

DELEGATED POWERS AND REGULATORY REFORM COMMITTEE
DATA PROTECTION BILL

**Fourth supplementary memorandum by the Department for Digital, Culture,
Media and Sport**

Introduction

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Digital, Culture, Media and Sport (“DCMS”).
2. It identifies amendments to existing delegated powers in the Data Protection Bill (“the Bill”), and some new delegated powers, and it explains why the powers or amendments to powers have been proposed, as well as the nature of, and reason for, the procedure selected. This memorandum covers all amendments made to the Bill in Public Bill Committee as well as government amendments tabled ahead of Report stage in the House of Commons.
3. DCMS have considered the amendments to the Bill as set out below, and is satisfied that they are necessary and justified.
4. All references to the Bill in this document refer to Bill 153, as brought from the House of Lords on 18 January 2018.

PART 6: ENFORCEMENT

Clause 148: Amendment to regulation-making power to confer power on the Information Commissioner to give an enforcement notice in respect of other failures to comply with the data protection legislation

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative resolution procedure

Context and purpose of the amendment

5. Part 6 of the Data Protection Bill provides a suite of enforcement powers to the Information Commissioner. Clause 148(1) empowers the Commissioner to give a person an enforcement notice where the Commissioner is satisfied that a person has

failed, or is failing, as described in subsection (2), (3), (4) or (5). Such an enforcement notice can require the person to take steps, or refrain from acting, as specified in the notice. Under clause 154(1) the same failures may trigger the issuing of a penalty notice, as might a failure to comply with an information notice, an assessment notice or an enforcement notice.

6. Clause 148(8) confers on the Secretary of State power to make regulations to add to the failures (to comply with the data protection legislation) which may trigger the issuing of an enforcement notice. In addition to making provision about the giving of an enforcement notice in respect of the failure, the regulations may also make amendments to clause 148 itself and to clauses 149 to 152 (see clause 148(9)(b)). This is necessary because clauses 149 to 152 make supplementary provision about enforcement notices and how they operate, including the rectification and erasure of personal data, restrictions on the giving of enforcement notices and the cancellation and variation of such notices. Before making regulations under this section, the Secretary of State must consult the Information Commissioner and such other persons as the Secretary of State considers appropriate (clause 179(2)).
7. Further consideration has been given to how this regulation-making power will work in practice, including in light of some of the other changes being made to the Information Commissioner's enforcement powers. It is therefore considered necessary to amend clause 148(9) so as to allow the regulations to also make consequential provision about the giving of an information notice, an assessment notice or a penalty notice, or about powers of entry and inspection, in connection with the failure. This is required due to the interaction between some of these provisions; there are a number of provisions in the Bill which operate by reference to a failure described in a particular provision of clause 148. If regulations under clause 148(8) were to amend clause 148(2) by adding a new failure to the list therein, further amendments may be required to other, related provisions in the Bill so as to ensure the desired outcome is achieved (including whether the new failure was to be caught or excluded by those other, linked provisions). As a result, these amendments propose permitting regulations under clause 148(8) to also amend clauses 143, 144, 146, 147 and 154 to 156 and Schedules 15 and 16.

Justification for taking the power

8. As touched on above, and set out in more detail at paragraph 125 of the first memorandum prepared for the Committee in respect of this Bill, the Bill sets out a number of circumstances where the Commissioner may issue an enforcement notice

(and if appropriate, a penalty notice) due to a failure to comply with the data protection legislation. However there are other types of failure, not currently covered by the enforcement notice regime, which may prove necessary to address in light of the Information Commissioner's operational experience. These amendments to the regulation-making powers will ensure that appropriate provision can be made, including specifying how related provisions such as those relating to information and assessment notices, would interact with any future changes. The Government amended the Bill in the House of Lords to take account of the Committee's recommendations in its 6th Report of Session 2017-19.

Justification for procedure selected

9. As set out in the first memorandum prepared for the Committee in respect of this Bill, regulations made under clause 146(8) are subject to the affirmative procedure (see clause 148(9)(c)). That procedure remains appropriate in light of these amendments, in light of the potential consequences for those affected by any extension to the enforcement notices regime in the Bill. It is appropriate that any such regulations are debated and approved by both Houses. The affirmative procedure is also appropriate given that the regulations, including as a result of these amendments, can amend primary legislation.

Clause 159: Amendment to provision requiring the Information Commissioner to issue guidance about regulatory action

Power conferred on: Information Commissioner

Power exercisable by: Statutory guidance

Parliamentary Procedure: First edition of guidance: Negative resolution procedure

Subsequent editions: Laid only

Context and purpose of the amendment

10. Clause 159 imposes a duty on the Information Commissioner to produce and publish guidance about how the Commissioner proposes to exercise her functions in connection with assessment notices, enforcement notices and penalty notices. Clause 159(2) also provides the Commissioner with a discretionary power to produce and publish guidance about how she proposes to exercise her other functions under Part 6.

