amendment of Schedule 1 in order to ensure legislative coherence. Otherwise, data controllers would have to consult not only the GDPR and the Bill but also secondary legislation made under the Bill to understand the full effect of the processing conditions as amended. As the Government has taken the decision to re-enact the substance of the existing statutory instruments, it is the Government's view that legislative coherence can be strengthened by requiring all further amendments to be set out in Schedule 1.

Justification for procedure selected

27. By virtue of clause 9(7), the regulations are subject to the affirmative procedure. This is considered appropriate given that such regulations will affect how

¹ SI 2000/417

² SI 2002/2905

³ SI 2006/2068

⁴ SI 2009/1811

⁵ SI 2012/1978

particularly sensitive categories of personal data may be processed and the fact that any regulations are capable of amending clause 9 of and Schedule 1 to the Bill.

Clause 11(1) and (2): Power to specify maximum fees and to require controllers to prepare guidance about fees

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and Purpose

28. Article 13 and 14 GDPR impose obligations on a controller to provide certain information to a data subject and take action under Articles 15 to 22 (which confer various rights on data subjects) and 34 (which requires a data controller to inform a data subject of a personal data breach). The relevant information must be provided free of charge. However, where a request for information is manifestly unfounded or excessive the controller may charge a reasonable fee or refuse to act.
29. Article 15 GDPR gives a data subject a right to obtain from a controller information about processing and a copy of the personal data undergoing processing. Article 15(3) provides that where the data subject asks for additional copies the controller may charge a reasonable fee based on administrative costs.
30. Clause 11(1) provides a power to make regulations setting a cap on what is considered reasonable for the purposes of both Article 12(5) and Article 15(3). Clause 11(2) separately enables the Secretary of State to make regulations requiring specified categories of controller to publish guidance about those fees and identifying what such guidance must include.

Justification for taking the power

31. The powers are necessary to ensure that controllers do not exercise the rights to levy fees in a way that imposes unreasonable burdens on data subjects. Although the GDPR specifies that any such fee must be reasonable and based on administrative costs, the Government is keen to avoid controllers attempting to charge excessive fees, thus requiring a data subject to challenge the fee. The Government considers, therefore, that there should be a backstop power for the Secretary of State to set a maximum fee if evidence comes to light that the fees being charged by controllers are excessive. There is an analogous power to set a maximum fee for subject access requests under section 7(2)(b) of the DPA (although under that Act a fee is chargeable for the generality of subject access requests save in prescribed cases).

Justification for the procedure selected

32. By virtue of clause 11(3), these powers are subject to the negative procedure. Notwithstanding the fact that fees prescribed under the DPA are only required to be laid before Parliament and are not otherwise to any parliamentary procedure (see section 67(6) of that Act), the negative procedure is more commonly applied to statutory instruments setting fee levels (including, for example, fees set under section 9 of the Freedom of Information Act 2000 in respect of requests for information) and is considered to provide a sufficient level of parliamentary scrutiny in this instance not least, because the effect of any regulations would be to cap the level of fee that may be charged.

Clauses 13(6) and 48(4): Power to provide for further safeguards in respect of automated decision-making

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

33. Article 22 of the GDPR prohibits a decision having legal (or similarly significant) effects concerning a data subject to be based solely on automated processing. Article 22(2)(b) provides an exemption where the decision is authorised by Union or Member State law which includes suitable measures to safeguard the data subject's rights or freedoms and legitimate interests. Clause 13 imposes safeguards for those purposes, which replicate the existing safeguards in section 12(2) of the DPA. Clause 13(6) gives the Secretary of State the power to impose additional safeguards by regulations; the power extends to amending provision in clause 13 (subsection (7)(a)).
34. Article 11 of the LED makes similar provision in respect of automated decision-making. Clauses 47 and 48 give effect to Article 11 and subsections (4) and (5)(a) of clause 48 include a similar regulation-making power.

Justification for the power

35. Automated processing is likely to become an increasingly prevalent aspect of decision making and it is therefore possible new, additional safeguards will be needed to be adopted to meet changed circumstances as a result of future developments in this area. The Government therefore considers it is prudent to take a power to make regulations to allow the Secretary of State to impose additional safeguards or to amend the existing safeguards in clauses 13 and 48 to take account of any future technological or industry developments.

Justification for procedure selected

36. By virtue of clauses 13(9)(b) and 48(5)(b), the powers are subject to the affirmative procedure. The Government considers this level of scrutiny to be appropriate given the purpose to safeguard the rights and freedoms of data subjects and as the regulations will have the effect of imposing obligations on data controllers. The affirmative procedure is also appropriate given that the power may also be exercised so as to amend clauses 13 and 48.

Schedule 2, paragraph 13(3): Power to amend list of Royal appointments in respect of which “listed GDPR provisions” do not apply

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

37. Paragraph 13 of Schedule 2 restricts the application of certain rights of a data subject under Chapter III of the GDPR and obligations of a controller, where those obligations correspond to those rights, in relation to data processing for the purposes of assessing a person’s suitability for the offices to which appointment is made by Her Majesty. Under the equivalent provision in the DPA (see paragraph 4 of Schedule 7), the list of appointments is prescribed by order. Paragraph 13(2) of Schedule 2 to the Bill imports the list of appointments currently contained in the Data Protection (Crown Appointments) Order 2000 (SI 2000/416).

38. Paragraph 13(3) gives the Secretary of State power to amend the list of offices to which the restriction will apply.

Justification for taking the power

39. The power in paragraph 13(3) ensures the restriction remains limited in its scope and operates only in respect of specified offices to which appointment is made by Her Majesty. It also allows the list to be kept current and, as such, is equivalent to the precursor power in the DPA.

Justification for procedure selected

40. By virtue of paragraph 15(4) of Schedule 2, these regulations are subject to the affirmative procedure as befitting a Henry VIII power. This level of scrutiny is appropriate to protect the rights and freedoms of data subjects given that the effect

of the regulations is to restrict those rights. It also mirrors the level of scrutiny attached to the precursor power in the DPA.

Schedule 2, paragraph 24(6): Power to amend list of codes of practice

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

41. Article 85 GDPR allows Member States to exercise wide derogation when processing for freedom of expression and information including, among other thing, journalistic, academic, artistic or literary reasons. Paragraph 24 of Schedule 2 sets out the UK exemptions in reliance on this power. To rely on this exemption a controller must reasonably believe that publication of this material is in the public interest. That belief is informed by the codes set out in paragraph 24(5) by reference to various industry codes and guidelines. Paragraph 24(6) confers a power on the Secretary of State to add or remove a code from this list.

Justification for taking the power

42. This provision is similar to a power under section 32(3) of the DPA which allowed the Secretary of State to designate codes to be taken into account. The last instrument made under that power was Data Protection (Designated Codes of Practice) (No 2) Order (SI 2000/1864). This order has not been updated for some time and the list in paragraph 24(5) reflects an updated list. The Government expects that these codes will be changed or added to over time as industry standards and regulatory bodies change. For example, we anticipate that we may need to add a code of practice published by Independent Press Standards Organisation in due course.

Justification for procedure selected

43. By virtue of paragraph 24(7) of Schedule 2, this power is subject to the affirmative procedure. Given that this power will have the effect of amending primary

legislation the Government considers that the affirmative procedure is appropriate here. The procedure is also in line with that attached to the precursor power in section 32(3) of the DPA.

Clauses 15(1) and 111(1): Power to make further exemptions

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

44. Articles 6 (lawfulness of processing), 23 (restrictions on rights of data subjects), 85 (processing and freedom of expression and information) and 89 (safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes) of the GDPR provide that a Member State may make certain derogations in law. The UK's exercise of its rights of derogation are set out in Schedules 2 to 4 to the Bill and repeat many of the exemptions contained in the DPA and in underlying regulations. Article 23 requires that any such laws must meet an objective of public interest, limited to those listed in Article 23(1)(a)-(j), and be proportionate to the legitimate aim. Clause 15(1) provides a power to make regulations in reliance on those Articles derogating from the rights given to data subjects and the obligations imposed on controllers and processors in the GDPR. By virtue of subsection (2), such regulations may amend or repeal any provision in clause 14 of and Schedules 2 to 4 to the Bill.

