Delegated Powers Memorandum

Prisons and Courts Bill

Prepared by the Ministry of Justice

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Prisons and Courts Bill ("the Bill"). The Bill was introduced in the House of Commons on 23 February 2017. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

Purpose and effect of the Bill

2. The Bill was announced in the Queen's speech and provides for important reforms to the prison and courts system. The Bill is in six Parts.

3. Part 1 relates to prisons:
    - It sets out the purpose of prisons and the role of the Secretary of State for Justice in relation to prisons. It makes provision for Her Majesty's Inspectorate of Prisons made up of the Chief Inspector of Prisons and staff who carry out functions on his behalf, places additional reporting requirements on the Chief Inspector in relation to prisons and provides the powers, such as powers of entry, in order to facilitate the Chief Inspector's functions.
    - It puts the Prison and Probation Ombudsman on a statutory footing.
    - It makes provision for prison security. It enables a public communications provider, such as a mobile phone network operator to be authorised to interfere with wireless telegraphy in relevant institutions, and makes provision about the testing of prisoners for psychoactive substances.

4. Part 2 makes provision for new procedures in civil, family, tribunal and criminal matters:

- In relation to the criminal jurisdiction it enables defendants to provide information in writing (preferably online) including an indication of plea, and enables matters to be dealt with outside court such as mode of trial and sending to the Crown Court. It gives the Crown Court a new power to remit cases to the magistrates' court for trial or sentence. It also makes provision for the extended use of audio and video technology to enable hearings to be held in alternative formats and a delegated power to amend any existing legislation to facilitate pre-trial and enforcement decisions being made on the papers. It creates a new online procedure enabling a defendant to plead guilty and receive an automatic online conviction and statutory standard penalty.
- It makes provision which will apply across the civil, criminal and tribunal jurisdictions to ensure open justice for virtual hearings, including the creation of new criminal offences to guard against abuse.
- It creates a new online procedure rules committee that will be able to create new online procedure rules in relation to the civil, tribunal and family jurisdictions.
- It makes provision about the cross-examination of vulnerable witnesses in family proceedings.
- It confers the power to make procedure rules for employment tribunals and the Employment Appeal Tribunal on the Tribunal Procedure Committee and extends the membership of the Committee to include an employment law practitioner and employment judge or non-legal member.

5. Part 3 makes provision about the organisation and functions of courts and tribunals:
    - It provides for authorisation of the exercise of judicial functions by court and tribunal staff across the jurisdictions. The relevant procedure rules will have the power to authorise functions in their respective jurisdiction. Statutory independence, and immunities that currently apply to justices' clerks, will now apply to all court or tribunal staff exercising judicial functions. The post of justices' clerk will be removed from statute.
    - It abolishes local justice areas to increase flexibility in the deployment of magistrates and where a case can be heard.
    - It makes reforms to the arrangements for the composition of employment tribunals and the Employment Appeal Tribunal.

- It makes other reforms to the court system, replacing statutory declarations with statements of truth for certain traffic and air quality offences in the County Court, and giving the High Court the jurisdiction to make attachment of earnings orders in relation to judgment debts.

6. Part 4 makes changes to the judiciary, making provision for judicial leadership positions, and more flexible deployment. It also brings the arrangements for the remuneration of judges and members of employment tribunals under the remit of the Lord Chancellor. It also extends the scope of persons the Lord Chancellor may ask the Judicial Appointments Commission to assist, and provides that those in receipt of that assistance may be charged.

7. Part 5 makes provision in relation to whiplash: subjecting damages for pain, suffering and loss of amenity for minor soft tissue injury claims arising out of road traffic accidents to a tariff and regulating the settlement of such claims.

8. Part 6 makes the necessary legal provision for the short-title of the bill, the extent, regulations and parliamentary procedures, and powers to make consequential, incidental etc provision.

Delegated Powers

9. The Bill contains a range of delegated powers. The Bill primarily concerns prisons and courts, including tribunals. There is a well-established legal framework in relation to delegated powers concerning courts and tribunals which is relevant for powers taken in this Bill.

Rules of court

10. In relation to courts and tribunals, the power to prescribe the practice and procedure is commonly delegated by statute to procedural rules made by the relevant procedure rules committee which are independent of the Government[1]. Such rules are made by statutory

[1] The essential scope of the power, in relation to "practice and procedure" is cast in identical terms to the corresponding power to make Civil Procedure Rules (in section 1 of the Civil Procedure Act 1997)(and also, for example, Family Procedure Rules (section 75 of the Courts Act 2003), Criminal Procedure Rules (section 69 of the Courts Act 2003), Court of Protection Rules (section 51 of the Mental Capacity Act 2005), Magistrates' Court Rules (section 144 of the Magistrates' Courts Act 1980), Crown Court Rules (section 84 of the Senior Courts Act 1981) and Tribunal Procedure Rules (section 22 of the Tribunals, Courts and Enforcement Act 2007).

instrument, subject to the negative resolution procedure. Given that much of the court provisions relate to procedural matters, many delegated powers in Parts 2 and 3 of the Bill will fall to be dealt with by the relevant procedural rules and existing procedures will apply. For this reason, and to avoid duplication, the key aspects of the procedure rules are set out below. However, there are still some matters that remain with the Lord Chancellor, and some new powers for the Secretary of State, which will be set out in appropriate detail.

11. Rules of court are often extensive (the Civil Procedure Rules currently comprise 89 Parts) and ill-suited to being contained in primary legislation. Rules of court have not been contained in primary legislation since the first Rules of the Supreme Court which formed a Schedule to the Supreme Court of Judicature Act 1873 (and which were themselves amendable by subsequent rules of court made under delegated powers). Rules of court are also made, subject only to very limited exceptions (essentially the first exercise of powers to make rules for closed material procedures) by dedicated rule committees or (as with probate or rules concerning non-criminal matters in the magistrates' court[2]) the Lord Chief Justice or a judicial officer holder nominated by the Lord Chief Justice, subject to approval by the Lord Chancellor. It would be a novel departure, raising issues in relation to the division of responsibilities between the judiciary and executive arising out of the reform of the office of Lord Chancellor, for rules of court to be contained in primary legislation.

12. As mentioned, the majority of existing powers to make rules of court are subject to the negative resolution procedure. This is widely accepted as appropriate for what are generally regularly made instruments which fine-tune an existing extensive body of rules, and are made by an independent expert committee or senior judicial office holder.

Civil Procedure Rules

13. The Civil Procedure Rules are made under powers in the Civil Procedure Act 1997 (CPA 1997), which are the first modern powers regarding rules of court. Later powers concerning rules of court such as the powers to make Criminal Procedure Rules, and Family Procedure Rules (and even Tribunal Procedure Rules) followed this model. The Civil Procedure Rules govern the practice and procedure in the civil division of the Court of Appeal, the High Court, and the County Court. Such rules are to be made with a view

[2] Section 127 Senior Courts Act 1981 (probate rules); section 144 Magistrates' Courts Act 1980 respectively.

to securing that the system of civil justice is accessible, fair and efficient, and that the rules are both simple and simply expressed (section 1 CPA 1997).

14. The rules are made by the Civil Procedure Rule Committee. The Committee's membership is made up of persons specified in section 2 CPA 1997 and appointed by either the Lord Chief Justice or Lord Chancellor. Before making rules, the Committee must consult such persons as they consider appropriate to do so and meet, unless inexpedient to do so. The Rules must be signed by a majority of the Committee and then submitted to the Lord Chancellor who may allow or disallow them.

15. he Lord Chancellor has the following additional powers under the CPA 1997:

    - to make consequential amendments to enactments by statutory instrument (under section 4 of the CPA 1997) in two ways:

        i. as a result of the Civil Procedure Rules (subject to the negative procedure); and

        ii. to facilitate the making of those rules (restricted to enactments made before the CPA 1997 and subject to affirmative procedure));

    - to give written notice that rules are to be made by the Committee for a specified purpose (section 3A CPA 1997); and

    - by statutory instrument, to amend the constitution of the Committee (subject to the negative procedure, but requiring the concurrence of the Lord Chief Justice and consultation with the Head and Deputy Head of Civil Justice – section 2A CPA 1997).

16. The Civil Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice (or a judicial office holder nominated by the Lord Chief Justice) (section 5 CPA 1997); and the Rules may, instead of providing for a matter themselves, refer to provision made or to be made in Practice Directions about that matter (paragraph 6 of Schedule 1 CPA 1997). This is an important power which is widely exercised to give efficacy to the rules: Practice Directions themselves are not subject to Parliamentary procedure; but rules providing for a matter to be dealt with in a Practice Direction are subject to negative resolution procedure like any other rules.

Criminal Procedure Rules

17. The Criminal Procedure Rules emanated from the *Review of the Criminal Courts of England and Wales*, carried out by Auld LJ in 2001. The provisions concerning the Rules

are in the sections 68-74 of the Courts Act 2003 (CA 2003) and the first set of Criminal Procedure Rules was introduced in 2005. The Rules apply to all cases in the magistrates' court, the Crown Court, the criminal division of the Court of Appeal, and the High Court's jurisdiction under the Extradition Act 2003.

18. Section 69 CA 2003 provides that rules of court are to be made governing the practice and procedure of criminal courts. These rules are to be made by the Criminal Procedure Rule Committee. The power to make rules includes power to make different provision for different cases or different areas, including different provision for a specified court or description of courts, or for specified descriptions of proceedings or a specified jurisdiction. The power to make these rules is to be exercised with a view to securing that the criminal justice system is accessible, fair and efficient, and the rules are both simple and simply expressed.

19. The Committee is to be made up of persons specified and appointed (by either the Lord Chief Justice or Lord Chancellor) in section 70 CA 2003. This includes, amongst others, the Lord Chief Justice, a High Court judge, circuit judge, district judge, lay magistrate, justices' clerk[3], Director of Public Prosecutions, practitioners and volunteers with experience of the criminal courts.