11. A number of amendments are proposed to this clause in light of the changes being made to the Commissioner's enforcement powers through other amendments. In summary, the intended approach is that these new or amended powers should be accompanied by heightened requirements on the Commissioner to produce and publish guidance about how she proposes to exercise them.
12. In particular, an amendment would include information notices in clause 159(1) so that there is a mandatory requirement on, rather than discretion afforded to, the Commissioner to produce and publish guidance about such notices. Further amendments would set out more detailed requirements as to what the guidance in respect of information notices, assessment notices, enforcement notices and penalty notices must cover. This will include, among other matters, a requirement for the Commissioner to include information about when she would consider it appropriate to issue a notice in urgent cases, and a requirement for the Commissioner to include information as to how the Commissioner will determine how to proceed if a person does not comply with a notice.
13. Before producing any guidance under clause 159, including any altered or replacement guidance, the Commissioner must consult the Secretary of State. Clause 159(7)(b) also currently requires the Commissioner to consult such other persons as the *Secretary of State* considers appropriate; by way of an additional amendment we propose to change this to a requirement for the Commissioner to consult such other persons as the *Commissioner* considers appropriate. A similar amendment is also proposed in respect of clause 157(5)(b).

Justification for taking the power

14. As set out in paragraph 114 of the first memorandum prepared for the Committee, the enforcement powers available to the Commissioner under the new data protection legislative framework are significant. It is therefore appropriate that those who might be affected by these powers, and indeed the public more generally, have the benefit of publicly available guidance as to how the Commissioner intends to exercise her powers. Since a number of amendments are proposed in order to strengthen the Commissioner's powers, it is appropriate that this is matched by heightened requirements as to the guidance that the Commissioner must produce and publish.

Justification for procedure selected

15. The procedure that would apply to this guidance is set out in clauses 159 and, following amendments at Report stage in the House of Lords, clause 160 of the Bill. In respect of the first time guidance produced under clause 159(1), the Commissioner must submit it to the Secretary of State who will lay it before Parliament. If within the “40 day period” either House resolves not to approve the guidance, the Commissioner must not issue it and instead produce a further version (to which the same procedure will apply). Otherwise, if no such resolution is approved, the Commissioner must issue the guidance which will come into force at the end of the period of 21 days beginning with the date on which it is issued.
16. Subsequent editions of the guidance, including altered or replacement guidance, must be laid before Parliament and are not otherwise subject to any Parliamentary procedure.
17. The Commissioner’s enforcement powers are set out in the General Data Protection Regulation (“GDPR”) and the Bill. Any guidance issued under clause 159 must be consistent with such powers and cannot add to or otherwise amend those powers. The guidance will simply inform controllers, processors and others of the Commissioner’s proposed approach to the exercise of these powers. In those circumstances it is considered that the approach taken in the Bill provides an appropriate level of parliamentary scrutiny, taking into account the heightened requirements for the guidance as imposed by the proposed amendments. It also reflects the Committee’s recommendations in its 6th Report of Session 2017-19.

PART 7: SUPPLEMENTARY AND FINAL PROVISION

New clause after clause 124: Duty to prepare a data protection and journalism code of practice

Power conferred on: The Information Commissioner

Power exercisable by: Statutory Code of Practice

Parliamentary procedure: Negative procedure

Context and Purpose

18. This new clause would require the Commissioner to prepare a code of practice which contains practical guidance and best practice in relation to the processing of personal data for the purposes of journalism in accordance with the data protection legislation. In preparing this code the Commissioner must have regard to the special importance of the public interest in the freedom of expression and information. The

Commissioner is already required to produce three similar codes (a data-sharing code, a direct marketing code and an age appropriate design code).

19. The Government considers that a code of practice on data protection and journalism would provide clarity about the requirements of data protection legislation to those processing personal data for the purposes of journalism. A code would also make it easier for the Information Commissioner to ensure those processing personal data for the purposes of journalism properly protect personal data and make enforcement of the GDPR simpler.
20. The Commissioner may either amend or replace the code of practice and is required to keep all of the codes she is required to produce under review (clause 126(3)). Before preparing a code or amendments the Commissioner must consult with the Secretary of State and such others as she considers appropriate, including data subjects and trade associations.