45. In Part 4 of the Bill, which governs processing by the intelligence services, clause 108 set out exemptions from the provisions of Part 5 for the purpose of safeguarding national security. Schedule 11 provides for further exemptions on other grounds – there is some commonality between provision in this Schedule and Schedule 2. Clause 111 confers an analogous power to that in clause 15 to provide for further exemptions if the Secretary of State considers the exemption is

necessary for safeguarding the interests of data subjects or the rights and freedoms of others; such regulations may also make amendments to Schedule 11.

Justification for taking the power

46. Articles 6, 23, 85 and 80 confer express powers on Member States to alter the application of the GDPR in the circumstances provided for in those Articles. Similarly, in relation to Part 4, Article 9 of Convention 108 enables exceptions to be made to the provisions in Chapter II of the Convention in the circumstances set out in that article. The Bill exercises these derogations to reflect current public policy, but this is subject to change over time. Flexibility is required, including after the UK leaves the EU when the regulation-making power in section 2(2) of the European Communities Act 1972 will no longer be available, to enable the UK to make full use of the permissible derogations, including by adapting (and, if necessary, amending existing provision in clause 14 and Schedules 2 to 4) or extending these derogations in the light of changing public policy requirements.

Justification for procedure selected

47. By virtue of clauses 15(3) and 111(3), these powers are subject to the affirmative procedure. The affirmative procedure is considered appropriate given the wide ranging scope of the derogations, and therefore of the regulation-making power, and the resultant potential to impact (whether positively or negatively) on the rights and freedoms of data subjects, and on the obligations on controllers and processors. The affirmative procedure is also considered appropriate given that regulations made under clause 15 and 111 may amend provisions in clause 13 and Schedules 2 to 4, and in Schedule 11, as the case may be. The parliamentary procedure mirrors that applied to the precursor power in sections 38(1) and (2) of the DPA.

Clause 17(1) and (2): Power to make provision in respect of transfers of personal data to third countries and international organisations.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

48. Subsection (1) of clause 17 provides a regulation-making power to exercise a derogation under Article 49(4) GDPR for the Secretary of State to specify circumstances in which a transfer of personal data is or is not necessary for an important reason of public interest, for the purpose of relying on Article 49(1)(d) of the GDPR to transfer personal data to a third country (i.e. a non-EU Member State) or international organisation.
49. Subsection (2) of clause 17 exercises a derogation under Article 49(5) of the GDPR for the Secretary of State to make regulations setting limits on the transfer of personal data to a third country or international organisation which does not have an adequacy decision in place where she considers such a restriction necessary for important reasons of public interest.
50. Article 49 appears in Chapter V of the GDPR, which places strict restrictions on the ability to transfer personal data to a third country (that is, a non-EU Member State) or international organisation. Generally such transfers require the EU Commission to have decided that the third country or international organisation ensures an adequate level of protection (Article 45), or for there to be certain safeguards in place (Article 46). Article 49(1) provides for other limited grounds for transferring personal data to third countries or international organisations, one of which being that the transfer is necessary for important reasons of public interest (Article 49(1)(d)).

Justification for taking the power

51. Article 49(1)(d) resembles an existing provision in paragraph 4(1) of Schedule 4 to the DPA. That paragraph enables overseas transfers of personal data for reasons of substantial public interest (similar to subsection (1) clause 17). Paragraph 4(2) of Schedule 4 to the DPA gives the Secretary of State a similar power to that in subsection (2) of clause 17. Although the paragraph 4(2) power has not been exercised, the Government considers that there is a significant difference between paragraph 4(1) and Article 49(1)(d) which significantly increases the likelihood of the power being exercised in future: Article 49(4) states that the “public interest” basis must be recognised in EU or domestic law. It is not possible for the Government to identify and set out all current and future matters of public interest in the Bill. In many cases existing law will already provide such a basis. Should any need emerge in future clause 17(1)(a) will give the Secretary of State the power to provide for any further legal basis. Clause 17(1)(b) will also give the Secretary of State the power to stop or prevent improper uses of this provision to facilitate transfers that she considers are not in the public interest. Although no such uses have been identified for inclusion in the Bill, the power provides a valuable safeguard to help protect individuals’ personal data.
52. Where there is no adequacy decision in place, the subsection (2) provision will give the Secretary of State a power to restrict the ability to transfer personal data on any other basis for important reasons of public interest, thereby providing a further safeguard to help protect individuals’ personal data.

Justification for procedure selected

53. By virtue of clause 17(3), these regulation-making powers are subject to the negative procedure, matching the level of Parliamentary scrutiny attached to the precursor power. Given that the framework for the transfer of personal data to third countries is provided for in the GDPR and that any regulations would serve to amplify the application of the public interest test provided for in Article 49, the negative procedure is considered to provide an appropriate level of scrutiny.

Clause 21(1): Power to make provision in consequence of regulations related to the GDPR.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by secondary legislation

Parliamentary procedure: Affirmative procedure

Context and purpose

54. This power enables the Secretary of State to make similar provisions for the applied GDPR, in consequence of regulations made under section 2(2) of the European Communities Act 1972 (“the 1972 Act”) in respect of the GDPR. Although it is not currently anticipated that regulations will need to be made under the 1972 Act, the purpose of the power is to ensure that should any regulations be made using that Act, it will be possible to make regulations for the applied GDPR, this helps ensure consistency between the regimes.

Justification for taking the power

55. The power is necessary to ensure that there is no divergence between the GDPR and the applied GDPR, in the event powers under section 2(2) of the European Communities Act 1972 are used to make regulations for the GDPR.

Justification for procedure selected

56. Regulations under section 2(2) of the European Communities Act 1972 may be subject either to the negative or the affirmative procedure. Accordingly, it is appropriate that any regulations made for the applied GDPR in consequence of regulations made under section 2(2) follow a similar procedure. The Government has opted for the higher of the two available procedures. In addition, as the power may be used to alter this Bill, to the extent it relates to the applied GDPR it is appropriate that the affirmative procedure is used.

Clause 22(8): Power to specify cost cap above which data controllers are not required to respond to subject access requests in respect of manual unstructured data.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by secondary legislation

Parliamentary procedure: Negative procedure

Context and purpose

57. Clause 22 disapplies certain provisions of the applied GDPR and of the Bill to manual unstructured data held by public authorities as defined by the Freedom of Information Act 2000 (“FOIA”). The clause re-enacts provisions in sections 9A(2) to (6) and 33A of the DPA. In particular, clause 22(5) provides that a data controller is not required to comply with the obligations imposed in respect of data subjects’ rights of access, conferred by Article 15(1) to (3) of the GDPR (as applied by Chapter 3 of Part 2), in relation to manual unstructured data held by FOIA public authorities if either of two conditions are satisfied. The second condition (subsection (5)(b)) is that the controller estimates that the cost of complying with the subject access request would exceed “the appropriate maximum”. A data controller must still confirm whether or not personal data concerning the data subject is being processed unless the estimated cost of complying with that obligation alone in relation to the personal data would exceed “the appropriate maximum” (subsection (6)). Subsection (8) confers power on the Secretary of State to specify the appropriate maximum for the purposes of subsections (5) and (6). Inclusion of this power replicates that in section 9A(5) of the DPA. The current regulations made under that power are the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004/3244). Regulation 3 prescribes an appropriate limit of £600 in the case of the public bodies listed in Part I of Schedule 1 to the FOIA (including government departments). An appropriate limit of £450 is prescribed in relation to all other public authorities. It is proposed to preserve these limits under the replacement regime.

Justification for taking the power

58. Given the nature of the data to which clause 22 applies, complying with subject access requests could impose significant burdens on FOIA public authorities. It is therefore considered appropriate that there should be a cap of the costs that may be incurred in responding to a subject access request. It is considered appropriate to set out the amount of the cap in secondary legislation to take account of changes over time in the costs that may be incurred by public authorities in responding to such subject access request.

Justification for procedure selected

59. By virtue of clause 22(9), these regulations are subject to the negative procedure as is the case with the precursor regulation-making power in the DPA. The Bill itself establishes the principle of a monetary cost cap (which will apply only to a narrow category of data), consequently the negative procedure is considered to afford an adequate level of scrutiny.

PART 3: LAW ENFORCEMENT PROCESSING

Clause 28(3): Power to amend list of competent authorities

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure (Negative procedure if change of name only)

Context and purpose

60. Part 3 of the Bill regulates data processing for law enforcement purposes and transposes the LED into UK law. The LED applies to the processing of personal data for law enforcement purposes by “competent authorities”. Article 3(7) defines a competent authority in the following terms:

“(a) any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties,

including the safeguarding against and the prevention of threats to public security; or

(b) any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.”