20. Before making any rules the Committee must consult any persons they consider it appropriate to do so, and meet those persons (unless inexpedient to do so). Rules must be signed by a majority of the members of the Committee and submitted for approval to the Lord Chancellor. If the Lord Chancellor disapproves then she must give written reasons to the Committee, but where she approves the rules are made by statutory instrument and subject to the negative resolution procedure (section 72 CA 2003).The Lord Chancellor has a power to give written notice that the Committee makes rules to meet a specified purpose, and where such notice is given the Committee must make such rules within a reasonable time period (section 72A CA 2003). In addition, the Lord Chancellor has the power under section 73 CA 2003 by order to (after consulting the Lord Chief Justice) amend, repeal or revoke any enactment to the extent that she considers necessary or desirable (a) in order to facilitate the making of Criminal Procedure Rules, or (b) in consequence of the power to make rules under section 69 of the Courts Act 2003 or the procedure to make rules under section 72 of that Act, or in consequence of the rules themselves.

[3] Paragraph 2 of Schedule 11 removes justices' clerk role from legislation.

21. Any such order which amends primary legislation is subject to the affirmative resolution procedure.

22. The Criminal Procedure Rules are supplemented with detailed practice directions made by the Lord Chief Justice (section 74 CA 2003).

Family Procedure Rules

23. Family procedure rules are also governed by the Courts Act 2003, sections 75-81. The legislative provisions are similar to those in the Civil Procedure Act 1997 in respect of the Civil Procedure Rules. The Family Procedure Rules govern the practice and procedure in the Family Division of the High Court and the family court (section 75 CA 2003). The rules are made by the Family Procedure Rule Committee, and are subject to similar requirements to those that apply to the Civil Procedure Rules (section 79 CA 2003). Membership of the Committee is constituted along similar lines to the Civil Procedure Rule Committee (section 77 CA 2003) and Requirements concerning the constitution of the Committee may be amended by the Lord Chancellor (section 78 CA 2003). Rules are made by statutory instrument subject to the negative resolution procedure. Again, the Lord Chancellor may give written notice to the Family Procedure Rule Committee to make rules to achieve a specified purpose (section 79A CA 2003) and may make consequential amendments as a result of the Family Procedure Rules (section 80 CA 2003). The Family Procedure Rules are supplemented by Practice Directions made by the Lord Chief Justice (section 81 CA 2003).

Tribunal Procedure Rules

24. Tribunal Procedure Rules are governed by the Tribunal, Courts and Enforcement Act 2007 (TCEA 2007, section 22). Tribunal Procedure Rules are made by the Tribunal Procedure Committee in relation to the practice and procedure to be followed in the first-tier and upper tribunals. The rules are to be exercised so that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done; the tribunal system is accessible and fair; and that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently[4]. Tribunal Procedure Rules are made by statutory instrument subject to the negative resolution procedure.

25. Tribunal Procedure Rules are again subject to similar legislative requirements that apply to civil and family procedure rules (section 22 TCEA 2007). The relevant provisions may

[4] Schedule 5 TCEA 2007 sets out the provisions regarding how rules are made and the constitution of the committee.

be found in parts 1 to 4 of Schedule 5 TCEA 2007. The TCEA 2007 established a unified structure for most tribunals, establishing two new tribunals to which the functions of a number of pre-existing jurisdictions were transferred, in the form of a First-tier Tribunal and an Upper Tribunal, divided into seven chambers (General Regulatory; Social Entitlement; Health, Education and Social Care; Tax; War Pensions and Armed Forces Compensation; Immigration and Asylum; and Property). While most chambers have their own bespoke rules made by the Tribunal Procedure Committee, the Committee favours the use of generic rules, keeping the core rules for each chamber as similar as possible.

26. Membership of the Tribunal Procedure Committee is again constituted along similar lines to the Civil Procedure Rule Committee, with broadly similar provisions with regard to appointments to the Committee (paragraphs 20 to 24 of Schedule 5 TCEA 2007). Requirements concerning the constitution of the Committee may be amended by the Lord Chancellor (paragraph 25 of Schedule 5 TCEA 2007). Rules are made by statutory instrument subject to the negative resolution procedure. Again, the Lord Chancellor may give written notice to the Committee to make rules to achieve a specified purpose (paragraph 29 of Schedule 5) and may make consequential amendments as a result of the family procedure rules (paragraph 30 of Schedule 5). The Tribunal Procedure Rules are supplemented by practice directions made by the Senior President of Tribunals (section 23 TCEA 2007).

Range of powers

27. The Bill contains the following range of delegated powers:

- Regulations subject to the affirmative procedure
- Regulations subject to the negative procedure
- Rules of court made by the relevant procedural committees subject to the negative procedure
- Directions

Clause by Clause analysis:

PART 1: PRISONS

Prison and Probation Ombudsman

28. The “Prison Safety and Reform White Paper” was published by the Government on 3 November 2016 at https://www.gov.uk/government/publications/prison-safety-and-reform. The White Paper acknowledged the long standing calls for the Prison and

Probation Ombudsman (PPO) to be put on a statutory footing to enhance the Ombudsman's independence and credibility and committed to exploring ways of achieving this. The Prisons and Courts Bill delivers this policy and will confer statutory underpinning for the role.

Clause 4(2)(e) The Prisons and Probation Ombudsman – power to confer additional functions

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

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution procedure*

Context and purpose

29. The Prisons Ombudsman was created in 1994 to provide an independent route of appeal to complainants who had not achieved satisfaction through the internal prison services complaint system. In 2001 the role of the Prisons Ombudsman was expanded to include complaints from those under supervision by the probation service and was consequently renamed the Prisons and Probation Ombudsman ("the Ombudsman"). Since its establishment the Ombudsman's remit has expanded and changed including extension to those detained in immigration detention centres, as well as the investigation into deaths in probation approved premises and secure training centres. Clause 4(2) sets out the statutory functions of the Ombudsman which includes investigations into deaths in custody and those subject to probation supervision, investigations of complaints by detained persons, investigations at the request of the Secretary of State, and reports into themes and patterns identified by the Ombudsman. This power will enable the Secretary of State to confer additional functions on the Ombudsman by regulations, and specify the manner in which a function conferred by the regulations is to be performed.

Justification for taking the power

30. The clause reflects the current position in relation to the remit of the Ombudsman's role and sets out the Ombudsman's existing functions, but is it clear that this role has evolved over time. The clause affords the Secretary of State the power to increase the scope of the Ombudsman's functions in order to allow her to continue to respond to changing circumstances and the evolving nature of the role. The scope of the Ombudsman's functions has grown since the role was created in 1994 (as described at paragraph 29). This power will enable the Secretary of State to confer further related functions on the

Ombudsman in a timely and transparent manner, so that the Secretary of State and the Ombudsman can continue to respond to changes in the sector, rather than being required to wait for an appropriate primary legislative vehicle to facilitate such a change. Given the very sensitive areas in which the Ombudsman operates, such a responsive approach to change is important. This power provides an appropriate level of parliamentary scrutiny while achieving the aim of allowing the Ombudsman's role to continue to be responsive to change. Subsection (3) requires that the Secretary of State must consult the Ombudsman before making any such regulations.

Justification for the procedure

31. This power will be subject to the affirmative resolution procedure. Given the regulations would be adding to a role that is otherwise set out in primary legislation, the Government considers that the draft affirmative procedure confers the appropriate level of Parliamentary scrutiny on the addition of any new functions and the widening of the Ombudsman's remit.

Clause 9: Investigation of complaints by the Ombudsman

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

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution procedure*

Context and purpose

32. The PPO investigates complaints submitted where eligible complainants have failed to obtain satisfaction from the relevant complaints system. Eligible complainants are set out at Clause 9(1).

33. Currently the PPO is established on an administrative basis. The investigations aim to establish the facts relating to the complaint with particular emphasis on the integrity of the process adopted by the authority in remit and the adequacy of the conclusions reached; examine whether any change in operational methods, policy, practice or management arrangements would help prevent a recurrence; seek to resolve the matter in whatever way the PPO sees fit, including by mediation; and where the complaint is upheld, restore the complainant, as far as is possible, to the position they would have occupied had the event not occurred.

The Bill delivers the Government's policy to underpin the PPO's existing complaints function in legislation. The purpose of this power is to allow the Secretary of State to establish the scope of the complaints function, in terms of what types of matters the PPO will and will not be able to investigate and to establish any applicable procedural arrangements (such as timeframes etc).

Justification for taking the power

34. Clause 9(1) of the Bill sets out who is an eligible complainant and that complainants must have exhausted internal complaints procedures. It is intended that regulations will set out what is an eligible complaint including limitations on matters subject to investigation and procedures for making a complaint such as time limits. For example, the PPO does not currently investigate complaints about sentences, immigration status or matters that are the subject of civil litigation or criminal proceedings. Enabling the Secretary of State to make provision for these matters in secondary legislation affords the necessary flexibility to amend the complaints procedures to address for example increases or decreases in volume, trends in areas the subject of complaints, the development and implementation of new procedures or processes that should be within the PPO's remit. This power will ensure the complaints investigation arrangements remain pertinent and responsive to changes in the custodial estate, probation supervision arrangements, and immigration detention facilities and escorts.

Justification for the procedure

35. This regulation-making power provides for procedural arrangements, but will also enable the Secretary of State to increase or reduce the scope of the matters that the PPO can investigate in relation to complaints. The Government therefore considers that the affirmative procedure provides an appropriate level of parliamentary scrutiny.

Clause 21(2), Paragraph 2(4) Schedule 2: Interference with Wireless Telegraphy in Prisons etc

Power conferred on: *Secretary of State*

Power exercisable by: *Direction*

Parliamentary procedure: *None*

Context and Purpose

36. Clause 21(2) of the Bill amends section 1 of the Prisons (Interference with Wireless Telegraphy) Act 2012 ("the 2012 Act") so that the existing power for the Secretary of State to authorise prison governors or directors in England and Wales to interfere with wireless telegraphy in a prison or Young Offenders' Institution is extended to include a power to authorise a public communications provider (PCP), such as a mobile network operator, to effect this interference. The purpose of this amendment is to enable PCPs to operate independently to deploy new technologies to disrupt the use of illegally held mobile phones in custody.