Justification for taking the power

21. The clause is intended to provide guidance to those processing personal data for the purposes of journalism as to the requirements of data protection legislation and good practice in the processing of personal data for the purposes of journalism, having regard to the special importance of the public interest in the freedom of expression and information.
22. A code of practice is appropriate because a statutory code, unlike primary legislation, can be updated from time to time and provides a flexible means of ensuring that controllers who process personal data for the purposes of journalism comply with data protection legislation and are aware of best practice. It is important that the code is able to keep up to date as the media landscape changes and so the Commissioner is able to amend the code. A code can also provide a level of detail and explanation that is not possible in legislation.

Justification for procedure selected

23. Clause 125 sets out the procedure applicable to the approval of all of the codes of practice the Commissioner is required to produce. The procedure requires the Commissioner to submit the final version of the code to the Secretary of State and for the Secretary of State to lay the code before Parliament. The first version of the code must be submitted to the Secretary of State within 18 months from Royal Assent, and the Secretary of State must lay that version before Parliament as soon as reasonably practicable.

24. The Commissioner is unable to issue the code if within a 40 day period (as defined in clause 125(7)) either House of Parliament resolves not to approve the code of practice.
25. In the absence of a resolution within the 40 day period not to approve the code of practice, the Commissioner must issue the code which will come into force at the end of the period of 21 days beginning with the day on which the code of practice is issued. The Commissioner is then required by clause 126 to publish the code of practice or in the case of an amendment, the amendment or the amended code.
26. As set out above, the purpose of the code is to provide guidance to those processing personal data for the purposes of journalism; it does not alter any legislative requirements and does not create or modify any government powers. The Government therefore considers it appropriate for the above procedure (akin to the negative parliamentary procedure) to apply. The procedure as it applies to the existing codes is covered in previous memoranda.

New clause after clause 176: Guidance about how to seek redress against media organisations

Power conferred on: The Information Commissioner

Power exercisable by: Statutory Guidance

Parliamentary procedure: None

Context and purpose

27. This proposed new clause would require the Information Commissioner to issue guidance about the steps that may be taken where an individual considers that a media organisation is failing or has failed to comply with the data protection legislation. A “media organisation” is defined as a body or other organisation whose activities consist of or include journalism.
28. There are multiple mechanisms by which individuals can seek redress against media organisations who are failing or have failed to comply with the data protection legislation. The Government considers this guidance will assist individuals better navigate statutory and media self-regulation mechanisms of redress that are available to them.
29. The guidance must include provision about relevant complaints procedures including who runs them, what can be complained about and how to make a complaint. Relevant complaints procedures include procedures for making complaints to the

Commissioner but also the Office of Communications (Ofcom), BBC and other persons who produce or enforce codes of practice for media organisations. It must also make provision about the powers of the Commissioner in relation to a failure to comply with the data protection legislation, when a claim may be made before a court and how to make such a claim, alternative dispute resolution procedures, the rights of bodies and other organisations to make complaints and claims on behalf of data subjects and the Commissioner's power to provide assistance in special purpose proceedings.

Justification for taking the power

30. This clause is intended to provide greater clarity for individuals about what procedures exist for seeking redress against media organisations who have failed or are failing to comply with data protection legislation and how to access those mechanisms. As such, the clause requires the guidance to include provision about making complaints to the Commissioner as well as media regulatory bodies including the Office of Communications, BBC and other persons who produce or enforce codes of practice for media organisations. Much of the current guidance on data protection and journalism published by the Commissioner is directed to the media, not individuals, and limited to explaining to the media what happens when someone complains to the Commissioner.

Justification for the procedure selected

31. The guidance must be laid before Parliament, but is not otherwise subject to any Parliamentary procedure. The guidance is practical guidance which will set out in one document what are the existing mechanisms of redress available to individuals against media organisations who fail or are failing to comply with data protection legislation. The guidance therefore is not legislative in nature. It will simply confirm existing mechanisms of redress against media organisations providing details about such things as who runs them, what can be complained about, alternative dispute resolution procedures, how to make a complaints and the rights of bodies and other organisations to make complaints and claims on behalf of data subjects. As such it is not considered appropriate for the guidance to be subject to formal Parliamentary scrutiny.

Clause 179 – Amendment disapplying the hybrid instrument procedure in respect of the regulation-making powers in clause 7 of the Bill.