61. In the interests of legal certainty, the Government considers that it is preferable to give effect to Article 3(7)(a), in part, by setting out in the Bill a list of competent authorities rather than copying out the definition in the LED. Clause 28(1)(a) and Schedule 7 accordingly provides for such a list. The list includes UK Government and devolved administration ministers or departments, police forces and other law enforcement agencies, prosecutorial agencies, courts and prison services. The precursor to Part 3 of the Bill – Part 4 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 (SI 2014/3141) – adopted the same approach with Schedule 4 to the Regulations listing UK competent authorities. The list in Schedule 7 is designed to capture the principal office holders or organisations which will process personal data for law enforcement purposes, but it is not intended to be exhaustive. There will be other legal persons exercising functions for law enforcement purposes, for example local authorities undertaking prosecutions under trading standards legislation. By virtue of clause 28(1)(b), such persons will also come within the definition of a competent authority.

Justification for taking the power

62. The law enforcement landscape is subject to change as existing organisations take on new functions, shed existing functions, are abolished or change their official name, and new agencies are established. To ensure that the list of the principal competent authorities remains up to date, it is necessary to take a power to amend Schedule 7. Such amendments may take one of three forms, namely an amendment to the name of an office holder or organisation listed in the Schedule, the removal of an office holder or organisation, or the addition of a new office holder or organisation. The scope of the regulation-making power is necessarily

circumscribed by the provisions of Part 3 of the Bill in that this Part is concerned only with the processing of personal data for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Section 4 of the Freedom of Information Act 2000 contains a not dissimilar power to amend a list of public authorities subject to a regulatory regime.

63. Any additions to or deletions from the list of competent authorities in Schedule 7 may have implications for the operation of clause 71(4)(b). Clause 71 sets out conditions under which a competent authority may transfer personal data to a third country or international organisation. One such condition – contained in clause 71(4)(b) – is particular to the competent authorities specified in subsection (4)(b) by reference to the list in Schedule 7. As a result, any additions to or subtractions from the list in Schedule 7 may well have a knock on impact on the operation of clause 71(4)(b); clause 28(4) therefore enables regulations made under clause 28(3) to make consequential amendments to clause 71(4)(b).

Justification for the procedure

64. Clause 28(5) and (6) provides for regulations made under clause 28(3) to be subject to the affirmative procedure save where the regulations do no more than change the name of a person specified in Schedule 7, in such a case the negative procedure applies. The affirmative procedure is generally considered appropriate given the Henry VIII nature of the power and the fact that the inclusion of an office holder or organisation in the list of competent authorities carries with it significant responsibilities for the office holder or organisation concerned and significant implications for data subjects in terms of the regulatory regime governing the processing of their data. An amendment to the Schedule simply to reflect a change of name of one of the entries in the Schedule does not carry the same consequences, as such the negative procedure is considered adequate.

Clause 33(6): Power to amend Schedule 8 by adding, varying or omitting conditions for sensitive processing.

Clause 84(3): Power to amend Schedule 10 by adding, varying or omitting conditions for sensitive processing.

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary Procedure:</i>	<i>Affirmative procedure</i>

Context and purpose

65. Clause 33 sets out the first data protection principle governing the processing of personal data for law enforcement purposes, namely that the processing must be lawful and fair. In determining the lawfulness of processing, additional safeguards apply where the personal data is particularly sensitive, for example, data revealing a person’s racial or ethnic origin, DNA data or data concerning a person’s health. Such “sensitive processing” (as defined in subsection (8) of clause 33) is only permissible if it is strictly necessary, and it meets one of the conditions in Schedule 8. Paragraphs 2 and 3 of Schedule 8 transpose the two conditions expressly provided for in Article 10 of the LED, namely to protect the data subject’s vital interests or where the personal data is already in the public domain. Article 10 of the LED allows further conditions to be prescribed by Member State law. Paragraphs 1 and 4 to 6 of Schedule 8 specifies further conditions; these replicate conditions relevant to processing for law enforcement processing specified in Article 9(2) of the GDPR or Schedule 3 to the DPA. Clause 33(6) enables regulations to amend Schedule 8 to add, vary or omit conditions.
66. Schedule 10 makes equivalent provision in respect of the conditions applicable to sensitive processing under the Convention 108 regime which applies to the intelligence services as provided for in Part 4 of the Bill. Clause 84(3) contains an analogous regulation-making power to add to the conditions in Schedule 10, although it is wider in scope in that such regulations may also vary or omit the existing conditions.
67. The powers in clauses 33(6) and 84(3) are analogous to that in clause 9(6) as described above save that the powers in Parts 3 and 4 do not include a power to make consequential amendments to clauses 33 and 84 respectively; such a power is not required in the context of those clauses.

Justification for taking the power

68. The list of conditions in Schedules 8 and 10 is exhaustive. However, the GDPR (Article 9(4)), LED (Article 10(a)) and Convention 108 (Article 6), clearly provide for Member States/Parties to set out other conditions under which the processing of sensitive personal data may be authorised. The regulation-making powers afford the flexibility to specify additional conditions in the light of changing circumstances. The power mirrors that at paragraph 10 of Schedule 3 to the DPA.

Justification for the procedure

69. The regulation-making powers are subject to the affirmative procedure by virtue of clause 33(7) and 84(4). The Government considers this level of scrutiny to be appropriate to protect the rights of data subjects given that the effect of any regulations would be to set out further circumstances (or, in the case of the clause 84 power, modify existing circumstances) under which sensitive personal data may be processed. The parliamentary procedure mirrors that applied to the precursor power in Schedule 3 to the DPA.

Clause 48(4): Power to provide for further safeguards in respect of automated decision-making

70. See paragraphs 33 to 36 above.

Clause 51(4): Power to prescribe maximum fee for certain subject access requests.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative procedure

Context and purpose

71. Clauses 43 to 45 confer certain rights on data subjects, namely a right of access to information about the data subject held by a controller, a right to rectification of inaccurate data and a right to erasure or to restriction of processing of data where

such processing would infringe the data protection principles in clauses 33 to 38. By virtue of clause 50(5), a controller may not charge for the provision of information in response to a request made under clauses 43 to 45 (“subject access requests”). This prohibition on charging is subject to the provisions in clause 51. That clause enables a controller to respond to a subject access request which is manifestly unfounded or excessive in one of two ways. The first way is to provide the information requested by the data subject on payment of a reasonable fee to meet the costs of dealing with the request. The second way is to refuse to act on the request. Where a controller chooses to act on the request on payment of a fee, clause 51(4) enables the Secretary of State to specify a maximum fee or fees.

Justification for taking the power

72. Where a controller elects to act on the request on payment of a fee, Article 12 of the LED provides some further elaboration on how the fee is to be calculated, namely by “taking into account the administrative costs of providing the information or communication or taking the action requested”. Public sector organisations are expected to set their fees on the basis of full cost recovery (see Chapter 6 of the HM Treasury guide “Managing Public Money”).
73. Given that the ability of a controller to charge a fee for subject access requests is limited to those requests which are manifestly unfounded or excessive, and given the principles set out in Managing Public Money, the Government’s considers that it is appropriately a matter for individual controllers to set the level of fees to be charged under clause 51. The Government considers, however, that there should be a backstop power for the Secretary of State to set a maximum fee if evidence comes to light that the fees being charged by controllers are excessive. Section 7(2)(b) of the DPA confers a similar power to prescribe the maximum fee for subject access requests (although under that Act a fee is chargeable for the generality of subject access requests save in prescribed cases).

Justification for the procedure

74. By virtue of clause 51(5), regulations made under clause 51(4) are subject to the negative resolution procedure. Notwithstanding the fact that fees prescribed under

the DPA are only required to be laid before Parliament and are not otherwise to any parliamentary procedure (see section 67(6) of that Act), the negative procedure is more commonly applied to statutory instruments setting fee levels (including, for example, fees set under section 9 of the Freedom of Information Act 2000 in respect of requests for information) and is considered to provide a sufficient level of parliamentary scrutiny in this instance (not least, because the effect of any regulations would be to cap the level of fee that may be charged).