37. Paragraph 2(4) of Schedule 2 to the Bill then amends section 2 of the 2012 Act so that the current duty for the Secretary of State to give directions to a governor or director who is authorised to interfere with wireless telegraphy is supplemented by a new duty for the Secretary of State to give directions to a PCP that is authorised to effect the interference.

38. The purpose of this new duty to give directions to the PCP is to ensure that there are sufficient safeguards built into the new process of authorisations granted to PCPs. This will ensure that PCPs provide sufficient information to governors or directors and to the Secretary of State, on a sufficiently regular basis, so that the PCP's actions in effecting the interference with wireless telegraphy can be monitored and scrutinised.

39. Paragraph 2(4) of Schedule 2 also requires the Secretary of State to give directions to governors or directors specifying descriptions of information which is to be provided to OFCOM and the intervals at which this information is to be provided. The purpose of this measure is to allow OFCOM to scrutinise the way in which the interference by PCPs is being effected, and in particular to guard against the risk of incidental interference with lawful mobile phone communications outside of prison.

40. Pursuant to paragraph 2(2) of Schedule 1 to the 2012 Act, PCPs will be obliged to act in accordance with the directions which are given to them, and failure to do so will constitute a breach of statutory duty.

Justification for taking the power

41. The power for the Secretary of State to give directions to PCPs is necessary in order to ensure that the process for authorisations granted to PCPs mirrors the existing process for authorisations granted to governors or directors, and contains the same associated procedural safeguards. These safeguards ensure that governors, directors, the Secretary of State, and OFCOM all have sufficient information about the way in which the PCP is effecting the interference. This allows for a sufficient degree of monitoring

and oversight. In ECHR terms, it also assists to ensure that any possible interference with Article 8 is "in accordance with the law," to the extent that there are adequate in-built procedural safeguards.

Justification for the procedure

42. The decision to allow the Secretary of State to issue directions to PCPs administratively without recourse to any parliamentary procedure reflects the existing process for directions issued to governors or directors under section 2(4) of the 2012 Act.

43. As with the existing directions under the 2012 Act, the requirements to be contained within them will be operational and technical in nature, such that parliamentary oversight of their content would be unnecessary. Given the possibility that, in the future, multiple authorisations may be in place across a large number of different prisons, necessitating multiple sets of directions to PCPs, it would not be practicable for all of these directions to undergo parliamentary scrutiny. The absence of any parliamentary process also makes it easier for directions to be amended swiftly where necessary for operational reasons, and this offers the necessary degree of flexibility.

PART 2: NEW PROCEDURES IN CIVIL, FAMILY AND CRIMINAL MATTERS

Clause 23: The written information procedure

Power conferred on: *The Criminal Procedure Rule Committee*

Power exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

44. This clause requires the Criminal Procedure Rules ("Rules") made by the Criminal Procedure Rule Committee under sections 69 and 72 of the Courts Act 2003 to include provision for the accused to give information to a magistrates', the Crown Court and criminal division of the Court of Appeal in writing (including electronically) if the accused so chooses. Such information can include an indication as to whether the accused intends to plead guilty or not guilty but cannot include the giving of an actual plea. Any such written information so provided can only be used by the court for case management purposes. It also provides that the Rules may authorise or require the court, police or prosecution to give information in writing.

45. The clause falls within the scope of the existing rule making power in section 69 of the Courts Act 2003 and ensures that the Committee make such Rules as to what

information an accused may choose to give the court in writing as well as when and how such information is to be given. It also sets out the purposes for which such information is used by the court and the limits of the information that can be given (i.e. excludes the giving of pleas.)

Justification for taking the power

46. As set out in paragraphs 17-22 above, the Committee was established by the Courts Act 2003 specifically to make and maintain rules governing the practice and procedure of the criminal courts. The chairman is the Lord Chief Justice, and members are drawn from among those involved in the criminal justice system, including the judiciary, the legal professions, prosecutors, the police and voluntary organisations. It is independent of government (paragraphs 18-20 above set out the Lord Chancellor's powers). The amendments made by this clause confer on the Committee an additional commitment consistent with its existing statutory responsibilities. The point of allowing the Rules to provide the supplementary procedures is to keep criminal procedure consistent and easy to find, and to make it possible for the Criminal Procedure Rule Committee to keep that procedure up to date and efficient in the light of experience.

Justification for procedure

47. Section 72 of the Courts Act 2003 requires that Criminal Procedure Rules are to be agreed by the Lord Chancellor before being made and must be contained in a statutory instrument subject to annulment by resolution of either House of Parliament. Given that this clause concerns only criminal procedure, and contains nothing that might justify any more searching scrutiny, there is nothing to justify departure from the usual procedure.

Clauses 25(2), 26(2), 28(2), 29(2) and paragraphs 2 and 5[2] of Schedule 3: Either way offence – choice of written procedure for plea before venue, mode of trial and sending cases to the Crown Court: circumstances when written information procedure is disapplied

Power conferred on: *The Criminal Procedure Rule Committee*

Power exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

48. The above clauses insert powers into Magistrates' Courts Act 1980 and the Crime and Disorder Act 1998 to enable the Criminal Procedure Rule Committee to provide for circumstances when a magistrates' court must not provide written documents in respect

of plea before venue, mode of trial and sending cases to the Crown Court (respectively). Accordingly the written procedure could not apply in these circumstances. This is required to enable courts to dispose of cases immediately where the defendant wishes to plead guilty, be convicted and sentenced at the first available opportunity rather than be required to invite the defendant to indicate a plea online and attend court at a later date to confirm that indicated plea.

Justification for taking the power

49. It is appropriate for circumstances when the written information procedure is to be disapplied (so that the defendant must be dealt with before the court) to be set out in Rules. Such matters are procedural in nature and fall within the existing statutory responsibilities of the Committee. The point of allowing the Rules to provide for such circumstances when the written procedure is not to apply is to make it possible for the Committee to keep that procedure up to date and efficient in the light of operational experiences as well as to keep criminal procedure consistent and easy to find.

Justification for the procedure

50. Section 72 of the Courts Act 2003 requires that Criminal Procedure Rules are to be agreed by the Lord Chancellor before being made and must be contained in a statutory instrument subject to the negative resolution procedure. Given that this clause concerns only criminal procedure, and contains nothing that might justify any more searching scrutiny, the Government believes that the usual parliamentary procedure for rules of court is applicable.

Clauses 25(2), 26(2), 28(2), 29 (4) and paragraphs 2 and 5(5) of Schedule 3: Either way offence - choice of written procedure for plea before venue and mode of trial and sending cases to the Crown Court: information to be provided to accused

Powers conferred on: *The Criminal Procedure Rule Committee*

Powers exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and purpose

51. Clauses 25(2), 26(2), 28(2) insert new provisions alongside existing provisions in the Magistrates Courts Act 1980 (MCA 1980) in relation to the procedure for determining the trial venue for adults charged with an either way offence. Paragraph 2 of Schedule 3 inserts equivalent provision in respect of young defendants who require an allocation

decision. Clause 29 (4) and paragraph 5(5) of Schedule 3 inserts new provision alongside existing provision in the Crime and Disorder Act 1998 in relation to the mechanism for sending adult and young defendants to the Crown Court as a result of an allocation decision. The new provisions provide for the accused to have a choice to engage with a particular stage of procedure in writing without having to attend court. Before making such a decision, a magistrates' court must provide the accused with certain documents about the proceedings and procedure which apply. Essentially, the overall aim is to ensure the accused is aware that allocation can be dealt with either in writing or in court and is informed of the effects of following each procedure. For offences which are indictable only or allocated to the Crown Court, the fact that the case is to be sent to the Crown Court for trial is also to be provided to the defendant. The existing court-based procedures are postponed whilst the accused is considering whether to engage in allocation procedures in writing. If the accused does engage in writing then the written procedures apply in place of the court-based procedures. Conversely, if the accused does not engage in writing then the court-based procedures apply.

52. These clauses ensure that core documents are provided to the defendant in addition to any other information which may be specified in Rules. The policy intention is to replicate the same steps in writing as the court must follow under existing court-based procedures and to ensure that before asking the defendant to engage in any stage of the proceedings in writing, the defendant will have received adequate information so as to make an informed decision about which procedure to adopt.

53. Clause 25(2) deals with plea before venue in new section 17ZA MCA 1980. New section 17ZA(3) provides that before being asked for a written indication of plea, the magistrates must give the defendant documents containing the following information:

    a) the nature of the charge;
    b) the fact that a person may give an indication as to plea in writing;
    c) the time period within which this would have to be done;
    d) that if the person does not choose to give a written indication of plea then he or she must attend court at a certain time to indicate a plea in person and if the person does not attend this hearing that the court may proceed to allocate the case in absence;
    e) that if the person chooses to give a written indication of a guilty plea then the case will be listed for a hearing at which the person may be convicted and

sentenced. The person may be sentenced by the magistrates' court or the case may be committed to the Crown Court for sentencing;

f) that if the person chooses to give a written indication of a not guilty plea then the person will have the choice of whether to deal with mode of trial in writing.

54. New section 17ZA(3)(i) MCA 1980 provides that the Rules set out what other information a magistrates' court must give a defendant before he or she can choose to indicate a plea in writing.

55. Clause 26 deals with mode of trial in new section 17F MCA 1980. New section 17F(3)(d) provides that before being asked whether to agree to have the court decide mode of trial without being present, the magistrates must first give the defendant documents explaining the following:

a) that the court must make a decision as to allocation and the procedure for making that decision;

b) that the person may choose to have the court make that decision without being present;

c) the means, and time limit, by which the person should tell the court to make that allocation decision without being present.

56. New section 17F(3)(d) MCA 1980 provides that the Rules set out what other information a magistrates' court must give a defendant before he or she can decide to have an allocation decision made without being present.

