

## DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

### DRAFT INVESTIGATORY POWERS BILL

#### MEMORANDUM BY THE HOME OFFICE

1. This memorandum identifies the provisions of the Draft Investigatory Powers Bill (the Draft Bill) which confer powers to make delegated legislation, and explains why these powers have been taken and the nature of, and reason for, the procedure selected for exercising those powers.

The purpose of the Draft Bill is to modernise and update the legal framework governing the state's ability to acquire private data.

2. The Bill is in 9 Parts:

Part 1 sets out general protections for communications;

Part 2 provides for the lawful interception of communications;

Part 3 provides for the obtaining of communications data;

Part 4 makes provision for the retention of communications data;

Part 5 concerns equipment interference;

Part 6 makes provision for bulk warrants;

Part 7 provides safeguards in respect of the intelligence agencies' processing of bulk personal datasets;

Part 8 sets out oversight arrangements;

Part 9 contains miscellaneous and general provisions.

#### **PART 1: GENERAL PROTECTIONS**

##### **Clause 7(3): power to designate an EU or other international mutual assistance agreement**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

### ***Purpose of the Provision***

4. Clause 7 provides that the Secretary of State must ensure that no request for assistance in connection with the interception of communications is made under an international mutual assistance agreement on behalf of a person in the United Kingdom unless a warrant has been issued. Clause 7(3) provides for the Secretary of State, by regulations, to designate an international agreement to which the UK is a party as an international mutual assistance agreement for these purposes.
5. The delegation ensures that, if the UK enters into a new international agreement providing for mutual assistance in relation to the interception of communications, the provisions of clause 7, ensuring that a warrant must be in place, can be applied in relation to that agreement without the need for primary legislation.
6. The effect of any exercise of the delegated power will be to apply the safeguards in the Bill requiring a Secretary of State to issue a warrant, approved by a Judicial Commissioner, to any applications made for assistance under that agreement. Accordingly, the power adds safeguards and the negative procedure is appropriate.
7. The power replicates that under section 1(4) of the Regulation of Investigatory Powers Act 2000, which is also subject to the negative procedure.

### **Clause 9(4): power to modify statutory provisions providing for public authorities to obtain communications data**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative where any provision of primary legislation is amended or repealed, otherwise negative*

8. Clause 9 restricts the use of general information powers by public authorities to obtain communications data from telecommunications or postal operators. Schedule 2 to the Draft Bill amends the information powers most commonly used by public authorities to obtain communications data, repealing them so far as they enable public authorities to secure the disclosure by operators of communications data without the consent of the operator.
9. There are a large number of general information powers in existence, so that it is difficult to be sure that the Bill identifies and amends every relevant power. Subsection (2) therefore contains a catch-all provision which prevents public authorities using such powers except where the operator has given consent or

the power involves a court order or other judicial authorisation or warrant. However, it may be preferable that textual amendments are made for the purposes of clarity. Subsection (4) therefore provides that the Secretary of State may modify any enactment in consequence of subsection (2). The Secretary of State may accordingly amend legislation to restrict public authorities' powers to require disclosure of communications data, so that subsection (2) no longer needs to be relied on.

10. Subsection (4) will also mean that the Secretary of State can take steps in respect of any new information powers which are enacted following the coming into force of the Bill. While a new power would, in principle, be caught by subsection (2), it may be preferable to use the power in subsection (4) to amend the offending provision to provide clarity and certainty for operators and public authorities.
11. Regulations under subsection (4) which amend or repeal any provision of primary legislation are subject to the affirmative resolution procedure. This ensures that such regulations are afforded the appropriate degree of parliamentary scrutiny. Other regulations under subsection (4) – i.e. those which amend or repeal secondary legislation - are subject to the negative procedure. It is appropriate that a higher level of scrutiny applies to the power to amend primary legislation.

## **PART 2: LAWFUL INTERCEPTION OF COMMUNICATIONS**

### **Clause 34(2): power to authorise interception in the course of carrying on business etc**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

12. Clause 34(1) provides that conduct is authorised for the purposes of the offence of intercepting a communication in the course of its transmission if it is in accordance with regulations made under subsection (2).
13. Under subsection (2), the Secretary of State may make regulations authorising conduct which is a legitimate practice reasonably required for the purpose of monitoring or keeping a record of communications relating to the business

carried on by the person. Such conduct might include, for example, monitoring communications to investigate or detect unauthorised use of telecommunication systems or to secure effective system operation. The interception must take place in the course of transmission on apparatus or services provided by or to the person carrying on the business in connection with that business.

14. Given the pace of developments in technology and the conduct which might need to be undertaken by businesses in order to keep up with these developments and threats to the security of their systems, it is appropriate that the details of the conduct is contained in secondary legislation. That is particularly the case given that legitimate practices by businesses might otherwise risk breaching the prohibition on unlawful interception.
15. Since this secondary legislation sets out exceptions to the criminal offence in clause 2 of the Bill, it is appropriate that the power should be subject to the affirmative procedure. The power replicates that under section 4(2) of the Regulation of Investigatory Powers Act 2000, which is also subject to the affirmative procedure.