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative resolution procedure

Context and purpose of the amendment

32. The regulation-making power in clause 7(1)(c) provides the Secretary of State with the power to specify or describe a body as a public authority even if it is not considered as such under the Freedom of Information Act 2000 (“FOIA”) or the Freedom of Information (Scotland) Act 2002 (“FOISA”).
33. The power in clause 7(3) provides the Secretary of State with the power to provide that a person specified or described in regulations is not a public authority for the purposes of the GDPR, even if it is considered to be a public authority under FOIA or FOISA.
34. Paragraphs 12 to 19 of the first memorandum prepared for the Committee set out the context and purpose of these delegated powers, and the justification for the powers and for the procedure adopted.
35. However, in summary these regulation-making powers are required 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.
36. This is particularly important as sections 4 and 5 of FOIA provides the Secretary of State with order-making powers to add or remove bodies from the list of “public authorities” in Schedule 1 to that Act, and sections 4 and 5 of FOISA provide Scottish Ministers with similar powers.
37. The affirmative procedure has been applied to these regulations, as it is acknowledged that being deemed to be a public authority for the purposes of the GDPR has a number of consequences, some of which affect how data controllers and processors can operate. Before making regulations under either power in clause 7, the Secretary of State must consult the Commissioner and other such persons as the Secretary of State considers appropriate (clause 179(2)).
38. During discussions regarding minor amendments to the wording of clause 7 (the addition of the wording “or described” in clause 7(1)(c) and 7(3)), further consideration was given to the impact of the regulation-making powers in clause 7 on data controllers and processors, and in particular the type of bodies which might be

affected. As a result, it has become clear that there may, *in extremis*, be cases where exercising the powers in clause 7 could trigger the hybrid instrument procedure.

39. An amendment made at Commons Committee would makes it clear that the hybrid instrument procedure is not to apply to regulations made under clause 7 even in cases where it ordinarily would apply.

Justification for amendment to the procedure

40. The Government notes that the powers in clause 7 are very narrowly drawn. They relate solely to the designation of bodies as “public authorities” for the purposes of the data protection legislation. Moreover, as above, they are already subject to the affirmative procedure and a statutory consultation requirement.
41. It is accepted that being deemed a public authority could have an impact on the body being included or removed from the definition, as well as other, similar, bodies, and appreciate that it is important that such bodies are able to raise concerns or questions about any changes proposed. However, we are content that the requirement to consult in clause 179(2) and the application of the affirmative procedure will provide sufficient opportunity for such comments and concerns to be raised and considered.
42. It is notable that the order making power in section 5 of FOIA is also subject to provision in section 82(5) of FOIA which disapplies the hybrid instrument procedure. The Select Committee on Delegated Powers and Deregulation concluded in its Twenty First Report of the 1998-99 Session at paragraph 12 that “the only consequence of allowing [an instrument under section 4 of FOIA] to go before the Hybrid Instruments Committee would be to allow the public authorities concerned to petition the House against the making of the order. We see no case for this.” We consider that their conclusion also holds in the context of this Bill.
43. In light of the above, the Government is of the view that the amendment adding de-hybridisation provision to clause 179 is necessary and justified.

New clause after clause 183: Representation of data subjects with their authority: collective proceedings

Power conferred on: Secretary of State

Power exercisable by: Regulations

Context and purpose

44. This power would enable the Secretary of State to make regulations enabling representative bodies to bring collective proceedings which combine two or more claims in relation to data subjects' rights.
45. Under Article 80(1) of the GDPR and clause 180 of the Bill a non-profit organisation which meets certain criteria (a "representative body") can exercise certain rights on behalf of a data subject, with the authorisation of that data subject. The rights that can be exercised by a representative body in this way are the right to complain to the Information Commissioner, the right to an effective judicial remedy against the Information Commissioner, the right to an effective judicial remedy against a controller or processor (except in relation to Part 4), and the right to compensation (except in relation to Parts 3 and 4).
46. A representative body is likely to be authorised by multiple data subjects to represent them in claims against controllers or processors for the same breaches. Under the current legislative framework a representative body will only be able to make a claim before the courts on behalf of one data subject at a time. If the representative body wishes to bring a claim under Article 80 of the GDPR or clause 183 of the Bill on behalf of multiple data subjects, it would have to make multiple claims.
47. Although a representative body could seek to utilise some of the existing measures for collective redress such as Group Litigation Orders, these processes will not necessarily provide the most efficient and effective means of redress where one representative body has been authorised by many data subjects to make a claim on their behalf. They may also lead to additional work for the courts, who may face a large number of identical claims being filed by the same representative body on behalf of many data subjects. The Government therefore considers that it would be appropriate for representative bodies to be entitled to combine claims on behalf of multiple data subjects into one claim.

Justification for taking the power

48. In order for representative bodies to be entitled to make a claim on behalf of multiple data subjects (with their authorisation), legislative provision needs to be made to permit such claims, and to deal with ancillary matters such as how any damages will be calculated and awarded.