57. Clause 28 deals with elections for trial in the Crown Court for low-value shoplifting by way of amendment to section 22A MCA 1980. New section 22A(1A) MCA 1980 provides that before being asked whether to elect Crown Court trial in writing, the magistrates must first give the defendant documents explaining the following:

a) the nature of the charge;

b) that the person may choose to elect Crown Court trial or summary trial and that this decision can be made in writing;

c) that this decision must be made by a certain time;

d) that if the person chooses to be tried in the Crown Court, then the case is sent to the Crown Court for trial whereas if the persons agrees to summary trial then it will proceed to summary trial. If the person does not may an election

decision in writing within the required time, then that person must appear before the court to make that election

58. New section 22(1A)(e) MCA 1980 provides that the Rules set out what other information a magistrates' court must give a defendant before he or she can decide to elect Crown Court trial in writing for a low-value shoplifting offence.

59. Paragraph 2 of Schedule 3 deals with a child or young person indicating a plea in writing in certain cases. New section 24ZA MCA 1980 provides that before being asked for a written indication of plea, the magistrates must give the defendant documents containing the following information:

    a) the nature of the charge;

    b) the fact that a person may give an indication as to plea in writing;

    c) the time period within which this would have to be done;

    d) that if the person does not choose to give a written indication of plea then he or she must attend court at a certain time to indicate a plea in person and if the person does not attend this hearing that the court may proceed to allocate the case in absence;

    e) that if the person chooses to give a written indication of a guilty plea then the case will be listed for a hearing at which the person may be convicted and sentenced. The person may be sentenced by the magistrates' court or the case may be committed to the Crown Court for sentencing;

    f) that if the person chooses to give a written indication of a not guilty plea then the court will proceed to allocate the case.

60. New section 24A(3)(j) MCA 1980 provides that the Rules set out what other information a magistrates' court must give a defendant before he or she can choose to indicate a plea in writing in these cases.

61. Clause 29 amends section 51 of the Crime and Disorder Act 1998 (CDA 1998) so as to enable indictable cases involving adults to be sent to the Crown Court without a hearing; that is, both in respect of offences that are only triable on indictment and those that are triable either way that have been allocated for trial in the Crown Court. New section 51(2A) CDA 1998 requires the magistrates' court to provide the defendant with documents which state the charge against the person and explain that a magistrates' court is required to send the person to the Crown Court for trial. New section 51(2A)(d) CDA 1998 provides that the Rules set out what other information a magistrates' court

must give a defendant before sending the person to the Crown Court for trial in their absence. Paragraph 5(6) of Schedule 3 makes equivalent changes in relation to young defendants with new section 51A(3A) CDA 1998 providing that the Rules set out what other information a magistrates' court must give a young defendant before sending him or her to the Crown Court. The policy intention is to ensure the defendant is informed about the criminal procedure which is to be followed notwithstanding that the defendant does not have any choice in respect of the mechanism of sending such cases to the Crown Court.

Justification for taking the power

62. Requiring the Committee to set out what additional information needs to be provided to the accused about allocation and sending to the Crown Court before he or she can decide whether to indicate a plea or elect jury trial in writing as opposed to in court, is a commitment consistent with the Committee's existing statutory responsibilities. The point of allowing the Rules to provide the supplementary procedures is to keep criminal procedure consistent and easy to find, and to make it possible for the Criminal Procedure Rule Committee to keep that procedure up to date and efficient in the light of experience if, for example, as a result of operational concerns it is thought further specific information is required to be provided to the accused to ensure they have adequate information to make informed decisions about which procedure to adopt.

Justification for the procedure

63. Section 72 of the Courts Act 2003 requires that Criminal Procedure Rules are agreed by the Lord Chancellor before being made and must be contained in a statutory instrument subject to the negative resolution procedure. Given that this clause concerns only criminal procedure, and contains nothing that might justify any higher level of scrutiny, the Government believes that the usual parliamentary procedure for rules of court is applicable.

Clause 29(5) and paragraph 5(7) of Schedule 3: Sending cases to the Crown Court

Powers conferred on: *The Criminal Procedure Rule Committee*

Power exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

64. Clause 29 amends section 51 of the Crime and Disorder Act 1998 (CDA 1998) in relation to the sending of indictable cases to the Crown Court involving adults. Paragraph 5 of Schedule 3 amends section 51A in relation to sending of young defendants to the Crown Court. Both provisions enable such cases to be sent without the accused being present. Clause 29 (5) also substitutes the detailed statutory provisions on sending related cases currently in section 51(3) to (12) with a provision for the Rules to prescribe the situations when related cases (including summary offences) which are linked to the alleged offence, defendant or co-defendant are to be sent to the Crown Court for trial together with the main offence. Paragraph 5(5) and (6) of Schedule 3 makes the equivalent changes to section 51A so that Rules set out the circumstances in which cases related to young defendant cases being sent to the Crown Court are also sent with the main offence.

Justification for taking the power

65. Section 51 (in respect of adults) and 51A CDA 1998 (in respect of children and young persons) provide the statutory mechanism by which cases are sent from the magistrates' court to the Crown Court. For adults, in indictable only cases, the process is essentially automatic. For adults, in either way cases, having set out the framework in primary legislation for enabling the accused to choose to elect Crown Court trial in writing without a hearing, where an accused has so elected to have the matter sent without a hearing, then there is no purpose to hold a hearing solely for the purpose of sending. For children and young persons, there is no right to elect for jury trial so the offence must be sent to the Crown Court where the conditions set out in section 51A(3) CDA 1998 are satisfied (e.g. a homicide offence or a "grave offence" where the Youth Court's sentencing powers are inadequate). Having established the statutory mechanism by which cases are sent to the Crown Court in primary legislation, the process by which related cases are also sent on the back of the main offence are procedural matters which are appropriately dealt with in Rules and fall within the existing statutory responsibilities of the Committee. The Government acknowledges that removing provisions from primary legislation and making them subject to the exercise of secondary legislation, in this case rules of court, should not be undertaken lightly. However, the Government thinks it is merited in this case. The provisions are clearly procedural, and the point of allowing the Rules to provide for such processes is to make it possible for the Committee to keep that procedure up to date and efficient in the light of operational experiences as well as to keep criminal procedure consistent and easy to find. Further, when the original

provisions were made (ss.51 and 51A CDA 1998), the Criminal Procedure Rules and Committee had not yet been established.

Justification for the procedure

66. Section 72 of the Courts Act 2003 requires that Criminal Procedure Rules must be agreed by the Lord Chancellor and must be contained in a statutory instrument subject to the negative resolution procedure. Therefore, although this procedure was previously in primary legislation, the Government believes that in substance it is no different from other matters of criminal procedure that are currently included with the Rules. Given that this power relates only to criminal procedure, the Government believes the usual parliamentary procedure for rules of court remains appropriate.

Paragraph 6 of Schedule 5: Live links in other criminal proceedings: Rules of Court

Power conferred on: *The Criminal Procedure Rule Committee*

Power exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and purpose

67. This provision amends the existing power of the Criminal Procedure Rule Committee (the Committee) under section 55 of the Criminal Justice Act 2003 to make Criminal Procedure Rules (Rules) in relation to the use of live links in criminal proceedings so as to also enable the Committee to make Rules in relation to the use of live audio links under Part 8 of the Criminal Justice Act 2003 (Live links in criminal proceedings). This reflects changes proposed to section 51 of the Criminal Justice Act 2003 to enable courts to be able to direct the use of live audio links (in addition to live video links) in respect of any participant in eligible criminal proceedings (as opposed to just a witness other than the defendant, as is presently the case), as well as to enable eligible criminal proceedings to be conducted “virtually”; that is, where all participants take part in such proceedings at the same time through a live audio or live video link.

68. Paragraph 6 of Schedule 5 retains and amends the existing power of the Criminal Procedure Rule Committee (the Committee) under section 55 of the Criminal Justice Act 2003 to make Criminal Procedure Rules (Rules) in relation to the live link power under section 51 of that Act, so that the Committee will be able to make Rules in relation to the expanded power. It will also enable the Committee to make Rules in relation to contested

applications for a live link direction under section 51 of the Criminal Justice Act 2003 being determined by the court without a hearing. Currently, the powers of the Committee are restricted to making Rules in relation to uncontested applications for these directions being decided without a hearing. The Government's intention here is to enable the Committee to make Rules which would allow the courts to decide contested applications without a hearing in appropriate circumstances, where the application is contested on a wholly groundless or wholly unreasonable basis, for example. It is worth bearing in mind that the courts will, pursuant to their obligations as public authorities under section 6 of the Human Rights Act 1998, continue to have to order a hearing where this is required by the right to a fair trial (Article 6 of the European Convention on Human Rights). Indeed, in deciding whether to conduct any particular matter without a hearing, the courts will have to act in accordance with the overriding objective of the Rules to deal with cases justly, which explicitly includes recognising the rights of a defendant, particularly those under Article 6 – see Rule 1.1(2)(c)[5].

Justification for taking the power

69. The Committee was established by the Courts Act 2003 (see paragraphs 17-22 above) specifically to make and maintain Rules governing the practice and procedure to be followed by the criminal courts. The Government considers that there is no reason to make an exception in relation to the supplemental practice and procedure (with the most significant matters of procedure set out in the Bill provisions) to be followed with respect to the expanded live link power under section 51 of the Criminal Justice Act 2003, including the determination of contested applications without a hearing where appropriate. Enabling the experienced and knowledgeable Committee to make Rules, which can be amended more straightforwardly than primary legislation and are regularly updated, will ensure that the supplemental practice and procedure in relation to this live link power is reflective of operational experience, and thereby remains fair and efficient. It will also ensure that these Rules are consistent with other aspects of criminal practice and procedure, in particular Rules relating to other live link powers and the use of technology in general.

Justification for the procedure

70. Section 72 of the Courts Act 2003 requires Rules to be agreed by the Lord Chancellor before being made and to be contained in a statutory instrument subject to the negative resolution procedure. Given that Rules pursuant to section 55 of the Criminal Justice Act

[5] Criminal Procedure Rules 2015 S.I. 2015/1490

2003 will be concerned with criminal practice and procedure, and contain nothing that might justify any more searching scrutiny, the Government does not believe a departure from the usual parliamentary procedure is justified.