**Clause 39(5): power to specify conditions for the interception of communications at the request of a third country**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

16. Clause 39 sets out the conditions under which interception may be lawful at the request of the authorities of a country or territory outside the UK. The interception must be in accordance with an international agreement to which the UK is a party. Subsection (5) provides for the Secretary of State, by regulations, to set out additional conditions which must be met in order for the interception to be authorised.
17. For example, the Mutual Legal Assistance Convention provides for interception at the request of another country without the need for a warrant in certain limited circumstances. The regulations allow those conditions to be reflected in legislation.
18. As different agreements may contain different conditions, it is appropriate that the particular detail of the conditions is contained in secondary legislation. This

also permits the Secretary of State to provide for any future international agreements to which the UK may become a party.

19. Since this secondary legislation sets out exceptions to the criminal offence in clause 2 of the Bill, it is appropriate that it should be subject to the affirmative procedure. The power replicates that under section 4(2) of the Regulation of Investigatory Powers Act 2000, which is also subject to the affirmative procedure.

***Clause 43(5)(g): power to direct circumstances in which statistics may be published***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Direction*

*Parliamentary procedure:* *None*

20. Clause 43(1) prohibits certain persons (specified in subsection (2)) making an unauthorised disclosure of a number of matters concerning interception warrants. Those matters include the existence or contents of a warrant, details of the issue of a warrant, and the steps taken in pursuance of a warrant. Failure to comply with the prohibition is an offence.
21. The prohibition reflects that in section 19 of RIPA, and there has been some confusion as to the extent to which the publication of statistics, which some communications providers are keen to do, is prohibited. Subsection (5)(f) provides that a telecommunications operator may publish the number of warrants to which it has given effect, provided that publication is in accordance with a direction given by the Secretary of State as to how those statistics may be published. Such a direction might, for example, permit numbers of warrants to be published within a specified numerical range.
22. It is appropriate that detail of this nature should be left to the Secretary of State, who is best placed to judge what disclosures will not damage national security. Since a direction may be specific to a particular operator, it is appropriate for this to be an administrative direction rather than included in legislation.

### **PART 3: AUTHORISATIONS FOR OBTAINING COMMUNICATIONS DATA**

#### **Clause 49(5): power to provide for an alternative person to cancel an authorisation**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative (but may be affirmative)*

23. Clause 49 provides for the duration and cancellation of authorisations under clause 46. A designated senior officer who has granted an authorisation must, by virtue of clause 49(4), cancel the authorisation if satisfied that the authorisation is no longer necessary and proportionate.
24. Subsection (5) provides a regulation-making power to cater for the possibility that the person who has the duty under subsection (4) is no longer available to perform it. In particular, subsection (6) provides that the regulations may provide for the person on whom the duty is to fall to be a person appointed by the regulations. This clause mirrors the equivalent power in section 23(9) of RIPA.
25. It is appropriate for this power to be delegated to the Secretary of State, given the range of circumstances in which an alternative person might need to be appointed.
26. The negative procedure provides the appropriate level of parliamentary control for a power of this nature. The power in section 23(9) of the Regulation of Investigatory Powers Act 2000 is also subject to the negative procedure. However, regulations made under this power may also be subject to the affirmative procedure, essentially so that they may be combined with regulations made under another power subject to the affirmative procedure.

#### **Clause 55(1): power to modify section 54 or schedule 4 [designated public authorities]**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:*

*Enhanced affirmative procedure (except where regulations remove a public authority or modify the office, rank or position of designated senior officer, in which case the negative procedure applies)*

27. Clause 55 introduces Schedule 4, which lists those public authorities with powers to obtain communications data ('relevant public authorities'). Schedule 4 sets out the office, rank or position of the designated senior officer in each public authority, the purposes for which the public authority may acquire communications data, and the kinds of communications data which may be obtained.
28. Clause 55 permits the Secretary of State, by regulations, to add or remove a public authority from the list, modify the purposes for which that authority may obtain communications data, impose or remove restrictions on authorisations that may be granted by the designated senior officer, and impose or remove restrictions on the purposes for which communications data may be obtained by an authority.
29. The power in clause 55(1) includes power to modify any enactment as appropriate in consequence of a person becoming, or ceasing to be, a relevant public authority.
30. The powers in clause 55 reflect those in section 25 of RIPA, which have been used to add a number of public authorities to the list of relevant public authorities in Chapter 2 of Part 1 of RIPA (see S.I. 2010/480, as amended).
31. The power in subsection (1) is most likely to be used to address changes to the list of relevant public authorities as a result of the abolition of a body, or the transfer of its functions to a successor body. However, the power may also be used to designate new bodies as relevant public authorities. When a new body is created by statute, for example, the need for the body to acquire communications data to carry out its functions can be overlooked. Similarly, circumstances may change over time such that an existing body may be able to present a compelling case for designation. The power in subsection (1) will ensure that public authorities have the power to obtain the communications data they need to carry out their functions in accordance with a statutory framework which provides the safeguards considered necessary by Parliament to ensure that investigatory powers are exercised compatibly with the ECHR.
32. The addition of a new public authority to Schedule 4, and any amendments to primary legislation consequent on the exercise of the power, are both significant matters. Accordingly, the enhanced affirmative procedure set out in clause 198 is considered appropriate to enable these matters to be debated in