Clauses 52(2) and 92(13): Power to extend “the applicable time period”.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative procedure

Context and purpose

75. Clauses 43 to 45 confer various rights on data subjects, namely rights of access, to rectification of inaccurate personal data, and to the erasure of personal data or to restriction of processing where the processing of the personal data would infringe the data protection principles. Where a data subject submits a request to a data controller in pursuance of one of those rights, the controller is required to action the request without undue delay, and in any event before the end of the applicable time period (see clause 43(3) and 46(2)). The “applicable time period” is defined in clause 51. The default position is that the applicable time period is the period of one month beginning with the relevant day (as defined in clause 52(3)). However, clause 52(2) and (5) enables this one month period to be extended up to a maximum of three months.
76. Clause 92 includes analogous provisions in relation to data subjects rights of access under the provisions in Part 4 of the Bill dealing with processing by the Intelligence Services. Subsection (13) includes an equivalent power to extend the applicable time period.

Justification for taking the power

77. The provisions of the LED, as transposed by Part 3 of the Bill, confer enhanced rights on data subjects. These will impose new burdens on the law enforcement and other criminal justice agencies which will be subject to the provisions in this Part of the Bill (see published impact assessment). Moreover, in the case of subject access requests, the default maximum period for responding to a request is reduced from 40 days (see section 7(8) and (10) of the DPA) to one month. Meeting the default one month time limit for responding to subject access requests or to requests to rectify or erase personal data may, in some cases, prove to be challenging, particularly where the data controller holds a significant volume of data in relation to the data subject. A power to extend the applicable time period to up to three months will afford the flexibility to take into account the operational experience of police forces, the CPS, prisons and others in responding to requests from data subjects under the new regime. Section 7(10) of the DPA contains a similar power to extend the maximum period for responding to subject access requests under that Act. Similar considerations apply to the maximum one month period for responding to subject access requests as provided for in Part 4 of the Bill.

Justification for the procedure

78. By virtue of clause 52(6) and 92(14), the regulation-making powers are subject to the negative procedure. Although any regulations would arguably have the effect of diminishing the rights of data subjects, in that they would potentially have to wait longer for a response to a request under clauses 42 to 44 or clause 92, as the case may be, any such diminution would be marginal given the restriction on the exercise of the power imposed by clause 52(5) and 92(13). Given this, the negative procedure is considered to provide an appropriate level of parliamentary scrutiny and is in line with the procedure applicable to the precursor power in section 7(10) of the DPA.

PART 4: NATIONAL SECURITY PROCESSING

Clause 84(3): Power to amend Schedule 10 by adding, varying or omitting conditions for sensitive processing.

79. See paragraphs 65 to 69 above.

Clause 92(4): Power to specify cases where no fee is payable and to prescribe maximum fee for subject access requests.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative procedure

Context and purpose

80. Part 4 of the Bill deals with the processing of personal data by the intelligence services. Clause 92 confers certain rights on data subjects, namely a right of access to information about the data subject held by a controller. By virtue of clause 92(3), a controller is not obliged to provide information in response to such a subject access request unless the data subject has paid such reasonable fee, if any, as the controller may require. The power to charge a fee for subject access requests is subject to regulations made under clause 92(4) which enables the Secretary of State to specify cases in which the controller may not charge a fee or to specify a maximum fee or fees.

Justification for taking the power

81. Where a controller elects to charge a fee for a subject access request, clause 92(3) requires the fee charged to be of a reasonable amount. Public sector organisations are expected to set their fees on the basis of full cost recovery (see Chapter 6 of the HM Treasury guide “Managing Public Money”). It is expected that these constraints will, of themselves, be sufficient control on the amount of fees charged under clause 92.

82. Given the principles set out in *Managing Public Money*, the Government's considers that it is appropriately a matter for individual controllers to set the level of fees to be charged under clause 92. The Government considers, however, that there should be a backstop power for the Secretary of State to prevent the charging of fees in specified cases and/or to set a maximum fee if evidence comes to light that the fees being charged by controllers are excessive. Section 7(2) and (11) of the DPA confers a similar power to prescribe the maximum fee (or provide that no fee may be charged) for subject access requests.

Justification for the procedure

83. By virtue of clause 92(14), regulations made under clause 92(4) are subject to the negative resolution procedure. Notwithstanding the fact that fees prescribed under the DPA are only required to be laid before Parliament and are not otherwise subject to any parliamentary procedure (see section 67(6) of that Act), the negative procedure is more commonly applied to statutory instruments setting fee levels (including, for example, fees set under section 9 of the Freedom of Information Act 2000 in respect of requests for information) and is considered to provide a sufficient level of parliamentary scrutiny in this instance (not least, because the effect of any regulations would be to cap the level of fee that may be charged).

Clause 92(13): Power to extend “the applicable time period”.

84. See paragraphs 75 to 78 above.

Clause 111(1): Power to make further exemptions

85. See paragraphs 44 to 47 above.

PART 5: THE INFORMATION COMMISSIONER

Clause 119(1): Duty to prepare data-sharing code of practice

Clause 120(1): Duty to prepare direct marketing code of practice

Power conferred on: Information Commissioner

Power exercisable by: Statutory code of practice

Parliamentary procedure: Negative procedure

Context and purpose

86. These clauses place a duty on the Commissioner to prepare a data-sharing code of practice and a direct marketing code of practice. They carry forward provision made in sections 52A (inserted by the Coroners and Justice Act 2009) and 52AA (inserted by the Digital Economy Act 2017) of the DPA.
87. The Commissioner is required to prepare a data-sharing code of practice by clause 119. The code must contain practical guidance in relation to the sharing of personal data in accordance with the requirements of the data protection legislation, and such other guidance as the Commissioner considers appropriate to promote good practice in the sharing of personal data. “Good practice in the sharing of personal data” is defined in subsection (5) as meaning such practice in the sharing of personal data as appears to the Commissioner to be desirable having regard to the interests of data subjects and others, including compliance with the requirements of the data protection legislation (defined in clause 2(9)). “The sharing of personal data” is stated in the same clause to mean the disclosure of personal data by transmission, dissemination or otherwise making it available. The ICO’s current data sharing code of practice is available [here](#).
88. Clause 120 requires the Commissioner to prepare a code of practice containing practical guidance in relation to the carrying out of direct marketing in accordance with the requirements of the data protection legislation and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) (“PECR”) and such other guidance as the Commissioner considers appropriate to promote good practice in direct marketing. “Direct marketing” is defined in clause

120(5) as the communication (by whatever means) of advertising or marketing material which is directed to particular individuals. The meaning of “good practice in direct marketing” is given in the same clause and is such practice in direct marketing as appears to the Commissioner to be desirable having regard to the interests of data subjects and others, including compliance with the requirements of data protection legislation and PECR. The ICO’s current direct marketing guidance (section 52AA of the DPA only came into force on 27 June 2017) is available [here](#).

89. The Commissioner may amend or replace either code of practice and is required to keep them under review (Clause 122(3)). Before preparing a code or amendments, the Commissioner must consult with the Secretary of State and such trade associations (defined in subsection (5) as including a body representing controllers), data subjects and persons who appear to the Commissioner to represent the interests of data subjects as the Commissioner considers appropriate.
90. Clause 123 provides that failure by a person to comply with a code does not of itself make a person liable to legal proceedings in a court or tribunal. However, a code is admissible in evidence in such proceedings and a court or tribunal must take into account a provision of a code in determining a question where it appears relevant to a question arising in proceedings.

Justification for taking the power

91. The sharing of data is essential to the efficient and effective workings of businesses, law enforcement agencies and other organisations. To help organisations navigate the provisions of the GDPR and of this Bill, it is appropriate that the Commissioner should provide practical guidance on data sharing. Direct marketing is a sensitive category of data processing which is bound by its own set of rules, namely the PECR, it is again considered appropriate that the Commission should make available practical guidance for those who engage in such activities.
92. The provisions rely on the use of a code of practice because a statutory code, unlike primary legislation, can be updated from time to time and provides a flexible

means of ensuring that data controllers have access to accurate, up-to-date guidance, on the proper procedure to be followed in relation to the sharing of personal data and that those carrying out direct marketing similarly have access to up-to date guidance on direct marketing that accurately reflects the current law. A code can also provide a level of detail and explanation that is not possible in legislation.