Clause31: Conduct of certain criminal proceedings on the papers

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and purpose

71. Clause 28 creates a power for the Lord Chancellor, by regulations, to make provision, including amending, repealing or revoking primary or secondary legislation, to enable or facilitate the determination of pre-trial or enforcement decisions on the basis of documents before the court, without a hearing. Such regulations may only be made with the agreement of the Lord Chief Justice.

72. Save for where this would be contrary to law (for example, existing legislation, or the European Convention on Human Rights), the criminal courts already have inherent powers to determine matters without a hearing. This is further detailed in existing Criminal Procedure Rules[6] (Rules). By way of example, the Rules detail how the following matters may be determined without a hearing:

    a. issue of summons, warrants or requisitions (Rule 7.4(1)(b));

    b. application to dismiss offence sent for Crown Court trial (Rule 9.16(4)(a)), applications for special measures directions (Rule 18.8(a));

    c. applications for live link directions (Rule 18.23(a));

    d. oppositions to introduction of hearsay evidence (Rule 20.3(3);

    e. applications to introduce bad character evidence (Rule 21.3(5) and Rule 21.4(6));

    f. applying to set aside a conviction or varying a costs order (Rule 24.18(2)(a));

    g. objecting to jurors (Rule 25.8(4))[7].

[6] Criminal Procedure Rules 2015 S.I. 2015/1490

[7] See Criminal Procedure Rules 2015 S.I. 2015/1490 (as amended).

73. Sub-clause (2) restricts the exercise of this power to the removal of obstacles to pre-trial and enforcement issues being decided on the papers; regulations made under this power will not be able to remove from the criminal courts the option of holding a hearing. Thus, the courts will, pursuant to their obligations as public authorities under section 6 of the Human Rights Act 1998, continue to have to order a hearing where this is required by the right to a fair trial (Article 6 of the European Convention on Human Rights). Indeed, in deciding whether to conduct any particular matter without a hearing, the courts will have to act in accordance with the overriding objective of the Rules to deal with cases justly, which explicitly includes recognising the rights of a defendant, particularly those under Article 6 – see Rule 1.1(2)(c).

74. The Government's intention is for this power to be used to give the criminal courts greater flexibility in deciding how to conduct their proceedings. Accordingly, where appropriate, legislation which requires a pre-trial or enforcement matter to be determined at a hearing is to be removed so that the courts can, on a case by case basis, decide whether a hearing is required.

Justification for taking the power

75. The Government recognises that this is a 'Henry VIII' power which enables primary legislation to be amended by secondary, but considers that this is the best way to proceed. Taking this power will enable the Government to give full and careful consideration to removing legislative requirements for a hearing to take place. Given the wider court reform proposed in this Bill, the Government believes that the merits of removing legislative requirements for a hearing will be best assessed once these reforms have come into force and have "bedded in". Making changes through a power will also enable, if deemed to be appropriate, a multi-phased and "future-proof" approach to be taken. In addition, there are safeguards which will ensure that the power is not exercised in a way which could be said to jeopardise fair trial rights. Firstly, the power is restricted to pre-trial and enforcement decisions only. Accordingly, the power cannot be used to enable trial or sentencing decisions to be made without a hearing. Secondly, the power cannot be used to require a matter to be decided without a hearing. The decision whether to hold a hearing will always be for the court, which will have to comply with fair trial obligations. Thirdly, the power may only be exercised with the agreement of the Lord Chief Justice, thus ensuring that the views of the judiciary are reflected.

Justification for the procedure

76. Given that this power may be exercised to amend or repeal primary legislation the Government recognises that it is proper that it be exercised by way of the affirmative

procedure, in order to provide Parliament with the appropriate level of scrutiny. Although it will be for the courts to decide whether a particular pre-trial or enforcement matter should be determined without a hearing, the Government recognises Parliament should be able to scrutinise the types of pre-trial and enforcement issues to which the power is applied.

Automatic online conviction and standard statutory penalty

77. The Government's response to its consultation on Transforming Justice (https://www.gov.uk/government/consultations/transforming-our-courts-and-tribunals) sets out its intention to proceed with the automatic online conviction and standard statutory penalty procedure. Section 29 of the Criminal Justice Act 2003 contains a method for instituting criminal proceedings against a person by issuing a written charge, and requisition or single justice procedure notice. Clause 35 contains amendments to that provision which will allow relevant prosecutors to initiate proceedings by issuing a new type of notice ('written procedure notice') which replaces the single justice procedure notice and will enable the prosecution to be dealt with by way of the new automatic online conviction and standard statutory penalty, the substantive procedure for which is inserted into the Magistrates Court Act 1980 by clause 36.

Clause 35: Changes to institution of proceedings by written charge – specification of relevant prosecutors

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and purpose

78. Section 29 of the Criminal Justice Act 2003 provides that only relevant prosecutors may institute proceedings by written charge and subsection (5) defines the term "relevant prosecutor". That definition includes at subsection (5)(h) a person specified in an order made by the Secretary of State or a person authorised by such a person to initiate proceedings. Subsection (5A) provides that such an order must also specify whether that person and those authorised by them to institute criminal proceedings, are authorised to issue written charges, requisitions and single justice procedure notices or only written

charges and single justice procedure notices. Subsection (9) of clause 35 amends subsection (5A) so that it refers to written procedure notices in place of single justice procedure notices.

Justification for taking the power

79. This amendment is consequential on the creation by clause 35 of the written procedure notice, which replaces the single justice procedure notice.

Justification for the procedure

80. It is the Government's view that the amendment to section 29 of the Criminal Justice Act 2003 is consequential upon the creation of the written procedure notice, and doesn't justify a change to the parliamentary procedure

Clause 36: Automatic online conviction and standard statutory penalty procedure - specification of criminal offences

Power conferred on: *Secretary of State*

Power exercisable by: *Order made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

81. New section 16H(3)(a) of the Magistrates Court Act 1980 (MCA 1980) provides that a person may only be convicted of an offence by way of accepting the automatic online conviction option if the offence is of a kind specified for this purpose in an order made by the Secretary of State. The limit on this power at subsection (4) is that the Secretary of State may not specify a particular kind of offence unless it is a summary only offence that is not punishable with imprisonment.

Justification for taking the power

82. The intention is that the following types of offences will be appropriate for prosecution by this procedure:

a) Offences where there is no identifiable individual victim
b) Offences which are simple to prove
c) Offences in relation to which there is a high degree of consistency in sentencing
d) Offences in relation to which there is little likelihood of the court utilising a problem-solving approach and/or making complex ancillary orders
e) Offences in relation to which there is enough sentencing data available to enable an appropriate standard penalty to be set

83. The alternative approach would be for the Bill itself to specify the offences to which the procedure might apply. The Government has decided not to adopt this approach because at this stage it is not possible to set out all the offences to which the procedure may ultimately apply. It is intended that initially the procedure will be tested by applying it to a limited range of offences and that it will thereafter be expanded to other offences as appropriate. For example, new section 16J(2) MCA 1980 makes provision for the endorsement of the person's driving record with penalty points, but the Government does not envisage driving offences being specified initially. This approach will be made possible by way of the flexibility of a delegated power to specify applicable offences, which can then be amended as the system is tested. The offences initially intended for inclusion in the regulations are failure to produce a ticket for travel on a train; failure to produce a ticket for travel on a tram; and fishing with an unlicensed rod and line.

Justification for the procedure

84. The Government recognises that the automatic online conviction is a novel procedure and one that carries consequences for those that decide to opt in to it. In deciding which offences the new procedure can apply to the Government believes that the higher level of scrutiny afforded by the affirmative procedure is appropriate. This will enable Parliament to scrutinise and debate the offences chosen by the Secretary of State, thereby ensuring that the principles set out above are maintained as the scheme is expanded.

Clause 36 and Schedule 7: Automatic online conviction and standard statutory penalty procedure – other procedural matters

Power conferred on: *Criminal Procedure Rule Committee*

Power exercisable by: *Rules of court by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

85. Clause 36 provides that that certain aspects of the automatic online conviction and standard statutory penalty procedure will be prescribed by the Criminal Procedures Rules.

Justification for taking the power

86. A written procedure notice will set out the procedures which may be available for dealing with the charge (see clause 35(4)). The notice will ask the person to return a written notification to the designated officer of a magistrates' court in accordance with section 29(2B) of the Criminal Justice Act 2003. The person will be offered a range of methods by which they may return that notification, including online. The notice will indicate that if the person wishes to respond online the automatic online conviction option may be offered to them. New section 16G(1) Magistrates' Court Act 1980 (MCA 1980) defines references to a person being offered the automatic online conviction option: the accused person will be given a written notification by electronic means – and in accordance with the Criminal Procedure Rules – which explains that if the person intends to plead guilty they may agree to be convicted and penalised for the offence under new sections 16H and 16I MCA 1980 respectively. New section 16G(2) MCA 1980 similarly defines references to a person accepting an online conviction which will also take place by electronic means and in accordance with the Criminal Procedure Rules. The Government believes it is appropriate that the detail of the online system by which the offer and acceptance of the offer are given is set out in rules rather than on the face of the legislation. This utilises the expertise of the Committee, and provides the flexibility required to reflect developments in the technology as it evolves.

87. New section 16H(3) MCA 2003 sets out the qualifying conditions which must be met before a person can be convicted by way of the automatic online conviction option. One of these is that the "required documents" must be served on the accused. These are then defined at new subsection (6). That definition includes such documents as may be prescribed by the Criminal Procedure Rules. The Government believes that the Criminal

Procedure Rule Committee is best placed to consider what information the defendant requires to make a fully informed decision. This information may differ depending on the offence which is being prosecuted and the responses given by the person to the questions asked by the online system. The Government therefore believes that the flexibility of a rule making power is desirable.