both Houses, and to ensure that those who will be affected by the change are consulted and that the regulations are subject to proper oversight and control. The negative resolution procedure is considered sufficient for any regulations which does not contain such provision, for example those which simply remove a public authority from the list in Schedule 4.

**Clause 57(4): power to amend the definition of a designated senior officer in a local authority**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

33. Subsection (2) of clause 57 provides that a designated senior officer within a local authority is an individual holding a specified position (or a higher position) with that authority. Local authorities are relevant public authorities for the purposes of Part 3. The designated senior officer of a relevant public authority may accordingly grant authorisations to obtain communications data.
34. Subsection (4) provides that the Secretary of State may by regulations amend the definition of designated senior officer. The Secretary of State may not under this power amend local authorities' powers to obtain communications data, which are subject to restrictions in clauses 57(3), 58 and 59
35. Given the number of local authorities and changes in management structures, there is a risk that the definition of 'designated senior officer' in subsection (2) will not be applicable to all local authorities in future. Accordingly, it is appropriate for the Secretary of State to have power to amend the definition.
36. Similar provision is contained in section 25(2) of RIPA (see S.I. 2010/480). The negative resolution procedure provides the appropriate level of parliamentary scrutiny for a power of this nature.

**Clause 63/5): power to direct a public authority to enter into a collaboration agreement**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Direction*

*Parliamentary procedure:* *None*



37. Clause 62 makes provision for collaboration agreements, under which public authorities may share designated senior officers and single points of contact for the purposes of granting authorisations for the acquisition of communications data, and other functions under Part 3 of the Bill. Clause 64 makes separate provision in relation to collaboration between police forces.
38. Clause 63 makes additional provision in respect of collaboration agreements. A code of practice under Schedule 6 must include guidance to public authorities about such agreements.
39. In general, a public authority will enter into a collaboration agreement on a voluntary basis. However, subsection (5) provides that the Secretary of State may direct a public authority to enter into a collaboration agreement. The Secretary of State must consider that entering into the agreement would assist the effective exercise by the authority, or another public authority, of its functions under Part 3 of the Bill.
40. The Secretary of State must consult a public authority before directing it to enter into a collaboration agreement. The guidance in the code of practice must include the criteria the Secretary of State will use in considering whether a collaboration agreement is appropriate for a public authority.
41. It is appropriate that a decision of this nature should be left to the Secretary of State, who is best placed to judge whether entering into an agreement will assist the effective exercise of functions under Part 3 by a public authority, having consulted that authority. Since a direction will be specific to the circumstances of a particular public authority, it is appropriate for this to be an administrative direction rather than included in legislation.

**Clause 67(1): power to provide for transfer of functions relating to filtering arrangements**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

42. Clauses 51 to 53 make provision for the Secretary of State to establish, maintain and operate filtering arrangements for facilitating the obtaining of communications data by relevant public authorities. The filtering arrangements are a system for automatically filtering communications data obtained from operators in accordance with predetermined rules in order to provide public authorities with the subset of data relevant to their request. The wider set of data obtained by the filtering arrangements will be immediately deleted at the

point the subset of relevant data is disclosed to the public authority making the request. Clause 53 imposes further duties on the Secretary of State in connection with the operation of the filtering arrangements.

43. In the long term, it may be that it is desirable for another public authority to assume responsibility for operating the filtering arrangements. Accordingly, clause 67(1) provides for the Secretary of State to transfer functions under clauses 51 to 53 to another public authority, and to transfer those functions back to the Secretary of State. Clause 67(2) confers the power to modify any enactment about a public authority for the purpose of enabling or facilitating the public authority operating the filtering arrangements on behalf of the Secretary of State. This may, for example, enable statutory bars to be removed from public authorities.
44. These powers will ensure that the Department retains the flexibility to determine which body is best placed to operate the arrangements, taking into account any relevant considerations which apply at the time.
45. Given that the Bill vests these functions in the Secretary of State and the expected level of public interest in the operation of these arrangements, the Government considers that any transfer of functions should be subject to prior parliamentary scrutiny and approval through the affirmative procedure.