Justification for procedure selected

93. Clause 121 sets out the procedure applying in relation to the approval of data-sharing and direct marketing codes of practice. It carries forward provision made in section 52B of the DPA.
94. The procedure requires the Commissioner to submit the final version of the code to the Secretary of State and the Secretary of State to lay the code before Parliament. The Commissioner is unable to issue the code if within the 40 day period (as defined in clause 121(6)) either House of Parliament resolves not to approve the code.
95. In the absence of a resolution within the 40 day period not to approve the code, the Commissioner must issue the code and the code will come into force at the end of the period of 21 days beginning with the day on which the code is issued. The Commissioner is then required by clause 122 to publish the code or, in the case of an amendment, the amendment or the amended code.
96. The purpose of these two codes of practice is to provide practical guidance to data controllers as to the proper application of the data protection legislation, as such, they do not alter the law. Nonetheless, given the sensitivity of the issues addressed by these codes and the level of public interest, the Government considers that some level of parliamentary scrutiny is appropriate. Given the nature of the codes and their legal effect, the Government further considers that the equivalent of the negative procedure affords an appropriate level of scrutiny. This matches the procedure applicable to the precursor powers in the DPA.

Clause 124(1): Power to require Information Commissioner to prepare other codes of practice

Power conferred on: Information Commissioner

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

97. This clause carries forward the Secretary of State's power under section 51(3) of the DPA to direct the Commissioner to prepare such other appropriate codes of practice for guidance as to good practice in the processing of personal data and to make those codes available to such persons as the Commissioner considers appropriate. The Commissioner is required to consult such trade associations (see definition in subsection (5)), data subjects and persons who appear to the Commissioner to represent the interests of data subjects as the Commissioner considers appropriate before preparing such a code. A direction given under this clause must describe the personal data or processing to which the code of practice is to relate, and may describe the persons or classes of person to whom it is to relate.

Justification for taking the power

98. This provision simply carries forward an existing power which remains relevant and necessary. It is properly a function of the regulator in this area to support the proper application of the data protection legislation by issuing a range of appropriate good practice guidance to data controllers, processors and others. The Government considers it appropriate that the Secretary of State should have a backstop power to require the Commissioner to prepare a code of practice in relation to particular classes of personal data or processing.

Justification for procedure selected

99. By virtue of clause 124(4), these regulations are subject to the negative procedure, mirroring the position with the precursor power in section 53(3) of the DPA. Given

the effect of any regulations is simply to place the Commissioner under a duty to issue a code of practice providing practical guidance as to the processing of specified classes of personal data – and, as such, does not amount to a significant restriction on the independent regulator’s freedom of action - the negative procedure is considered to afford an appropriate level of parliamentary scrutiny.

Clause 128: Guidance about privileged communications

Power conferred on: Information Commissioner

Power exercisable by: Statutory guidance

Parliamentary Procedure: Laid only

Context and purpose

100. This clause requires the Information Commissioner to issue guidance as to the steps she takes in practice to secure that privileged communications, as defined by subsection (5) of the clause, which she has access to when carrying out her investigatory functions are used or disclosed only so far as necessary.

101. In addition, she is to provide guidance as to the steps she takes in practice to ensure that she does not access privileged material which she is prohibited from accessing under an enactment, including the provisions in clauses 138 and 141 and paragraph 11 of Schedule 15 of the Bill.

Justification for taking the power

102. The clause is intended to provide greater clarity surrounding the way in which the Commissioner handles privileged material in practice, and confirming the processes the Commissioner has in place to protect its privileged nature. This should provide reassurance that privileged material which data controllers and processors are required to provide to the Commissioner will be handled appropriately.

Justification for the procedure

103. By virtue of clause 128(4) the guidance must be laid before Parliament, but is not otherwise subject to any Parliamentary procedure. The guidance is practical guidance setting out details of the processes the Commissioner has in place, rather than legislative in nature and, as such, it is not considered necessary to subject the guidance to formal Parliamentary scrutiny. The guidance will only confirm the steps the Commissioner takes to respect the privileged nature of the documents she has access to, and how she ensures she does not access material which she is prohibited from accessing under clauses.

104. That being said, as the guidance confirms the steps the Commissioner takes to comply with its legal obligations in respect of accessing and handling privileged material, it was considered appropriate for the Commissioner to have to consult the Secretary of State before publishing the guidance and for the draft guidance to be laid before Parliament. This will provide an opportunity for any concerns about the adequacy of the processes the Commissioner adopts in practice to be raised and addressed, and will provide greater transparency than under the DPA.

Clause 131: Guidance about fees

Power conferred on: Information Commissioner

Power exercisable by: Statutory guidance

Parliamentary Procedure: None

Context and purpose

105. This clause requires the Commissioner to prepare and publish guidance about the fees the Commissioner proposes to charge for services provided to a person or at a person's request, which the Commissioner is required or authorised to provide under clause 129 or 130 or Article 57(4) of the GDPR.

106. Before the Commissioner publishes guidance under clause 131, the Commissioner must consult the Secretary of State.

Justification for taking the power

107. The duty on the Commission to prepare and publish guidance is needed in the interests of transparency. Such guidance will inform persons of the Commissioner's approach to charging fees for services or in relation to manifestly unfounded or excessive requests. Such guidance will necessarily need to reflect the principles in the HM Treasury guide "Managing Public Money".

Justification for the procedure

108. Guidance under clause 131 is not subject to any parliamentary procedure. The clause confers no new powers on the Commission. The power to charge fees in specified circumstances is set out in the GDPR and the Bill. The Commission might be expected to issue guidance in any event about the fees it proposes to charge, but in the interests of greater transparency this clause places an express duty on the Commission to do so. Given the narrow focus of the guidance and the fact that the criteria for setting fees is to be found in the legislation, the Government's view is that such guidance does not need to be subject to parliamentary scrutiny.

Clause 132(1) and (6): Power to require controllers to pay specified charges to Commissioner

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

109. Clause 132(1) to (3) confers a power on the Secretary of State, by regulations, to require data controllers to pay charges of an amount specified in the regulations to the Commissioner. Clause 132(6) enables regulations to be made about information to be provided to the Commissioner in relation to such a charge. These powers replicate and replace the substance of the provisions in sections 108 to 110 of the Digital Economy Act 2017 ("**DEA**"). The intention is to ensure

that all provisions relating to the Commissioner's data protection functions are in the same piece of primary legislation.

110. The regulations will provide for a free-standing charge – that is, where the charge does not relate to any service provided by the Commission to the data controller. They may also make provision about the times or periods within which a charge must be paid; and (relying on the generic provision in clause 168(3)) may make provision for different charges to be payable in different cases (including no charge or a discounted charge).
111. The clause also confers a related power for the Secretary of State by regulations to require a data controller to provide information to the Commissioner, or to enable the Commissioner to require a data controller to provide information, for the purposes of determining whether a charge is payable and the amount of any such charge.

Justification for taking the power

112. It is considered appropriate for charges to be set out in regulations rather than on the face of the Bill, enabling them to be amended from time to time as necessary. The power is subject to a number of procedural safeguards (see clause 133). The Secretary of State is required to consult representatives of affected persons and (pursuant to clause 169) the Commissioner before making regulations. She must also have regard to the desirability of securing that the charges payable are sufficient to offset certain specified expenses related to the Commissioner's role as statutory regulator for data protection legislation (as defined in the Bill) and the costs arising from section 1 of the Superannuation Act 1972 or section 1 of the Public Service Pensions Act 2013 (which will replace the scheme under the Superannuation Act 1972). There is also a duty on the Secretary of State to review the working of the regulations every five years. These provisions are similar to those in section 109 of the DEA but include reference to the obligations imposed on the Commissioner as a result of the Bill.

Justification for procedure selected

113. By virtue of clause 133(4) and (5), the regulations are subject to the affirmative procedure, unless the regulations simply increase the charge made under previous regulations in line with the retail prices index, in which case the procedure is negative. The negative procedure is considered adequate where the regulations are simply uprating the level of charges to take account of inflation. Given the impact on businesses and others of any real terms increase in charges and on any changes to the information that controllers must provide the Commissioner, the higher level of scrutiny is considered appropriate in such cases. This approach reflects the recommendations of the Delegated Powers and Regulatory Reform Committee in its 21st Report of Session 2016/17.