88. New section 16H(3))d) MCA 1980 provides that service of the required documents should be effected in accordance with the Criminal Procedure Rules. The rules can cater for documents to be served at different times and in accordance with the design of the technological interface which will evolve over time.

89. New section 16H(2) MCA 1980 provides that a person is convicted of the offence in question by virtue of accepting the automatic online conviction option. New section 16L(1) MCA 1980 provides that the time when a conviction under section 16H takes effect is to be determined in accordance with Criminal Procedure Rules. The time at which the online conviction will take effect will depend on the design and technical capability of the online system which will administer the procedure. The Government believes that the rules Committee will be best placed to understand the means by which the system will communicate the receipt of the person's acceptance and how much time that will take, which may change over time as the development of the online system evolves.

90. New section 16K(4) MCA 1980 provides that a person convicted of an offence by virtue of accepting the automatic online conviction option must be given a notice of penalty, which will be given by electronic means and in accordance with the Criminal Procedure Rules. The Government believes that provision about service of the notice is most appropriately made by rules as this will better enable provision to be made in accordance with the design of the technological interface which will evolve over time.

91. Section 30(1) of the Criminal Justice Act 2003 allows for criminal procedure rules to be made in relation to written charges, requisitions and single justice procedure notices. Paragraph 1 of Schedule 1 makes amendments to that provision which are consequential on the creation of the written procedure notice by clause 35, which replaces the single justice procedure notice. This will allow the rules committee to make the same provision about written procedure notices as they can currently make about requisitions and single justice procedure notices.

Justification for the procedure

92. Rules made under these provisions must be made in accordance with the established procedure for making Criminal Procedure Rules described in paragraphs 17-22 above. The Government does not consider there is a need to create an alternative procedure in relation to the additional powers given to the Committee under these clauses. The powers given are not controversial and fall clearly within the practice and procedure to be followed by the criminal courts.

Clause 36 and Schedule 7: Standard statutory penalty

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and purpose

93. Clause 36 inserts new sections 16I and 16J into the Magistrates' Courts Act 1980 (MCA 1980) to provide for the penalty to be imposed on offenders convicted via the new automatic online conviction procedure. In all cases the penalty will consist of a fine, a surcharge and prosecution costs. In certain cases the penalty may also consist of an amount for compensation or, in the future, a number of penalty points to be endorsed on the offender's licence.
94. Offenders would be given the full details of the prospective fixed fine, surcharge and costs (and compensation and penalty points if relevant) before agreeing to accept the automatic conviction and penalty.

95. New section 16I and section 16J MCA 1980 do the following:
    a) Section 16I(2) and (9) gives the Secretary of State the power to, by order, set the fine to be automatically imposed on conviction.
    b) Section 16J(1)(a) gives the Secretary of State the power to, as part of that order, set different fine amounts for different offences; and (1)(b) gives the Secretary of State the power to set different fine amounts for an offence depending on the circumstances in which the offence is committed.

c) Section 16I(3) and (9) gives the Secretary of State the power to, by order, specify that an offence is an automatic conviction which must result in a specified number of penalty points, and other specified particulars, being endorsed on the offender's driving record.

d) Section 16J(2) limits the above power so that only offences which may already carry penalty points on conviction may be specified.

e) Section 16I(4) and (9) gives the Secretary of State the power to, by order, specify that an offence is one in respect of which an automatic conviction must result in the offender being liable to pay compensation. The amount of compensation payable is determined by the prosecutor (s16I(5)(a).

f) Section 16I(5)(b) and (9) gives the Secretary of State the power to, by order, set a cap on the amount of compensation which a prosecutor may determine is payable for an offence.

g) Section 16J(3)(a) gives the Secretary of State the power to, as part of that order, specify different caps for different offences; and (3)(b) gives the Secretary of State the power to set different caps for an offence depending on the circumstances in which the offence is committed.

h) Section 16I(8) and (9) gives the Secretary of State the power to, by order, specify the amount of the surcharge to be automatically imposed on conviction.

i) Section 16J(5) gives the Secretary the power to, as part of that order, specify the amount of the surcharge as a proportion of the fine amount specified for that offence.

96. The way in which the fixed fine is set using the above powers will be based on current fining practice. Relevant factors in setting the fine level for each offence may be the overall average of fines imposed for the offence sentencing guidelines published by the Sentencing Council, current sentencing practice and income data. It is necessary for the power to cover the ability to set different fines for different offences, or different fines for an offence committed in different circumstances: for example, if at some point a speeding offence is specified as suitable for this procedure, it may be appropriate to set a fine of a certain amount for offenders convicted of driving at 1 to 20mph over the limit; and a higher amount for offenders convicted of driving above that speed.

Justification for taking the power

97. It is important to note that these provisions in no way affect the maximum penalty for the relevant offences, which will remain set out in primary legislation for offences created in

statutory legislation; and in relevant byelaw offences. In effect this is a new type of penalty (within the statutory maximum) which will be automatically imposed on offenders who are convicted via this procedure.

98. Given that it is proposed that offences eligible for this new procedure will be specified in secondary legislation, and that each offence may carry a different penalty (or penalties), it is therefore necessary that the relevant penalties are also specified in secondary legislation.

Justification for the procedure

99. The powers to set the penalty are subject to the negative resolution procedure (new section 16J(6) MCA 1980). This is because it may be necessary to frequently change fine amounts, and other amounts specified as part of the penalty, following changes to sentencing guidelines or practice, and/or economic changes, or following on from changes to offences, or the way in which offending behaviours are categorised, which may make the original fine amounts inappropriate. Where the courts would have discretion available to them to immediately respond to such changes when sentencing an offender the online system will not have this discretion. The negative procedure is therefore appropriate so that the Government can swiftly ensure that those who are to be convicted of the offences by way of this procedure are being appropriately penalised. Any fine maxima in the substantive offences will remain applicable.

100. It will also be necessary to take prosecutors' feedback into account in relation to the appropriate cap to set on compensation in light of the cases prosecuted via this procedure, and to have the flexibility to amend the cap swiftly accordingly.

101. In relation to the setting of the surcharge, the power to set the amount in secondary legislation subject to the negative procedure mirrors the surcharge provided for in s161A Criminal Justice Act 2003, which provides that the court when sentencing an offender must order him or her to pay a surcharge; section 161B provides that the amount of the surcharge payable is specified by order of the Secretary of State (in the Criminal Justice Act 2003 (Surcharge) Order 2012)[8].

[8] S.I. 2012/1696

Online procedure: the civil and family courts and the tribunals

Clause 38: Regulations for the purposes of section 37

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

102. The Bill creates a new online procedure capable of applying to civil, family and tribunal proceedings and, establishes an Online Procedure Rule Committee, similar in concept to the Civil, Family and Tribunal Procedure Rule Committees to provide new, simplified rules to support this procedure.

103. Clause 37(1) requires rules of court, or tribunal procedure rules to be made in relation to proceedings specified by the Lord Chancellor. Clause 38(1) enables the Lord Chancellor to specify such proceedings by reference to, amongst other matters, the legal or factual basis of the proceedings, the value of the matter in issue and, in civil and family proceedings, the court in which the proceedings would be brought. Subsection (2)(a) enables the Lord Chancellor to specify the circumstances in which a party might choose to commence proceedings under current civil, family, and tribunal rules, which would otherwise be subject to the online procedure, as well as the circumstances in which the online procedure rules are not to apply to proceedings or would cease to apply to proceedings. Subsection (2)(b) enables the Lord Chancellor to specify in regulations those civil, family and tribunal proceedings in respect of which parties are required to use the online procedure. Subsection (2)(c) enables the Lord Chancellor to provide that certain proceedings, which would otherwise be excluded from the online procedure by regulations, may still be subject to the online procedure rules (so enabling the Online Procedure Rule Committee to provide parallel rules for a paper based procedures). In respect of regulations made under subsection (2) and clause37, the Lord Chancellor must consult the Lord Chief Justice in respect of civil and family proceedings (subsection 4) or the Senior President of Tribunals in respect of tribunals (subsection 5), as appropriate.

Justification for taking the power

104. These provisions will ensure that the Government will retain control over the proceedings to which the online procedure will apply or may no longer apply. The initial intention is that it will apply to money claims up to the value of £25,000. However, over time the Government wishes to be able to widen its scope, not least in respect of family and tribunal proceedings, and may also wish to stagger implementation to cover different stages of specified proceedings. The ability to break down proceedings in this way, and to monitor the impact of the reforms as well as the IT, is a key element of the development of the online system and can only be achieved if the regulations under which the online procedure is implemented enable us to do so.

Justification for the procedure

105. As noted above, these provisions will ensure that the Government will retain control over the proceedings to which the online procedure will apply. However, the potential impact on court users as the scope of the online procedure is widened, makes regulations made under this power suitable for fuller consideration by Parliament and, as such, are suited to the affirmative procedure.

Clause 39: The Online Procedure Rule Committee and its powers

Clause 40: Power to change certain requirements relating to the Committee

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

106. This provision enables the Lord Chancellor to amend clause 39(2) to 39(6), which concern the membership of the Online Procedure Rule Committee. Any amendment requires the concurrence of the Lord Chief Justice and the Senior President of Tribunals, and consultation with the Head and Deputy Heads of Civil Justice, and the President of the Family Division,

Justification for taking the power

107. The power for the Lord Chancellor to amend the provisions regarding the membership of the Online Procedure Rule Committee essentially replicates the existing powers that the Lord Chancellor has to amend the comparable provisions on membership of the Civil Procedure Rule Committee, the Criminal Procedure Rule Committee and the Family Procedure Rule Committee (see section 2A of the Civil Procedure Act 1997 and sections 71 and 78 of the Courts Act 2003 respectively). To ensure that suitably qualified persons may continue to be appointed to the committee as the scope of the online procedure increases, the Lord Chancellor may need to amend both requirements as to the number and expertise of committee members. The comparable powers in relation to the existing three rule committees have been used only very rarely. Nevertheless, as with the existing three committees, the powers in relation to the Online Procedure Rule Committee are necessary to ensure that changes may be made as and when required so that new members may be appointed as the need arises.