## **PART 4: RETENTION OF COMMUNICATIONS DATA**

### **Clause 71: power to require the retention of communications data**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Notice*

*Parliamentary procedure:* *None*

46. Clause 71(1) of the Bill provides a power for the Secretary of State to give a notice to a telecommunications operator requiring the operator to retain relevant communications data.
47. The Secretary of State must consider that the requirement to retain data is necessary and proportionate for one or more of the purposes set out in section 46(7) of the Bill.

48. Relevant communications data is defined in clause 71(9) as communications data which may be used to identify, or assist in identifying any of a list of information about a communication – for example the sender or recipient of a communication, or the location of the system by which the communication is transmitted.
49. The effect of the provision is that the Secretary of State may, by notice, require a person providing communication services to persons in the UK to retain the relevant communications data they generate or process.
50. Clause 71(2) contains further provision about the requirements that may be imposed by a notice. The notice may be given to one individual service provider, or to a description of operators. The extent of the requirement to retain data will be set out in the notice, which may require the retention of all communications data related to a particular service or all services offered by the operator, or a sub-set of that data.
51. The notice may also set out security or other requirements with which the provider is required to comply in relation to the retained data, or restrictions on how the data may be stored.
52. The notice may provide for different requirements in relation to different types of data, so an operator may be required to retain a certain type of data for 12 months (the maximum period permitted by clause 1(5)), but another type of data for only 3 months. The notice may, accordingly, be tailored to the specific circumstances of the provider and what is considered necessary and proportionate having regard to the purposes.
53. The power to give a notice, the definition of communications data that may be subject to a notice, and the persons who may be given a notice, are all specified on the face of the Bill. The specific details of the requirements to be imposed on a particular operator to retain data are left to the discretion of the Secretary of State.
54. It is appropriate that the Secretary of State should be able to determine the precise retention requirements to be placed on a particular operator, taking into account that operator's particular circumstances, the necessity of retaining the communications data processed by that particular operator for one or more of the relevant purposes, and the proportionality of doing so. The power to impose these requirements by notice means that these requirements can be tailored to the specific circumstances of the case, ensuring that only that communications data which it is necessary and proportionate to retain is subject to a retention notice. Decisions can be taken on the advice of experts who work closely with the providers in question and are familiar with the services they provide. This allows for a more flexible approach than would be the case if uniform

requirements for all providers were contained in primary or secondary legislation.

55. The scope of the Secretary of State's discretion is set out in primary legislation. It is appropriate that, within that framework, decisions as to the precise requirements to be placed on providers should be taken by the Secretary of State.
56. Clause 73 provides that an operator can refer a notice back to the Secretary of State for review. In such circumstances the Secretary of State must consult the Technical Advisory Board and the new Investigatory Powers Commissioner before making a determination on the review. The giving of retention notices will also be subject to oversight by the new Investigatory Powers Commissioner. The power reflects that in section 1 of DRIPA, which is also a direction-giving power.

**Clause 73(1): power to make provision in respect of a review of a retention notice**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

57. Clause 73 provides that a telecommunications operator to whom a retention notice is given under Part 4 may refer the notice (or any aspect of it) back to the Secretary of State for review. The effect of such a referral is to suspend the requirement on the operator to comply with the notice.

The requirements on the Secretary of State in respect of such a review, including consultation with the Technical Advisory Board and the Investigatory Powers Commissioner who must each provide an opportunity to the operator concerned to make representations and report their conclusions to the operator and to the Secretary of State, are set out in primary legislation.

58. Subsection (1) gives the Secretary of State power, by regulations, to provide for the circumstances in which, and period within which, a review may be requested.
59. It is appropriate to delegate the power to set out the circumstances in which a review may be requested to the Secretary of State. The circumstances in which it is appropriate for a review to be requested, and the time period within which a

review may be requested, may vary over time depending on developments in technology and other matters, and it is appropriate that the Secretary of State has flexibility to reflect that in secondary legislation. Secondary legislation also permits the Secretary of State to provide for the circumstances in more detail than is appropriate for primary legislation.

60. However, as the power affects the circumstances in which an operator may request a review of a notice which may impose significant obligations on it to retain communications data, the affirmative procedure is considered appropriate.

## **PART 8: OVERSIGHT ARRANGEMENTS**

### **Clause 170(1): power to direct the Investigatory Powers Commissioner**

*Power conferred on:* *The Prime Minister*

*Power exercisable by:* *Direction*

*Parliamentary procedure:* *None*

61. Clause 170(1) provides that the Prime Minister may direct the Investigatory Powers Commissioner to keep under review the carrying out of any aspect of the functions of an intelligence service, a head of an intelligence service, or any part of Her Majesty's forces, or of the Ministry of Defence, so far as engaging in intelligence activities.
62. This power of direction does not apply in relation to anything that is already required to be kept under review by the Investigatory Powers Commissioner under clause 169. The Prime Minister may give a direction at the request of the Investigatory Powers Commissioner or otherwise.
63. The power of direction enables the Prime Minister to increase the functions of the Investigatory Powers Commissioner and to ensure that the work of an intelligence service and other bodies who are carrying out intelligence work is subject to the appropriate levels of scrutiny. It is appropriate to achieve this by a power of direction, which enables the Prime Minister to respond quickly and flexibly to developing situations and to requests from the Commissioner for additional functions. The additional functions are intended to cover specific aspects of the functions of an intelligence service or a body carrying out intelligence work, which may change over time, and may be in response to a particular situation. It is not possible to provide an exhaustive list of the

additional functions for inclusion in primary legislation and this level of detail is not appropriate for primary legislation.