49. This power will give the Secretary of State the ability to make such legislative provision, to enable representative bodies to bring one claim on behalf of multiple data subjects at the same time. Any further procedural provision which is required will then be made to the civil procedure rules in England & Wales and Northern Ireland, through the usual processes for amending the civil procedure rules.
50. Regulations are appropriate because, while the overarching intention is straightforward, the exact content of the legislative framework for such proceedings requires detailed consideration and consultation with the Ministry of Justice and HM Courts and Tribunals Service (as well as the equivalent bodies in Northern Ireland) in order to ensure that it is implemented in the most effective way.
51. The amendment excludes Scotland from the power because the Scottish Government's Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, currently at stage three before the Scottish Parliament, makes similar provision in relation to civil claims in general, rather than just in relation to data protection claims. This renders it unnecessary for Scotland to be within the scope of the new power.

Justification for procedure selected

52. Subsection (5) of the new clause provides that the regulations will be subject to the negative resolution procedure. The negative resolution procedure is proposed in this case, as it is a limited power to make specific provision allowing a certain type of claim to be combined before the courts to improve procedural efficiency, in pursuance of a right which is already granted in EU law and primary legislation. The regulations do not include any power to amend the Bill or other primary legislation.

New clause after clause 183: Duty to review provision for representation of data subjects

Power conferred on: Secretary of State

Power exercisable by: Report

Parliamentary Procedure: Laid only

Context and purpose

53. The GDPR and the Bill already allow representative bodies to exercise certain rights of data subjects on their behalf, with their authorisation, as set out in Article 80(1) of the GDPR and clause 180. However, Article 80(2) of the GDPR allows Member

States to choose, if they wish to do so, to permit representative bodies to exercise data subjects' rights on their behalf, *without* the authorisation of those data subjects.

54. This proposed new clause requires the Secretary of State to review how the Article 80(1) and clause 183 processes are operating in practice, and whether it would be desirable to allow representative bodies to exercise data subjects' rights under the GDPR without their authorisation, in consultation with interested stakeholders. The Secretary of State is also required to give particular consideration to the needs of children and the particular challenges they face in enforcing their rights through Article 80(1) and clause 183.

55. Following the review, the Secretary of State must lay a report of the review before Parliament. This report must be laid within 30 months of the commencement of clause 183.

Justification for taking the power

56. It is not yet known fully how effective the right under Article 80(1), when viewed alongside other existing enforcement mechanisms, will be in allowing the effective representation of data subjects. Some Parliamentarians have expressed concerns that the requirement for a data subject's prior authorisation will limit the effectiveness of Article 80(1) and prevent it from being an effective source of redress. On the other hand, allowing representative bodies to take action on behalf of a data subject without their consent (and perhaps even without their knowledge) clearly raises a number of potential problems.

57. Rather than choose to implement Article 80(2) now before the impact and effectiveness of Article 80(1) is clear, the Government therefore proposes to conduct a review to assess how effective the existing rights under Article 80 and clause 183 are after they have been in effect for a period of time. In light of that assessment, the Government will also be required to consider whether it would be desirable to allow representative bodies to take action on behalf of data subjects without their consent. There is also a need to consider the specific situation of children and the challenges which they may face in authorising representative bodies to act on their behalf, as well as whether children's rights organisations should be able to exercise children's data protection rights on their behalf. This will also be considered as part of the review. In conducting the review the Secretary of State is required to consult with the Information Commissioner and such other persons as the Secretary of State

considers appropriate, including groups which are active in data protection, children's rights groups, children, parents, child development experts, and trade associations.

58. The Secretary of State is required to prepare a report of the review and lay it before Parliament within 30 months of clause 183 commencing. There is also an associated power for the Secretary of State to make regulations allowing representative bodies to exercise rights on behalf of data subjects without their consent, which can only be exercised following the laying of the report (see entry below).

Justification for procedure selected

59. The report on the review must be laid before Parliament within 30 months of clause 180 commencing, but is not otherwise subject to any Parliamentary procedure.

60. The report will set out the findings of the review which has been conducted into the operation of Article 80(1) and clause 183 and the merits of implementing Article 80(2). It will not be legislative in nature, and will not give rise to any new rights or obligations. It may reach conclusions and make recommendations about proposed action, but the decision as to whether to take any action as a result of the review, and what action to take, will rest with the Secretary of State. If the Secretary of State decides to implement Article 80(2) as a result of the review, this will be done by exercising the power below, which is proposed to be subject to the affirmative resolution procedure. As such it is not considered necessary to subject the report to formal Parliamentary scrutiny.