Justification for the procedure

108. The power to make amendments in relation to membership of the Online Procedure Rule Committee is subject to the negative procedure. Again, this mirrors the approach in relation to the Civil Procedure Rule Committee, the Criminal Procedure Rule Committee and the Family Procedure Rule Committee (see section 2A(4) of the Civil Procedure Act 1997 and section 108(5) of the Courts Act 2003). Requiring the amendments to membership of the Online Procedure Rule Committee to be made by way of negative procedure will ensure consistency across the rules committees, and as noted, above, the exercise of the power will require the concurrence of the Lord Chief Justice and Senior President of Tribunals and is subject to consultation with the senior judiciary, so use of the power will be, in any event, subject to scrutiny.

Clause39: The Online Procedure Rule Committee and its powers

Clause41: Making online procedure rules

Power conferred on: *The Online Procedure Rule Committee*

Power exercisable by: *Rules of court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

109. These provisions enable the Online Procedure Rule Committee to make online procedural rules in respect of civil, family and tribunal proceedings specified in regulations under clause 40. To make rules, clause 39 provides that the Committee has the same rule-making powers as the Civil, Family and Tribunal Rule Committees (subsection (7) and (8)[9]. Subsection (6) of clause 37 gives effect in rules to enables the Online Committee to make rules to provide for alternative, paper based procedures to accommodate cases to which the online procedure rules might otherwise cease to apply. The Online Committee may also apply existing civil, family and tribunal rules, with or without modifications made by the other committees. Clause 41 imposes a duty on the Online Committee to consult such persons as they consider appropriate, before making rules (subsection (1)(a)). That clause further provides that the Lord Chancellor may allow or disallow rules made by the Committee, but must inform the Committee if she does so (subsections (3) and (4)).

Justification for taking the power

110. These powers are comparable with those provided in respect of the Civil, Family and Tribunal Procedure Rules described at paragraphs 10-26 above. It is necessary to ensure that, as the Online Procedure develops and its scope increases that rules can be made and amended to take account of these changes. The experience of other rules committees suggests that rule development is an ongoing process. Rules are subject to regular amendment (amending orders in respect of the Civil Procedure Rules are issued at least twice a year and, in recent years, frequently more often than that), often taking account of developments in case law and requiring changes to be made at short notice. In other cases amendments are administrative, ensuring the courts continue to operate efficiently. In either case the expertise of the Online Procedure Rule Committee members will be invaluable to ensure the utility of the rules.

Justification for the procedure

111. The Online Procedure Rules are to be subject to the negative procedure. Again, this mirrors the general situation in relation to the Civil Procedure Rules, the Criminal Procedure Rules and the Family Procedure Rules (see section 3 of the Civil Procedure Act 1997 and sections 72(6) and 79(6) of the Courts Act 2003 respectively). These Online Procedure Rules will be subject to development and scrutiny by the Online Procedure Rule Committee. In the early stages of development of the online procedure,

[9] See paragraphs 10-26 above.

regular amendments to the online rules, may be necessary. Moreover, as with other rules of court, small but important amendments might be required at short notice, and may be more frequent given the potential scope of the online procedure. The flexibility required to ensure that the rules remain effective and the procedures they prescribe operate properly, is best served by the negative procedure. As stated in paragraph 11, except in one very specific and sensitive circumstance (closed material procedures) court rules have not been subject to an affirmative procedure since 1873, and the Government sees no justification to provide for a different level of scrutiny to that which generally applies to the other rules of court: as stated above, the rules will be subject to scrutiny by the Online Procedure Rule Committee in any event, and that Committee will be under a duty to consult on the rules where appropriate.

Clause 42: Power of Lord Chancellor to require rules to be made

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Written notice under this provision*

Parliamentary Procedure: *None*

Context and Purpose

112. This power enables the Lord Chancellor, if she considers it expedient to do so, to give notice to the Online Procedure Rule Committee to make such rules as it considers necessary to achieve a specified purpose.

Justification for taking the power

113. The power reflects similar provision in section 3A of the Civil Procedure Act 1997 (Civil Procedure Rule Committee), section 79A of the Courts Act 2003 (Family Procedure Rule Committee) and Part 3 of Schedule 5 to the Tribunals Courts and Enforcement Act 2007 (Tribunal Procedure Rule Committee) (see paragraphs 10-26 above). It enables the Lord Chancellor to ensure that rules giving effect to otherwise lawful Government policy can be made if the Online Procedure Rule Committee, for whatever reason, declines to make the rules themselves. Although such occurrences are rare (the Civil Procedure Rule Committee, for example, has only once received such notice in 17 years), without this power, Government policy may be stymied for want of rules, with the prospect of introducing further primary legislation in order to address the issue.

Justification for the procedure

114. In accordance with similar provisions in other legislation, the power to give written notice is not subject to Parliamentary procedure. It is a matter of expediency that the Lord Chancellor should be able to direct the Committee to make rules, which might be required as a matter of urgency, without additional procedure. Further the Committee can only make rules within the scope of its powers in clause39. However, once made by the Committee, the rules will be subject to the provisions of clause41, in that they will be made by statutory instrument and subject to the negative procedure, with similar justification as applies to that clause.

Clause 43: Power to make consequential amendments

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

115. This provision enables the Lord Chancellor, by regulations and having consulted both the Lord Chief Justice and the Senior President of Tribunals, to make consequential amendments to any enactment, in consequence of clauses37 (rules for an online procedure in courts and tribunals) and39 (The Online Procedure Rule Committee and its powers) and the online procedure rules, and to facilitate the making of online procedure rules. Although on its face this is a 'Henry VIII' power in that secondary legislation can amend primary legislation, this is not a novel power to rules of court, and is common to procedure rules in civil, family and tribunal jurisdictions (see paragraphs 10-26 above).

Justification for taking the power

116. Initially it is envisaged that the online procedure will apply to money claims up to the value of £25,000. However, given the anticipated development, overtime, of the online procedure and the widening of its scope it is particularly important that consequential amendments may be made to other enactments as work continues on rolling out the new procedure in order to ensure that procedure operates without hindrance.

Justification for the procedure

117. As is the case with comparable powers, for example those under the Civil Procedure Act 1997 to make the Civil Procedure Rules, the current proposal is that these should be subject to the affirmative procedure given the breadth of the power to amend both primary and secondary legislation.

Schedule 8: Practice directions

Power conferred on:	*The Lord Chief Justice/the Senior President of Tribunals/Senior Judiciary/the President of the Employment Appeals Tribunal/Chamber Presidents/Territorial Presidents*
Power exercisable by:	*Practice direction*
Parliamentary Procedure:	*None*

Context and Purpose

118. Together with the Constitutional Reform Act 2005, the Civil Procedure Act 1997 and the Courts Act 2003, respectively make provision for giving practice directions in civil and family proceedings. As set out above in paragraph 16, Civil Procedure Rules may, instead of providing for a matter themselves, instead refer to provision made or to be made in Practice Directions about that matter. The majority of the 89 parts of the Civil Procedure Rules, for example, are supported by at least one practice direction apiece, which provide the details necessary to put into practice the general principles of the Rules. The Employment Tribunals Act 1996 makes provision for practice directions in respect of employment tribunals and the Employment Appeal Tribunal.

119. Practice directions are made by the Lord Chief Justice (or a judicial office holder nominated by the Lord Chief Justice) and approved by the Lord Chancellor. In some cases, for example where the directions concern the interpretation or application of the law, the Lord Chancellor is not required to approve the direction, but must be consulted. Directions not made by the Lord Chief Justice (or the Lord Chief Justice's nominee), are subject to the approval of the Lord Chief Justice and the Lord Chancellor. In tribunal proceedings, similar provision is made by the Tribunals, Courts and Enforcement Act 2007. Practice directions are given by the Senior President of Tribunals and approved by the Lord Chancellor. Again, in some cases, the Lord Chancellor is only required to be consulted. Directions given by a Chamber President are subject to the approval of the Senior President of Tribunals and Lord Chancellor. In employment tribunals, the Senior

President of Tribunals may make practice directions and are subject to approval by the Lord Chancellor. Regulations made under the 1996 Act may enable territorial Presidents to make directions subject to approval by the Senior President and the Lord Chancellor. In both cases, in some circumstances the Lord Chancellor need only be consulted. Regulations under the 1986 Act may also make provision for practice directions enabling panel members and tribunal staff to act as mediators. In this instance ACAS is required to be consulted. In respect of Employment Appeal Tribunals, practice directions are given by the Senior President of Tribunals or the President of the Appeal Tribunal and are approved by the Lord Chancellor or the Lord Chancellor and Senior President respectively. Again, in some cases, the Lord Chancellor is only required to be consulted.

120. Part 1 of this Schedule, makes provision for giving practice directions in civil and family proceedings to which the online procedure will apply. The provisions are similar to those which are currently provided in respect of these proceedings by the Civil Procedure Act 1997 and the Courts Act 2003 and the Constitutional Reform Act 2005. Part 2 of the Schedule makes similar provision in respect of tribunal proceedings, again reflecting the provisions in the 2007 Act. Part 3 of the Schedule makes provision in respect of employment tribunals and the Employment Appeal Tribunal.

Justification for taking the power

121. It is anticipated that the need for practice directions in respect of the online procedure will be limited, since much of the detail often included in practice directions will be subsumed into the online procedure itself, so removing the need for further direction or explanation to give effect to, or assist understanding of, the rules. Nonetheless their use cannot be completely discounted and, in order to ensure that matters that can be provided for, and the means by which they are provided, under the current powers that apply to the Civil, Family and Tribunal Procedure Rules, can be provided in respect of the online procedure, it is considered appropriate to provide for making practice directions in this instance.

Justification for the procedure

122. As is the case with the comparable powers, these directions are not subject to Parliamentary procedure. They are made by the judiciary to ensure that relevant rules may be better understood and the efficiency of court proceedings. Given that these are

effectively judicial instruments, it would seem both inappropriate and impractical to require Parliamentary scrutiny.