64. A direction under clause 170 must be published except where publication would be contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom, or the continued discharge of the functions of any public authority whose activities are subject to review by the Investigatory Powers Commissioner.
65. The Investigatory Powers Commissioner already has wide powers under clause 170 to keep under review the exercise by public authorities of statutory functions relating to the powers under the Bill. The power of direction will be used to further enhance those safeguards by identifying specific additional functions that are appropriate for oversight by the Investigatory Powers Commissioner. It will not detract from the existing oversight regime or alter the nature of the safeguards that have already been approved by Parliament. It is therefore appropriate for the power of direction to be exercised without additional parliamentary approval. Those directions will also be published unless that would be contrary to the public interest or prejudicial to one of the matters set out above. This ensures increased transparency of the functions of the Investigatory Powers Commissioner and of the oversight of the intelligence services.
66. The power of direction mirrors that in section 59A of the Regulation of Investigatory Powers Act 2000, as amended by the Justice and Security Act 2013.

**Clause 177(1): power to modify the functions of the Investigatory Powers Commissioner**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

67. Clause 177(1) provides that the Secretary of State may modify the functions of the Investigatory Powers Commissioner or any other Judicial Commissioner. The power includes power to modify any provision made under any enactment.
68. The functions of the Investigatory Powers Commissioner are set out in clause 170. The Commissioner has far-reaching powers to keep under review the

exercise by public authorities of statutory functions relating to the powers under the Bill. Given the wide range of public authorities with statutory functions under the Bill, it is important that there is power to respond quickly and flexibly to, for example, changes in the statutory functions of those authorities, or changes in circumstances affecting the exercise of such functions, to ensure that all the public authorities who are carrying out such functions are subject to appropriate levels of scrutiny and that the Investigatory Powers Commissioner has the appropriate powers to carry out his important oversight functions.

69. While the Bill provides a broad description of the functions of the Investigatory Powers Commissioner, it is not possible to provide an exhaustive list of the Commissioner's functions in primary legislation and additional detail is appropriate for secondary legislation.
70. This power complements that of the Prime Minister in clause 170 to direct the Commissioner in respect of any aspect of the intelligence services' work. The regulation making power of the Secretary of State is broader and may be exercised in respect of any of the functions of the Investigatory Powers Commissioner.
71. Given the importance of the Commissioner's oversight role, and the existence of the power to modify primary legislation in subsection (2), it is appropriate that this power should be subject to the affirmative procedure.

**Clause 180(1) – power to specify cases in which an appeal may be made to a court in Northern Ireland or Scotland**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

72. Clause 180(1) amends Part 4 of the Regulation of Investigatory Powers Act 2000 to introduce a right of appeal from the Investigatory Powers Tribunal. Currently, no appeal lies from a decision of that Tribunal, and claimants must take cases to Strasbourg. New section 67A of RIPA will provide for an appeal on a point of law from a decision of the Tribunal. The Tribunal must grant leave to make an appeal.
73. A person may appeal against a decision of the Tribunal to the Court of Appeal in England and Wales. Subsection (2) of new section 67A of RIPA will provide a power for the Secretary of State to specify in regulations a description of cases

in which such an appeal may be brought to a court in Scotland or Northern Ireland. The regulations may also specify the relevant court in Scotland or Northern Ireland.

74. The cases in which it is likely to be appropriate for a court in Scotland or Northern Ireland include, for example, cases in which the Investigatory Powers Tribunal has considered a complaint relating to a police force in Scotland or Northern Ireland, or a warrant issued by the Scottish Ministers.
75. There may, however, be circumstances in which it would nevertheless be appropriate for an appeal to be heard in the Court of Appeal in England and Wales – for example where the appeal concerns a matter reserved under the devolution settlements. The regulation making power gives the Secretary of State flexibility to specify the types of cases in which an appeal may be made to a court in Scotland or Northern Ireland. Given the sensitivity of the matters determined by the Investigatory Powers Tribunal, it is important that the Secretary of State retains the flexibility to consider the appropriate forum for appeals.
76. Given that the right of appeal is set out in statute, the negative procedure is appropriate for a power of this nature.