New clause after clause 183: Post-review powers to make provision about representation of data subjects

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative procedure

Context and purpose

61. This power can only be exercised after the review under clause 182 has been conducted and the report which the Secretary of State is obliged to lay under the new clause *Duty to review provision for representation of data subjects* has been laid before Parliament.

62. If, as a result of the review and the findings of the report, the Secretary of State considers that it would be appropriate to implement Article 80(2) and allow representative bodies to exercise rights on behalf of data subjects without their consent, this power gives the Secretary of State the ability to do so.
63. The power permits the Secretary of State, by regulations, to allow representative bodies to exercise the rights of data subjects under Articles 77, 78, 79 and 82 of the GDPR without the authorisation of the data subject. It also permits the Secretary of State to allow children's rights organisations to exercise those rights on behalf of children without their consent (in addition to non-profit organisations who meet the existing criteria for representative bodies).

Justification for taking the power

64. Until an assessment has been made of how effective the rights under Article 80(1) are in practice at protecting data subjects' rights under the GDPR, the Government considers that it would be premature to implement Article 80(2). Instead, any implementation of Article 80(2) should only take place after a review which all relevant stakeholders have had the opportunity to contribute to has taken place, and has been published and laid before Parliament.
65. This will allow an assessment to be made of whether further provision is needed to supplement the Article 80(1) right, in light of practical experience of the use of that Article following the commencement of the Bill, and whether the risks of allowing cases to be brought on behalf of data subjects without their consent are outweighed by the benefits. It is therefore considered appropriate to take a power for the Secretary of State to make such provision at a later date, if the review indicates that this would be advisable, and following consultation with the Ministry of Justice, HM Courts and Tribunals Service (as well as the equivalent bodies in Northern Ireland).

Justification for procedure selected

66. The power can only be exercised after the review referred to in the new clause *Duty to review provision for representation of data subjects* has been conducted, and a report of that review has been laid before Parliament, which Parliament will have had the opportunity to consider. The power will allow the Secretary of State to make associated provision about matters such as the ability of a data subject to stop a representative body from exercising their rights, about proceedings before a court or tribunal in exercise of those rights, and allowing representative bodies to bring

proceedings before a court or tribunal combining two or more claims on behalf of a data subject.

67. The power also allows the Secretary of State to amend a limited number of sections of the Bill – sections 164 to 166, 177, 183, 196, 198 and 199 – and to insert new sections and Schedules into Parts 6 and 7. The listed sections all contain provisions about, or references to, the exercise of rights by representative bodies on behalf of data subjects, and so it may be necessary to amend these sections to reflect the new position with regard to the ability of representative bodies to represent data subjects without their consent. The Secretary of State will only be entitled to amend these sections in accordance with the purpose set out in subsection (1) – i.e. to make provision enabling representative bodies to exercise rights on behalf of data subjects without their consent.

68. As the power will allow the Secretary of State to amend certain provisions of the Bill, it is appropriate for the affirmative resolution procedure to apply.

Clause 204: Proposed amendment to provision conferring power to make transitional, transitory or saving provision

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: No procedure unless amending or repealing Schedule containing transitional provision (in which case the negative resolution procedure applies)

Context and purpose of the amendment

69. Clause 204 of the Bill confers on the Secretary of State a standard power to make transitional, transitory or saving provision by regulations in connection with the coming into force of any provision in the Bill. An amendment is proposed which would add a new Schedule to the Bill. The Schedule would set out transitional provision relating to matters such as the operation of data subjects' rights in respect of matters occurring before the repeal of the Data Protection Act 1998 ("DPA") and Part 4 of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014 (SI 2014/141) and the exercise of the Commissioner's enforcement powers under that and those Regulations. Accordingly amendments are proposed to clause 204 to introduce the Schedule and also to extend the regulation-making power so that it could be used to amend or repeal a provision of the Schedule. The amendment or

repeal of a Schedule provision may be necessary where an inadvertent error or omission becomes apparent following Royal Assent or where a more appropriate form of transitional provision than that contained in a Schedule provision is subsequently needed.

Justification for taking the power

70. The power to make transitional, transitory or saving provision remains necessary for the purpose of making free-standing provision in regulations on matters not covered in the new Schedule. This is likely to be where a matter has been inadvertently overlooked and so does not appear in that Schedule. Without this regulation-making power, primary legislation would be required to make the necessary provision. An amendment is proposed which will provide for the power to include a power to amend or repeal a provision of the Schedule by regulations. This is needed to deal with any omissions or changes to a Schedule provision should a need for these arise after Royal Assent, for instance, because it would be sensible to substitute for that provision new provision which is subsequently considered to be more appropriate. The aim however is for transitional provision to be contained mainly if not wholly in the Schedule. However, a possible need to include such provision in regulations or to amend or repeal the Schedule provisions by regulations cannot be ruled out.