PART 6: ENFORCEMENT

Clause 142(8): Power to confer power on the Commissioner to give an enforcement notice for the purpose of remedying other failures

Clause 148(5): Power to confer power on the Commissioner to give a penalty notice in respect of other failures

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

114. Clause 142(1) empowers the Commissioner to give a person an enforcement notice where the Commissioner is satisfied that there has been a failure described in subsection (2), (3), (4), or (5) and specifying the manner in which the person is required to remedy that failure.

115. The first type of failure is where a controller or processor has failed or is failing to comply with a relevant provision of the GDPR or of the Act.

116. The second type of failure is where a monitoring body which has not complied with an obligation under Article 41 of the GDPR (monitoring of approved codes of conduct).
117. The third type of failure is where the controller or processor has failed to respect the rights of the data subject conferred by the GDPR or by the Act.
118. The fourth type of failure is where a controller has not complied with regulations under section 132 (charges payable to the Commissioner by controllers).
119. Under clause 148(1) the same failures may trigger the issue of a penalty notice (although failure to comply with an assessment notice given in exercise of the Commissioner's powers under Article 58(1) of the GDPR or failure to comply with an enforcement notice may also do this).
120. Clause 142(8) confers on the Secretary of State power to make regulations to add to the failures which may trigger the issue of an enforcement notice. The regulations may also make provision about the giving of enforcement notices in respect of additional failures and may make consequential amendments to clauses 142 to 146 (see clause 142(10)(a) and (b)). Clauses 143 to 146 make supplementary provision about enforcement notices, the rectification and erasure of personal data, restrictions on the giving of enforcement notices and the cancellation and variation of such notices. Before making any regulations under clause 142(8), the Secretary of State is required to consult with such persons as the Secretary of State considers appropriate (clause 142(9)).
121. Clause 148(1) provides the Commissioner with power to give a penalty notice to a person in the same circumstances in which an enforcement notice may be issued or where there has been non-compliance with an assessment notice given in exercise of the Commissioner's powers under Article 58(1) of the GDPR or where there has been non-compliance with an enforcement notice.
122. Clause 140 is concerned with assessment notices which may be given to a controller or processor by the Commissioner to allow the Commissioner to assess whether there has been compliance with the data protection legislation.

123. Clause 148(2) and (3) deal with the matters to which the Commissioner must have regard in deciding whether to issue a penalty notice to a person and determining what the amount of the penalty should be.

124. Clause 148(5) empowers the Secretary of State to make regulations which give the Commissioner power to issue a penalty notice in respect of other failures and to make provision about the amount of penalty that may be imposed. The regulations may also make provision about the giving of penalty notices in relation to other failures and make consequential changes to clauses 149 to 151 which are concerned with restrictions on the giving of penalty notices, the maximum amount of a penalty and fixed penalties for non-compliance with charges regulations made under clause 132. In essence this power is a corollary to that in clause 142(8).

Justification for taking the power

125. The Bill provides for a wide range of circumstances where the Commissioner may issue an enforcement notice (and, if appropriate, a penalty notice), including in respect of a failure to adhere to the principal obligations placed on data controllers and processors. Nonetheless, the Bill imposes other duties on controllers, processors and others where a failure does not attract the power to issue an enforcement notice or a penalty notice. It may be that in the light of operational experience with the new data protection regulatory framework the Secretary of State (following consultation with the Commissioner), considers that other failures warrant the issue of an enforcement notice. These regulation-making powers provide the flexibility needed to extend the power to issue enforcement notices and penalty notices where necessary and enables this to happen relatively speedily should any gap in the enforcement framework be identified.

Justification for the procedure

126. By virtue of clauses 142(10)(c) and 148(7)(c), these regulations are subject to the affirmative procedure. This is considered appropriate given the consequences for data controllers of extending the enforcement and penalty notice regimes to cover other failures, it is therefore appropriate that such regulations should be debated

and approved by both Houses. Moreover, the affirmative procedure is appropriate given the Henry VIII nature of the powers.

Clause 151(1): Duty to publish document specifying the amount of the penalty for a failure to comply with charging regulations.

Power conferred on: Information Commissioner

Power exercisable by: Statutory document

Parliamentary procedure: Laid only

Context and purpose

127. The Bill provides that the enforcement and penalty regime applies to the failure by a controller to comply with regulations made under clause 132 (whether this is the failure to pay the charge or provide the required information). Clause 151 sets out the maximum penalty that may be charged. The Commissioner is required to produce a document that sets out the amount of the penalty that will be charged; such document may specify different amounts in different cases.

Justification for taking the power

128. The Government considers it appropriate to set the maximum amount of the penalty (through a combination of the formula in clause 151(3) and regulations made under clause 132) but otherwise to leave it to the Commissioner to determine the charge, to allow flexibility to set different charges in different cases and if necessary to adjust the penalty if it is not proving a sufficient deterrent (subject always to the maximum).

Justification for the procedure

129. The document must be laid before Parliament but it is not otherwise subject to any parliamentary process. This approach is considered appropriate given that the maximum amount of the penalty is provided for through a combination of provisions on the face of the Bill and regulations made under clause 132 which are subject to parliamentary scrutiny. .

Clause 152(1) and (2): Power to make provision about penalties

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

130. Clauses 148 to 151 and Schedule 16 confer power on the Commissioner to impose administrative penalties in the circumstances specified in clause 149(1). Clause 150 provides for two penalty maxima depending on the nature of the infringements: a higher maximum amount and a standard maximum amount. In the case of “an undertaking” the higher maximum amount is 20 million Euros or 4% of the undertaking’s total annual worldwide turnover in the preceding financial year, in any other case the higher maximum amount is 20 million Euros. The standard maximum amount is half these levels. Clause 152(1) and (2) enables the Secretary of State to make regulations which make further provision about administrative penalties. The provision which such regulations can make are:

- provision that a person is or is not “an undertaking”;
- provision about how an undertaking’s turnover is to be determined;
- provision for the purposes of Article 83 of the GDPR, and clauses 150 and 151 that a period is or is not a financial year;

131. The Secretary of State must consult such persons as the Secretary of State considers appropriate on regulation made under this clause (in addition to the general duty to consult the Commissioner).

Justification for taking the power

132. The provisions in the GDPR and the Bill provide for differential maximum fines depending on whether the person on whom the fine is to be imposed is an “undertaking”. Having established on the face of the Bill a formula for calculating

the maximum fine that may be imposed on an undertaking, it is appropriate to leave to regulations, the secondary detail as to which legal persons are to be treated as being, or not being, an undertaking (which may range from commercial undertakings to different forms of public body), how to determine an undertaking's turnover (which may vary according to the nature of the undertaking) and how to define an undertaking's financial year.

Justification for the procedure

133. By virtue of clause 152(4), these powers are subject to the affirmative procedure. This is considered appropriate given that, in particular, the definition of an undertaking will determine those organisations which are potentially subject to a higher maximum monetary penalty calculated by reference to a percentage of their turnover.

Clause 153(1): Duty to prepare guidance about regulatory action

Power conferred on: Information Commissioner

Power exercisable by: Statutory code of practice

Parliamentary procedure: Laid only

Context and purpose

134. This provision places the Commissioner under a duty to prepare and publish guidance about how the Commissioner proposes to exercise the Commissioner's functions in connection with assessment notices, enforcement notices and penalty notices.

135. The Commissioner can also prepare and publish guidance about how the Commissioner proposes to exercise the Commissioner's other functions relating to enforcement.

136. This provision sets out the matters that must be covered in any guidance prepared by the Commissioner on assessment notices, including: provision specifying factors to be considered in determining whether to give an assessment notice to a

person; provision specifying descriptions of documents or information that are not to be examined or inspected in accordance with an assessment notice, or are to be so examined or inspected only by a person of a description specified in the code; provision about the nature of inspections and examinations carried out in accordance with an assessment notice; provision about the nature of interviews carried out in accordance with an assessment notice; and provision about the preparation, issuing and publication by the Commissioner of assessment reports in respect of controllers and processors that have been given assessment notices.