**Clause 183(1): power to provide for membership of the Technical Advisory Board**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

77. Clause 183 provides for the continued existence of the Technical Advisory Board, established under the Regulation of Investigatory Powers Act 2000. The Technical Advisory Board is made up of experts from the telecommunications industry and from those public authorities who may apply for warrants or authorisations.
78. The Board's functions under the Bill include providing a report to the Secretary of State on any notice under Part 4 or Part 9 referred to the Secretary of State for review. The Secretary of State also has a duty to consult with the Board before making regulations under Part 9 imposing general obligations in respect of capability to comply with warrants under the Bill.



79. Subsection (1) provides that the Secretary of State may, by regulations, specify the number of persons to be appointed to the Board. By subsection (2), the regulations must make provision to ensure that the membership of the Board includes representatives of both the telecommunications industry and public authorities who exercise functions under the Bill, as well as any other persons the Secretary of State considers appropriate. The regulations must also ensure that the Board fairly represents the balance of competing interests.
80. Given the rapid pace of change in the telecommunications industry, and the likelihood of changes to the public authorities who have powers under the Bill, it is appropriate that the Secretary of State has flexibility to reflect the current situation in secondary legislation, and that this level of detail is left to secondary legislation.
81. The affirmative procedure is appropriate for these regulations given the important role performed by the Technical Advisory Board in reporting on powers under the Bill. The power reflects that in section 13 of RIPA which is also subject to the affirmative procedure.

## **PART 9: MISCELLANEOUS AND GENERAL PROVISIONS**

### ***Clause 188(1): power to give a notice requiring the taking of steps necessary in the interests of national security***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Notice*

*Parliamentary procedure:* *None*

82. Clause 188(1) provides for the Secretary of State to give a notice to a telecommunications operator, specifying steps that the Secretary of State considers necessary in the interests of national security. This notice, referred to as a 'national security notice' requires the person to whom it is given to take all the steps specified in the notice.
83. Subsection (2) provides that the Secretary of State must believe that the conduct required by the notice is proportionate to what is sought to be achieved by that conduct.
84. Subsection (3) provides examples of what may be required by a national security notice. In particular, a notice may require the telecommunications

operator to whom it is given to carry out any conduct, including the provision of services or facilities, for facilitating anything done by an intelligence service under any other Act, or for dealing with an emergency.

85. Subsection (4) provides that a national security notice may not impose a requirement the main purpose of which is to do something for which a warrant or authorisation under the Bill would be required.
86. Clause 190 makes further provision about national security notices under clause 188. The Secretary of State must consult the person in question before giving a notice, and must take into account the factors listed at subsection (3), including the likely benefits of the notice, the likely number of users of the service in question and the technical feasibility and cost of complying with the notice.
87. A notice must also specify a reasonable period to take the steps described in the notice. A notice must be kept under review by the Secretary of State. The Secretary of State may also, by regulations (see below) make further provision about the giving of notices.
88. A person to whom a notice is given is under a duty to comply with it, but may refer it to the Secretary of State for a review in accordance with clause 191.
89. The intention is that a notice will contain steps which are specific to the particular operator to whom it is given, taking into account their technical architecture and other relevant circumstances. It will accordingly contain detail specific to that operator which is not appropriate for primary or secondary legislation. A notice may also contain sensitive matters of national security which need to be kept secret.
90. A notice-giving power is the appropriate way of meeting these requirements. The safeguards provided for in the Bill will ensure that the interests of telecommunications and postal operators and the privacy of users of those services are protected. The notice reflects that provided for in section 94 of the Telecommunications Act 1984, but the notice-giving power is more restricted and subject to greater safeguards.

***Clause 189(1): power to impose obligations in relation to securing assistance with warrants***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

91. Clause 189 provides for the Secretary of State to impose obligations on postal or telecommunications operators, to secure their ability to provide assistance in relation to warrants or authorisations under Parts 2, 3, 5 or 6 of the Bill.
92. For each of the warrants or authorisations provided for in those Parts of the Bill, there is an attached duty on persons served with a warrant or given a notice to provide assistance in giving effect to that warrant or notice.
93. Subsection (1) provides for the Secretary of State, by regulations, to impose obligations on all or some such operators. The obligations imposed by the regulations must appear to the Secretary of State to be reasonable in order to secure that it is practicable to impose requirements on those operators to provide assistance with warrants.
94. Subsection (4) provides an inclusive list of obligations that may be imposed by regulations. These obligations will be general ones, requiring the operator to meet standards relating to security, or to provide certain facilities or services. For example, such obligations might include providing a mechanism for ensuring interceptions of communications can be effected within 1 working day of service of a warrant under part 2 of the Bill.
95. Before making such regulations, subsection (5) provides that the Secretary of State must consult the Technical Advisory Board, persons likely to be subject to the obligations in the regulations and their representatives, and persons with statutory functions in relation to such persons (for example the Investigatory Powers Commissioner).
96. It is appropriate that the detail of obligations such as this is contained in secondary rather than primary legislation. The regulations will permit detailed obligations to be set out in relation to particular categories of operator, and to reflect technological developments and representations made by the persons who must be consulted under subsection (5).
97. Given the nature of the obligations to be imposed on providers, it is appropriate that the affirmative Parliamentary procedure applies to regulations under this clause. The subsection (1) power reflects the power in section 12 of the Regulation of Investigatory Powers Act 2000 in relation to interception capability, which is also subject to the affirmative procedure.