Justification for procedure selected

71. It is customary for transitional, transitory and saving provisions to be included in commencement regulations which are not subject to any parliamentary procedure. In this case, considerable transitional provision has been included on the face of the Bill but the power to make further transitional provision in secondary legislation has been retained. In such circumstances no parliamentary procedure applies, as is customary. But if the further provision entails amending the Bill itself then the Government considers that some parliamentary procedure would be appropriate. More specifically, given the specific and time-limited nature of the provisions, the government considers that the negative procedure would be appropriate.

Schedule 18: Amendment to regulation-making power in Access to Health Records (Northern Ireland) Order 1993

Power conferred on: Department of Health (Northern Ireland)

Power exercisable by: Regulation-making power

Context and purpose of the amendment

72. Schedule 18 to the Bill amends references to the DPA in other legislation, and one such proposed amendment is to Article 5(4) of the Access to Health Records (Northern Ireland) Order 1993 (“AHR(NI) Order”).
73. Article 5 of the AHR(NI) Order provides a right of access to the health records of deceased patients to certain, specified people (e.g. the Personal Representative of the deceased) in Northern Ireland (see Article 5(1) as amended by the DPA).
74. Article 5(4) of the AHR (NI) Order provides that maximum fees for accessing medical records (as set out by the Order) could be charged, and did this in Article 5(4)(a) by reference to the regulation-making power in section 7 of the DPA.
75. Under the GDPR the power to charge fees for responding to subject access requests (as per Article 15(3)) is limited to cases where the data subject requests a further copy of the information provided to them, or where a request is manifestly unfounded or excessive, as per Article 12(5).
76. As such, the regulation-making power in clause 12 of the Bill is limited to these circumstances, rather than being as wide as the power in section 7 of the DPA.
77. Currently, the Department of Health in Northern Ireland use Article 5(4) of the AHR(NI) Order to apply a maximum fee for handling requests for access to deceased patients’ data in the circumstances set out in Article 5(4)(a). They wish for this to continue to be the case.
78. Access to deceased patients’ health records is not regulated by the GDPR, and so it is permissible for the Department to continue to charge fees in such cases.

Justification for taking the power

79. As outlined above, currently the Department of Health relies on Article 5(4)(a) to set maximum fees for responding to requests for access to deceased patients’ data, and they want to maintain the status quo.
80. As section 7 of the DPA is to be repealed by the Bill, the reference in Article 5(4)(a) of the AHR(NI) Order will be redundant, and there will not be a mechanism by which a maximum fee can be set for charging for access to health records.

81. In order to ensure Article 5(4)(a) continues to provide a means of setting a maximum fee, it is necessary to provide the Department with the power to set the maximum fee.

Justification for the procedure adopted

82. Article 12 of the AHR(NI) Order outlines that any regulations made under the Order are to be subject to the negative resolution procedure.

83. The power to prescribe a maximum fee for handling requests for access to personal data under section 7 of the DPA, is subject to the negative procedure as set out in section 67(5) of the DPA.

84. In light of the above, and having considered the impact of the regulation-making power, the Government is of the view that the negative procedure provides a sufficient level of scrutiny.

Schedule 18: Amendment to apply clause 156 to the Electronic Identification and Trust Services for Electronic Transfers Regulations 2016

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

85. The Electronic Identification and Trust Services for Electronic Transfers Regulations 2016 (“EITSET”) provide for enforcement of the regulations through applying various provisions in the DPA and modifying them where necessary to ensure they are effective in an EITSET context.

86. Given the DPA is being repealed, it has been necessary to make consequential amendments to EITSET to ensure that the Commissioner continues to have effective enforcement powers (see amendments to Schedule 18 to the Bill).

87. One of the reasons EITSET applied the enforcement provisions in the DPA was to avoid the Commissioner having numerous different enforcement procedures for the different regimes which she is responsible for regulating. As such, when making the consequential amendments to EITSET the intention has been to keep the enforcement regime as closely aligned to that in the Bill as possible.

88. In order to ensure the EITSET enforcement provisions are in line with those in the Bill, clause 154 of the Bill (penalty notices) has been applied with modification (for example removing references to the GDPR which are not relevant to EITSET).
89. This in turn means that the other clauses which are connected to clause 154 have also been applied, for example clauses 155 (Penalty notices: restrictions), 156 (Maximum amount of penalty) and clause 158 (Amounts of penalties: supplementary). Clause 157 was not applied as this relates to fees payable by data controllers to the Commissioner, and is not relevant to EITSET.
90. Clause 158 provides the Secretary of State with the power to make the regulations outlined in paragraph 130 of the Delegated Powers Memorandum dated 14 September 2017.