137. Guidance about documents that are either not to be examined or inspected or are to be examined or inspected only by a particular person must have provisions about documents and information concerning an individual's mental health or provision of social care to that individual.
138. For penalty notices, the guidance must cover the circumstances in which the Commissioner would consider it appropriate to issue a penalty notice, the circumstances in which the Commissioner would consider it appropriate to allow a controller or processor make oral representations about a notice of intent and must also include an explanation of how the Commissioner will determine the amount of penalties.
139. It is possible for the Commissioner to alter or replace guidance and the alteration or replacement guidance must then be published. Before the publication of any guidance (including alterations or replacements) takes place, the Commissioner must consult both the Secretary of State and such other persons as the Secretary of State considers appropriate.
140. Section 55C of the DPA places an equivalent requirement on the Commissioner to publish guidance about monetary penalty notices.

Justification for taking the power

141. The enforcement powers available to the Commissioner under the GDPR and Part 6 of the Bill are significant (as indeed are those under the DPA). That being the case, it is appropriate that data controllers and processors should continue to have clarity around how the Commissioner intends to exercise her enforcement powers.

Justification for the procedure

142. Guidance prepared by the Commissioner (including alterations or replacements) must be laid before Parliament; it is not otherwise subject to any parliamentary procedure (mirroring the approach in section 55C of the DPA). The Commissioner's enforcement powers are set out on the face of the GDPR and the Bill, the guidance issued under clause 153 cannot add to or otherwise amend those powers, it will simply inform data controllers and others of the Commissioner's approach to the exercise of the powers. In these circumstances, it is not considered necessary to subject the guidance to formal parliamentary scrutiny.

PART 7: SUPPLEMENTARY AND FINAL PROVISION

Clause 170(1): Power to reflect changes to the Data Protection Convention

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure

Context and purpose

143. Part 4 of the Bill, which provides for processing of personal data by the Intelligence Services, together with other the associated provisions in Parts 5 and 6 of the Bill insofar as they relate to Part 4, is based on the draft modernised Council of Europe Convention 108. Clause 170(1) confers power on the Secretary of State to make such provision as he or she considers necessary or appropriate in connection with an amendment of, or instrument replacing, the existing Convention 108. The power only applies where the amended or replacement instrument has, or is expected to have, effect in the UK. The "expected to have effect" formula reflects the UK's practice of not ratifying international treaties until the necessary domestic law is in place. The power does not include a power to make provision in connection with amendments of an instrument that replaced Convention 108.

144. Subsection (2) of clause 170 provides that regulations under subsection (1) may amend this Bill and), add to or otherwise amend the functions of the Commissioner. The power to amend the Act needs to go beyond the provisions in Part 4 of the Bill, which are based on the draft modernised Convention 108, as other provisions in the Bill (for example, relating to the functions of the Commissioner as set out in Schedule 13 and Part 2 of Schedule 14) also derive from Convention 108. It is also the case that following the UK's withdrawal from the EU, the modernised Convention 108 could impact on the GDPR and applied GDPR schemes, necessitating amendments to Part 2 of the Bill.

Justification for taking the power

145. The Council of Europe is in the process of revising Convention 108, with negotiations on a replacement Convention being well advanced. However, until the text of the revised Convention has been agreed, relevant provisions of the Bill must necessarily be based on the current draft of the text of the modernised Convention 108. Given that a revised Council of Europe data protection Convention is in prospect, it is necessary to have a power to amend relevant provisions of the Bill to ensure that they fully reflect the terms of the modernised Convention 108 as eventually agreed by the Council of Europe. In contrast, the GDPR and LED are settled international instruments and the Government accepts that primary legislation would be required should the Government of the day seek to amend the Data Protection Act to give effect to subsequent revisions or replacements of those instruments in order that the UK's data protection legislation remained aligned with that of the EU. Given that the GDPR and LED take effect from May 2018 and will replace the current legislative framework in the DPA, the Government considers that it is appropriate also to legislate in this Bill for a replacement legislative framework, based on the modernised Convention 108, for processing of personal data by the Intelligence Services. While it would have been preferable for the modernised Convention 108 to have been agreed before the Bill's introduction, this is not the case and it is therefore considered appropriate that a power should be taken to amend relevant provisions in the Bill should the final text of the revised Convention 108 materially depart from the existing draft

text. If the revised Convention 108 is agreed during the passage of the Bill, the Government will consider the continued necessity for this power.

Justification for the procedure

146. This is a wide ranging power to amend provisions in the Bill to take account of amendments to or a replacement of Convention 108. As a Henry VIII power the affirmative procedure (applied by virtue of clause 170(3)) is considered appropriate.

Clause 178(2): Extension of power under section 27(4) of the Police and Criminal Evidence Act 1984.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

147. Section 27(4) of the Police and Criminal Evidence Act 1984 (the “1984 Act”) empowers the Secretary of State to make provision through regulations for making criminal convictions recordable. That power has been exercised through the making of the National Police Records (Recordable Offences) Regulations 2000 (S.I. 200/1139) (the “2000 Regulations”). The 2000 Regulations provide that any imprisonable offences, or those specified in the Schedule to the 2000 Regulations, are recordable offences. The 1984 Act and the 2000 Regulations extend to England and Wales only. None of the offences in the Bill are imprisonable, however clause 178(1) provides that the 2000 Regulations have effect as if offences under the Bill were listed in the Schedule to them, which has the effect of making the offences in the Bill recordable. Clause 178(2) then extends the existing power under section 27(4) of the 1984 Act to enable regulations made under it to repeal clause 178(1).

Justification for taking the power

148. Without a power to repeal clause 178(1) through secondary legislation it would be necessary to make further primary legislation to remove the recordable status of any of the offences under the Bill. The reason for including clause 178(1) in the Bill, rather than making separate regulations under section 27(4) of the 1984 Act amending the 2000 Regulations to add the offences to the Schedule, is simply to ensure that the offences under the Bill are recordable from commencement: there is no need to afford these offences a special degree of permanence not attached to other offences listed in the schedule to the 2000 Regulations. It is considered that the most appropriate way to enable changes to be made in future, if needed, is through extension of the existing power under section 27(4) of the 1984 Act.

Justification for the procedure

149. The negative procedure applies for regulations made under section 27(4) of the 1984 Act. Although the extension of the section 27(4) power enables amendment to primary legislation – and so is a Henry VIII power - in this context the negative procedure is appropriate given the very limited scope of the power and to ensure consistency for any changes made to the 2000 Regulations under the section 27(4) power.

Schedule 17, paragraph 6(1): Power to amend Schedule 17

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary Procedure:</i>	<i>Affirmative procedure</i>

Context and purpose

150. Clause 171 effectively reproduces a section 56 of the DPA, making it an offence for an employer, or potential employer or a provider of services to the public to require a person to provide information in a “relevant record” obtained or obtainable through the exercise of a right to access information under the Bill or the GDPR in connection with that employment or services. “Relevant record” is defined in Schedule 17 as a health record (as further defined in clause 184), a

relevant record relating to a conviction or caution (as further defined in paragraph 2 of Schedule 17) or relating to certain statutory functions (as further defined in paragraph 3 of Schedule 17). Paragraph 6(1) of Schedule 17 gives the Secretary of State a power to amend the Schedule.

Justification for taking the power

151. The intention of the offence in section 56 of the DPA was to address an issue of “enforced subject access” encountered following the Data Protection Act 1984 – where, for example, employers required job applicants to use their data subject access rights to obtain more criminal records information than the employer would be entitled to under a statutory criminal records check. Since the offence was commenced under the DPA 1998 further examples have arisen in other sectors – for example, by insurers to obtain health records. This illustrates the possibility of a need to make further amendments to the list of “relevant records” in future. The power in paragraph 6(1) of the Schedule would enable this.

Justification for procedure selected

152. Any change made to the definition of “relevant records” would affect the future application of the offence under clause 171. It is therefore appropriate that the affirmative procedure should apply for them. The affirmative procedure is also appropriate given the Henry VIII nature of the power.

Clause 179(1): Guidance about PACE codes of conduct

Power conferred on: Information Commissioner

Power exercisable by: Statutory guidance

Parliamentary Procedure: Laid only

Purpose and context

153. This clause provides for the Information Commissioner to issue guidance confirming how she complies with her duty under section 67(9) of the Police and Criminal Evidence Act 1984 (“PACE”) in practice when exercising her investigatory

powers. This duty requires the Commissioner to have regard to codes of practice issued under PACE when investigating and charging offenders.

Justification for taking the power

154. The clause is intended to provide greater clarity surrounding the processes the Commissioner adopts in practice when carrying out investigations to ensure she complies with the requirements on her as set out in the codes of practice issued under PACE.