**Clause 189(6): power to give a notice requiring steps to be taken in relation to securing assistance with warrants**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Notice*

*Parliamentary procedure:* *None*

98. Clause 189(6) also provides for the Secretary of State to give a notice to a person on whom obligations are imposed by the regulations. This notice, referred to as a ‘technical capability notice’ requires the person to whom it is given to take all the steps specified in the notice for the purpose of complying with the obligations in the regulations.
99. Subsection (7) provides that the steps contained in a notice must appear to the Secretary of State to be necessary for securing that the person in question has the practical capability of providing assistance in relation to any warrant or authorisation.
100. Clause 190 makes further provision about technical capability notices, and national security notices under clause 188. The Secretary of State must consult the person in question before giving a notice, and must take into account the factors listed at subsection (3), including the likely benefits of the notice, the likely number of users of the service in question and the technical feasibility and cost of complying with the notice.
101. A notice must also specify a reasonable period to take the steps described in the notice. A notice must be kept under review by the Secretary of State. The Secretary of State may also, by regulations (see below), make further provision about the giving of notices.
102. A person to whom a notice is given is under a duty to comply with it, but may refer it to the Secretary of State for a review in accordance with clause 191.
103. The intention is that a notice will contain steps which are specific to the particular operator to whom it is given, taking into account their technical architecture and other relevant circumstances. It will accordingly contain detail specific to that operator which is not appropriate for primary or secondary legislation. A notice-giving power is the appropriate way of dealing with this. The safeguards provided for in the Bill will ensure that the interests of telecommunications and postal operators and the privacy of users of those services are protected. The subsection (6) power reflects the power in regulations made under section 12 of the Regulation of Investigatory Powers

Act 2000 in relation to interception capability. It is considered appropriate that the power should now appear in the Bill rather than in secondary legislation.

**Clause 190(6): power to make further provision about the giving of national security and permanent capability notices**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

104. Clause 190(6) provides that the Secretary of State may, by regulations, make further provision about the giving of national security and permanent capability notices. Clauses 188 and 189 already contain certain requirements about giving such a notice, as set out above, but subsection (6) gives the Secretary of State power to set out further details in secondary legislation.

105. This power will give the Secretary of State flexibility to reflect technological developments and other changing circumstances in the requirements which must be met before a notice can be given. For example, the regulations might include additional factors to be taken into account or additional requirements to consult interested persons. It is appropriate that this detail is left to secondary legislation.

106. The regulations are subject to the negative procedure, which is appropriate given the nature of the power and the safeguards that already exist in the Bill.

**Clause 191(1): power to make provision for referring a national security or technical capability notice for review**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

107. Clause 191 provides that a person who is given a national security or technical capability notice may refer the notice back to the Secretary of State for a review.

108. Subsection (1) provides that the Secretary of State may, by regulations, provide for the period within which and the circumstances in which a notice may be referred back to the Secretary of State for a review.
109. Delegating this power gives the Secretary of State necessary flexibility to set time periods and other criteria which will ensure that both operators' interests and the interests of national security are protected.
110. The affirmative procedure is appropriate for a power of this nature, given that the ability of a provider to request a review constitutes an important safeguard.

***Clause 200(2): power to make transitional, transitory or saving provision***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *None*

111. Clause 200(2) confers power on the Secretary of State to make such transitional, transitory or saving provisions as he or she considers appropriate in connection with the coming into force of the provisions in the Bill. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner. 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.

***Clause 201(2): power to make consequential provision***

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative where any provision of primary legislation is amended or repealed, otherwise negative*

112. Clause 201(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. The power includes a power to modify any provision made under any enactment (subsection (3)).

113. The powers conferred by this clause are wide but are necessary, for example, to ensure that consequential amendments can be made in consequence of the exercise of the powers in the Bill. There are various precedents for such provisions including section 148 of the Criminal Justice and Immigration Act 2008 and section 113 of the Protection of Freedoms Act 2012.