Justification for the powers

91. The justification for taking these powers in the context of the Bill is set out in paragraph 132 of the Delegated Powers Memorandum dated 14 September 2017, and the justification is the same for applying them to EITSET.

Justification for the procedure

92. The justification for the procedure adopted in the context of the Bill is set out in paragraph 133 of the Delegated Powers Memorandum dated 14 September 2017, and the same justification applies to the decision to apply the affirmative procedure in the context of EITSET.

Schedule 18: Amendment to apply clause 159 to the Electronic Identification and Trust Services for Electronic Transfers Regulations 2016

Power conferred on: The Information Commissioner

Power exercisable by: Statutory Guidance

Parliamentary procedure: First edition of guidance: Negative resolution procedure

Subsequent editions: Laid only

Context and purpose

93. As outlined above, the Commissioner's enforcement powers under EITSET are currently provided by applying a number of provisions in the DPA. In order to ensure the Commissioner continues to have effective enforcement powers under EITSET we

have made various consequential amendments applying certain enforcement powers under the Bill to EITSET, subject to modification where required.

94. Amongst the provisions applied are the information, assessment, enforcement and penalty notice provisions, although they have been modified to ensure they apply appropriately in the context of EITSET.
95. Clause 159 of the Bill imposes a duty on the Information Commissioner to produce and publish guidance about how the Commissioner proposes to exercise her functions in connection with information, assessment, enforcement and penalty notices.
96. Given the significant powers the enforcement provisions applied by EITSET provide the Commissioner, proposed amendments would apply clause 159 of the Bill to EITSET.
97. In addition, in order to ensure that the parliamentary process will work effectively should the Commissioner choose to issue combined guidance regarding the exercise of her enforcement powers under the Bill and under EITSET, at paragraph 24 of Schedule 2 to EITSET (as would be inserted by Schedule 18 to the Bill) an additional provision has been proposed outlining how the procedure will work if combined guidance is issued.

Justification for the powers

98. Clause 159 and the amendments which have been proposed to it are considered in detail above. This includes detailed discussion of the reasons the power is required and why the amendments to it are considered necessary and justified.
99. As mentioned, in order to avoid the Commissioner having numerous different enforcement processes across the different regimes she regulates, the consequential amendments proposed apply the majority of the enforcement provisions in Part 6 of the Bill.
100. In particular, the information, assessment, enforcement and penalty notice provisions all apply (subject to modifications to ensure they are relevant in the context of EITSET). Given the significant enforcement powers provided to the Commissioner, and the potential impact they have on trust service providers (in the context of EITSET), it was considered necessary that the Commissioner should be required to issue guidance as to how she proposes to use those powers.

101. As such, clause 159 has been applied by EITSET subject to minor modifications to ensure the wording makes sense in the context of EITSET (e.g. replacing references to data controller and processor to refer to trust service providers, and omitting subsection (4) and (10), as these are specific to the Bill).

Justification for procedure

102. The intention is to keep the Commissioner's enforcement powers in EITSET closely aligned to those in the Bill. With that in mind, the same procedure has been applied for the guidance issued under clause 159 as applied by EITSET. This procedure is discussed above.

103. As mentioned, the requirement for the Commissioner to issue guidance does not give the Commissioner the power to add or otherwise amend her powers. The guidance is intended to simply to inform trust service providers of the Commissioner's intentions for exercising those powers.

104. In addition to applying clause 159, Schedule 18 would include a provision "Approval of first guidance about regulatory action". This has been included as the Commissioner has outlined that in practice she may wish to produce guidance which covers both her enforcement powers under the Bill and her powers under EITSET, and so it is necessary to modify the approval process to ensure it functions appropriately in practice should the Commissioner issue combined guidance.

105. For example, should part of the combined guidance dealing with one of the regimes not be approved by Parliament, but the other part is, this provision makes it clear that the part of the guidance which was approved can be laid unaltered again with the amended version of the part of the guidance which was not approved, avoiding the need to amend a version which has already been approved (which could otherwise be required given the wording of clause 160(2)(b)).

106. This provision does not alter level of parliamentary scrutiny involved, as the first copy of the guidance (for both regulatory action under the Bill and under EITSET) must be approved by Parliament. As such, the Government is content that the regulation-making power in clause 159 (as applied by EITSET) and the provision amending the procedure in clause 160 (should combined guidance be issued) as would be provided for by Schedule 18 is necessary and justified.

Department for Digital, Culture, Media and Sport

8 May 2018