155. The requirements in the PACE codes of practice are detailed and cover a wide range of scenarios, as such it would not be appropriate to repeat these in the Bill. However, it was considered appropriate for the Commissioner to outline the steps she takes in practice to adhere to the requirement under section 67(9) of PACE.

156. The guidance should provide reassurance to data controllers and processors that the Commissioner is aware of the obligations on her, and of the procedures she should be following when carrying out an investigation.

Justification for procedure selected

157. By virtue of clause 179(4) the guidance must be laid before each House, but is not otherwise subject to any Parliamentary procedure. This provision gives the Commissioner the power to issue practical guidance, rather than a legislative power and, as such, it is not considered necessary to subject the guidance to formal Parliamentary scrutiny.

158. Given the guidance is intended to confirm the steps the Commissioner takes to comply with the requirements under section 67(9) of PACE (the PACE Codes of Practice are themselves subject to Parliamentary scrutiny), the Government considered it appropriate that the Secretary of State should be consulted before such guidance is published, and that it should be laid before Parliament. This will provide the opportunity for any concerns regarding the processes the Commissioner follows to be identified and addressed, and is a more transparent process than exists under the DPA.

Clause 182: Tribunal Procedure Rules

Power conferred on: Tribunal Procedure Committee (with power to allow or disallow exercised by the Lord Chancellor)

Power exercisable by: Rules made by statutory instrument

Parliamentary Procedure: Negative procedure

Context and purpose

159. Clause 182 sets out powers to make provision in the Tribunal Procedure Rules (“the Rules”). Clause 182(1) allows the Rules to regulate the exercise before the Tribunal of the rights of appeal under clauses 25, 77, 109 and 154, and the right to apply for an order under clause 157 (and its exercise by a representative body). Clause 182(2) allows the Rules to make provision about securing the production of material for processing personal data, and taking certain steps in relation to equipment and material which are used for processing personal data.

160. These powers effectively reproduce the provisions of paragraph 7 of Schedule 6 to the DPA, with the deletion of provisions that are no longer considered to be required, and the addition of provisions about the new right to apply for an order under clause 157 and the new right to authorise a representative under clause 173 and Article 80 of the GDPR and Article 55 of the LED. The additional provisions are found in clause 182(1)(b).

161. Equivalent powers in relation to the rights of appeal to the Tribunal under FOIA 2000 are found in paragraph 8 of Schedule 18 (see below).

Justification for taking the power

162. Amendments to the Rules will be required to regulate the Tribunal procedure for the new rights which are created under the Bill – for example, to specify the time limit for an application under clause 157 and to specify procedural requirements for representative bodies bringing applications on behalf of data subjects under Article 80 of the GDPR or Article 55 of the LED.

163. Additionally, from time to time amendments may be needed to the Rules dealing with the rights of appeal and application under the Bill, to incorporate changes in the Tribunal's processes so that the Tribunal can continue to function effectively and efficiently.
164. Clause 182(2) allows specific provision to be made in the Rules about securing the production of material used for the processing of personal data, and inspecting, examining, operating and testing equipment and material used to process personal data, so that the Tribunal can obtain the access and information it requires to determine cases. These are matters particular to data protection cases and so not covered by the general powers to make Rules set out in the Tribunals, Courts and Enforcement Act 2007.

Justification for the procedure

165. The negative resolution procedure is already specified in paragraph 28(6) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007, and applies to any changes made to the Rules; the Government considers that this remains appropriate for the procedural rules provided for in clause 182.
166. Prior to any new Rules being made, the process set out in section 22 of and Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 will be followed. This requires the Tribunal Procedure Committee to meet, and to consult such persons as it considers appropriate before making the Rules. The Lord Chancellor then either allows or disallows the new Rules (giving written reasons if the Rules are disallowed). This process helps to ensure that any Rules which are made are subject to sufficient consideration and scrutiny.

Schedule 18, paragraph 8 – new section 61 of the Freedom of Information Act 2000: Tribunal Procedure Rules

<i>Power conferred on:</i>	<i>Tribunal Procedure Committee (with power to allow or disallow exercised by the Lord Chancellor)</i>
<i>Power exercisable by:</i>	<i>Rules made by statutory instrument</i>
<i>Parliamentary Procedure:</i>	<i>Negative procedure</i>

Context and purpose

167. Paragraph 8 of Schedule 18 amends the FOIA 2000 by substituting a new section 61 of that Act, which includes powers to make Tribunal Procedure Rules (“Rules”). The new section 61(1) allows the Rules to regulate the exercise before the Tribunal of the rights of appeal under sections 57 and 60 of FOIA 2000. New section 61(2) allows the Rules to make provision about securing the production of material for processing personal data, and taking certain steps in relation to equipment and material which are used for processing personal data.
168. These powers effectively reproduce the provisions of paragraph 7 of Schedule 6 to the DPA, but only in relation to the rights of appeal to the Tribunal under FOIA 2000. These powers are equivalent to the powers conferred in clause 182.

Justification for taking the power

169. The power in new section 61(1) will be required from time to time to make amendments to the Rules dealing with the rights of appeal under FOIA 2000, to incorporate changes in the Tribunal’s processes so that the Tribunal can continue to function effectively and efficiently.
170. New section 61(2) allows specific provision to be made in the Rules about securing the production of material used for the processing of personal data, and inspecting, examining, operating and testing equipment and material used to process personal data, so that the Tribunal can obtain the access and information it requires to determine cases. These are matters particular to data protection and freedom of information cases and so not covered by the general powers to make Rules set out in the Tribunals, Courts and Enforcement Act 2007.

Justification for the procedure

171. The negative resolution procedure is already specified in paragraph 28(6) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007, and applies to any changes made to the Rules; the Government considers that this remains appropriate for the procedural rules provided for in new section 61.

172. Prior to any new Rules being made, the process set out in section 22 of and Schedule 5 to the Tribunals, Courts and Enforcement Act 2007 will be followed. This requires the Tribunal Procedure Committee to meet, and to consult such persons as it considers appropriate before making the Rules. The Lord Chancellor then either allows or disallows the new Rules (giving written reasons if the Rules are disallowed). This process helps to ensure that any Rules which are made are subject to sufficient consideration and scrutiny.

Clause 190(2): Power to make further consequential amendments

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

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

Context and purpose

173. Clause 190(2) confers power on the Secretary of State to make such consequential provision as he or she considers appropriate for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation (subsection (3)(b)). The Government's view is that, in a context such as this where the Bill expressly states that a power to make consequential provision includes a power to amend primary legislation, there is a clear implication that the power to make consequential provision also includes the power to modify primary legislation in other ways (because if there is power to make amendments there is power to do something falling short of amendments).

Justification for taking the power

174. The powers conferred by this clause are wide but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions in the Bill. But there are various precedents for such provisions including section 181 of the Anti-social Behaviour, Crime and Policing Act 2014, section 85 of the Serious Crime Act 2015 and section 180 of the Policing and Crime Act 2017. Schedule 16 to the Bill already includes some changes to

other enactments as a consequence of the provisions in the Bill, but the Government is conscious that there are some 1,000 references to the DPA in other enactments which will need to be amended. While the Government aims to bring forward amendments to the Bill to make as many of the necessary consequential amendments as possible, it is nonetheless necessary and prudent for the Bill to contain a power to deal with any outstanding consequential amendments in secondary legislation.

Justification for the procedure

175. If regulations under this clause do not repeal, revoke or otherwise amend primary legislation they will be subject to the negative resolution procedure (by virtue of subsection (6)). If regulations under this clause amend or repeal provision in primary legislation they will be subject to the affirmative resolution procedure (by virtue of subsection (5)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause. In practice, so far as the applicable parliamentary procedure is concerned, every non-textual modification of primary legislation that is equivalent to a textual amendment will be included in an instrument that is subject to the affirmative procedure (relying on the provision in clause 169(6)).

Clause 191(1): Commencement power

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

Context and purpose

176. Clause 191(1) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.

Justification for taking the power

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

Justification for the procedure

178. As usual with commencement powers, regulations made under clause 191(1) are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 192: Power to make transitional, transitory and saving provision

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure</i>	<i>None</i>

Context and purpose

179. Clause 192 confers a power on the Secretary of State to make regulations making necessary transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill.

Justification for delegation

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

Justification for procedure selected

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

DCMS and Home Office

14 September 2017