114. To the extent that regulations under this clause amends or repeals primary legislation, they will be subject to the affirmative resolution procedure, otherwise they will be subject to the negative resolution procedure (see clause 197). It is submitted that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

**Clause 202(1): power to appoint days for commencement**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *None*

115. Subsection (1) of clause 202 contains a standard power to bring provisions of the Bill into force by commencement regulations. As usual with commencement regulations, they 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 202(5): power to extend the Bill to any British overseas territory**

*Power conferred on:* *Her Majesty*

*Power exercisable by:* *Order in Council*

*Parliamentary procedure:* *None*

116. Clause 202(5) confers a power on Her Majesty, exercisable by Order in Council, to provide for any of the provisions of the Bill to extend, with or without modifications, to any of the British overseas territories. This power has been taken in order to allow the governments of such jurisdictions to adopt, subject to any modifications they feel necessary, the provisions of the Bill without having to legislate in their own jurisdictions. An Order under subsection (5) is not

subject to Parliamentary procedure. This is because it is considered that legislation by means of an Order in Council without Parliamentary procedure is the appropriate way to reflect the constitutional status of the Overseas Territories. There are a number of similar provisions in other enactments which also contain no Parliamentary procedure.

## SCHEDULES

### **Paragraph 2(1) of Schedule 5: power to specify the contents of a report on the exercise of functions under a transfer scheme**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative (but may be affirmative)*

117. Paragraph 2(1) of Schedule 5 provides that, where a public authority is exercising functions which have been transferred to it by regulations under clause 66(1) (in relation to the filtering arrangements in Part 3 of the Bill), it must make a report to the Secretary of State at least once in each calendar year. The report is on the discharge of the functions and any other matters that the Secretary of State may require by regulations.

118. The matters that may need to be specified in regulations are likely to depend on the nature of the body that takes over functions relating to the filtering arrangements, and the nature of any transfer of functions. Accordingly, it is appropriate that this power is delegated to the Secretary of State.

119. Given the nature of the power, and the safeguards that exist in Part 3 for the operation of the filtering arrangements, the negative procedure is considered appropriate here. However, regulations made under this power may also be subject to the affirmative procedure so that they may be combined with regulations made under another power subject to the affirmative procedure.



**Paragraph 4(1) of Schedule 5: power to vary the effect of a tax in relation to a transfer scheme**

*Power conferred on:* *The Treasury*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Negative*

120. Paragraph 4(1) of Schedule 5 confers power on the Treasury to make provision, by regulation, varying the way in which certain tax provisions apply either for anything transferred under a scheme made under paragraph 3 of that Schedule, or anything done for the purposes of, or in relation to a transfer under such a scheme. For the purposes of this power the relevant taxes are income tax, corporation tax, capital gains tax, stamp duty, stamp duty reserve tax and stamp duty land tax.

121. This power will enable the Treasury to ensure that appropriate tax provision is made, and at the appropriate time, to ensure that a transfer does not give rise to a tax change or confer a tax advantage on either party.

122. The power under paragraph 5 is exercisable by statutory instrument subject to negative procedure in the House of Commons (see clause 197(6)). This reflects the level of Parliamentary procedure applicable to equivalent powers in other Acts. The regulations are not subject to any procedure in the House of Lords, as the House of Commons is the correct forum for the determination of matters in respect of taxation.

**Paragraphs 5(3) and 6(4) of Schedule 6: power to bring into force and to vary a code of practice**

*Power conferred on:* *The Secretary of State*

*Power exercisable by:* *Regulations*

*Parliamentary procedure:* *Affirmative*

123. Schedule 6 makes provision for the Secretary of State to issue one or more codes of practice about the exercise of functions conferred by the Bill. Paragraph 5(3) provides for a code of practice to come into force in accordance with regulations made by the Secretary of State.

124. Paragraph 5 provides that the Secretary of State must publish a draft code and consider any representations made about it, and may modify the draft. The Secretary of State must consult the Investigatory Powers Commissioner.
125. After consultation, the code must be laid before parliament with the draft regulations which will bring it into force. The regulations are subject to the affirmative procedure.
126. Paragraph 6 provides that the Secretary of State may revise the whole or part of a code, and sets out the procedure for bringing into force a revised code. Paragraph 6(3) provides for the Secretary of State to make regulations to bring a revised code into force. The procedure for issuing a revised code is the same as that set out in paragraph 5.
127. The procedure set out in Schedule 6 differs from that currently provided for in section 71 of RIPA for issuing codes of practice under that Act. The new procedure responds to concerns raised by the Joint Committee on Statutory Instruments in its 30th Report of Session 2002/2003 concerning S.I. 2003/3175 made under equivalent powers in section 103 of the Anti-terrorism Crime and Security Act 2001.
128. Codes of Practice under Schedule 6 to the Bill will contain detailed provision about the exercise of functions under the Act. It is appropriate that these details should be contained in Codes of Practice brought into force by secondary legislation rather than in the Bill. Given the pace of technological change, and other developments, codes of practice will also need to be revised regularly.
129. Paragraph 7 sets out the effect of codes of practice. A person exercising functions to which a code relates must have regard to that code, and it is admissible in evidence in criminal or civil proceedings. It is appropriate that regulations under this power should be subject to the affirmative procedure.

**4 November 2015**