Prohibition of cross-examination in person in family proceedings

Clause 47 Prohibition of cross-examination in person in family proceedings

New section 31R(5) Matrimonial and Family Proceedings Act 1984

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution procedure*

Context and purpose

123. Clause 47 inserts new sections 31R to 31X into the Matrimonial and Family Proceedings 1984 (MFPA 1984). New section 31R prohibits cross-examination in person by a party to family proceedings where that person has been convicted of, or is charged with, a "specified offence", where the witness to be cross-examined is the victim, or alleged victim, of that offence. In turn, the victim or alleged victim may not cross-examine the perpetrator or alleged perpetrator. New section 31R(5) defines a "specified offence" to mean an offence specified in, or of a description specified in, regulations made by the Lord Chancellor.

124. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of "specified offences" for the purposes of the new section.

Justification for the power

125. It is intended that the offences specified in regulations specified under the power in new section 31R(5) MFPA 1984 should be a comprehensive list of all relevant sexual, violent and child abuse offences where it is considered that cross-examination of a victim (or alleged victim) by a perpetrator (or alleged perpetrator), or vice versa, would be inappropriate.

126. It is intended to mirror the domestic violence and child abuse offences which are set out in a non-statutory list published by the Lord Chancellor under section 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and referred to in regulations 33 and 34 of the Civil Legal Aid (Procedure) Regulations 2012. The lists are available at

https://www.gov.uk/government/publications/domestic-violence-and-child-abuse-offences. Those lists include offences under the law of England and Wales, Scotland and Northern Ireland. The intention is that the position should be the same in regulations made under new section 31R MFPA 1984.

127. The Government considers that, in order to keep the details of the specified offences comprehensive and up to date, it is appropriate to set them out in regulations, rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

128. The Government considers that the proposed level of scrutiny is appropriate given that the regulations will simply list, or describe, offences which are relevant for the purposes of the new section. If errors or omissions are identified in the provisions, or if new relevant offences are enacted, then the details will be readily amendable, such that they will be as up to date and comprehensive as possible.

New section 31S(4) MFPA 1984

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution procedure*

Context and purpose

129. Clause 47 inserts new sections 31R to 31X into the MFPA 1984. New section 31S prohibits cross-examination in person by a party to family proceedings where that person is someone against whom an on-notice protective injunction is in force, where the witness to be cross-examined is the person protected by the injunction. In turn, the person protected by the injunction may not cross-examine the person who is subject to the injunction. New section 31S(4) defines a "protective injunction" to mean an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.

130. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of "protective injunctions" for the purposes of the new section.

Justification for taking the power

131. It is intended that the types of protective injunctions specified in regulations under the power in new section 31S(4) MFPA 1984 should be a comprehensive list of all relevant

provisions where it is considered that cross-examination of a person protected by the injunction by the person subject to the injunction, or vice versa, would be inappropriate.

132. It is intended to mirror the definition of the term "protective injunction" set out in regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012[10]. That definition includes interdicts and orders issued under the law of Scotland or Northern Ireland.

133. As with the specified offences under new section 31R(5) MFPA 1984, the Government considers that, in order to keep the details of protective injunctions comprehensive and up to date, it is appropriate to set them out in regulations, rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

134. The Government considers that the proposed level of scrutiny is appropriate given that the regulations will simply detail types of injunction which are relevant for the purposes of the new section. If errors or omissions are identified in the regulations, or if new types of injunction are enacted, then the regulations will be readily amendable, such that they will be as up to date and comprehensive as possible.

New section 31W MFPA 1984

Power conferred on: *Lord Chancellor*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution procedure*

Context and purpose

135. Clause 47 inserts new sections 31R to 31X into the MFPA 1984. New section 31V(6) gives the court power to appoint a legal representative to undertake cross-examine of a witness in specified circumstances. New section 31W MFPA 1984 is a regulation making power, the purpose of which is to enable the Lord Chancellor to make provision for the payment out of central funds of such sums as appear to the court to be reasonably necessary to cover the proper costs, fees and expenses of a legal representative appointed under new section 31V(6) MFPA 1984.

136. The power in new section 31W MFPA 1984 is modelled on section 19(3)(e) of the Prosecution of Offences Act 1985 which makes similar provision in respect of legal

[10] S.I. 2012/3098

representatives appointed in similar circumstances in criminal proceedings, as provided for in section 38 of the Youth Justice and Criminal Evidence Act 1999.

Justification for taking the power

137. The intention is that the regulations should make provision similar to that in the regulations made under section 19(3)(e) of the Prosecution of Offences Act 1985, being Part 3 of the Costs in Criminal Cases (General) Regulations 1986[11], as applied with modifications by Part 3A of those Regulations. The Government is currently consulting on possible amendments to those 1986 Regulations and the outcome of that consultation will be taken into account when drafting the proposed regulations under section 31W MFPA 1984.

138. The regulations are intended to focus on the processes involved in determining costs payable to court-appointed legal representatives and in making such payments. It is considered that this level of procedural detail is most appropriately included in secondary legislation, rather than primary. Further, setting out this detail in secondary legislation will make it more readily amendable should this prove necessary once the new provisions are in practical use.

Justification for the procedure

139. The Government considers that the proposed level of scrutiny is appropriate given that the intention is that the regulations will be largely setting out matters of practice and procedure.

Clause 49: Employment Tribunal Procedure

Schedule 10, paragraph 2: Power to make procedural rules for employment tribunal proceedings

Power conferred on: *The Tribunal Procedure Committee*

Power exercisable by: *Tribunal rules given effect by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Background and context

[11] S.I. 1986/1335

140. Schedule 10, paragraph 2 substitutes section 7 of the Employment Tribunals Act 1996 (ETA 1996). At present, the Secretary of State has the power under ETA 1996 section 7 to make regulations dealing with procedure in employment tribunal proceedings. Although the Secretary of State may make procedural regulations, it is unlikely that the current legislative framework would be compatible with the incremental, agile approach necessary to implement the planned reforms in the employment tribunals (as outlined in the Government's *Reforming the Employment Tribunals System* paper) and will not be sufficiently responsive to ensure that procedures continue to remain effective in future. Schedule 10, paragraph 2 substitutes ETA 1996 section 7 to enable the Tribunal Procedure Committee to make procedural rules for employment tribunal proceedings instead. Schedule 10, paragraph 5 inserts a new Schedule A1 in ETA 1996 which makes detailed provision as to rules.

Justification for taking the power

141. The Tribunal Procedure Committee currently has power to make procedural rules for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 section 22 and Schedule 5, Part 1. The intention is to align ETA 1996 section 7 and new Schedule A1 with the TCEA 2007 so that (1) the Tribunal Procedure Committee is responsible for setting procedure for employment tribunal proceedings instead of the Secretary of State and (2) the Committee has power to make procedural rules for employment tribunal proceedings which corresponds to its power to make procedural rules for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 section 22 and Schedule 5, Part 1. This will enable the effective implementation of the Government's planned reforms in the employment tribunals. Employment tribunals are not being brought within the scope of the Tribunal Procedure Committee's existing rule-making powers under the TCEA 2007 because the Government wishes to retain the distinct nature of employment tribunals.

Justification for the procedure

142. Paragraph 21 of new Schedule A1 provides that rules for employment tribunal proceedings under ETA 1996 section 7 are subject to the same procedure as applies to procedure rules made by the Committee for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 Schedule 5, Part 3, save that the reference in the TCEA 2007 to Chamber Presidents is read as a reference to the President of the employment tribunals (England and Wales) and the President of the Employment Tribunals (Scotland).

143. Under TCEA 2007 Schedule 5, Part 3 the Committee must consult such persons as they consider appropriate to do so (and the Lord President of the Court of Session if rules concern Scotland) and meet before making rules unless inexpedient to do so. The Rules must be signed by a majority of the Committee and then submitted to the Lord Chancellor who may allow or disallow them. If allowed by the Lord Chancellor, the rules come into force in a statutory instrument subject to annulment by resolution of either House of Parliament. The Government considers that the proposed level of scrutiny is appropriate given that these are procedural rules and there is nothing to justify departure from the procedure in the TCEA 2007 Schedule 5, Part 3.

Clause 49: Employment Tribunal Procedure

Schedule 10, paragraph 3: Power to make procedural rules for Employment Appeal Tribunal proceedings

Power conferred on: *The Tribunal Procedure Committee*

Power exercisable by: *Tribunal rules given effect by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

144. Schedule 10, paragraph 3 substitutes section 30 of the ETA 1996. At present, the Lord Chancellor has the power under ETA 1996 section 30 to make rules dealing with procedure in proceedings in the Employment Appeal Tribunal. Although the Lord Chancellor may make procedural regulations, it is unlikely that the current legislative framework would be compatible with the incremental, agile approach necessary to implement the planned reforms in the Employment Appeal Tribunal (as outlined in the Government's *Reforming the Employment Tribunals System* paper) and will not be sufficiently responsive to ensure that procedures continue to remain effective in future. Schedule 10, paragraph 3 substitutes ETA 1996 section 30 to enable the Tribunal Procedure Committee to make procedural rules for proceedings in the Employment Appeal Tribunal instead. Schedule 10, paragraph 5 inserts a new Schedule A1 in ETA 1996 which makes detailed provision as to rules.

Justification for taking the power

145. The justification is comparable to that for the power in Schedule 10, paragraph 2. The intention is to align ETA 1996 section 30 with the TCEA 2007 i.e. that (1) the Tribunal Procedure Committee is responsible for setting procedure for employment tribunal proceedings instead of the Lord Chancellor and (2) the Committee has power to make procedural rules for Employment Appeal Tribunal proceedings which corresponds to its power to make procedural rules for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 section 22 and Schedule 5, Part 1. The Employment Appeal Tribunal is not being brought within the scope of the Tribunal Procedure Committee's existing rule-making powers under the TCEA 2007 because the Government wishes to retain the distinct nature of the Employment Appeal Tribunal.

Justification for the procedure

146. The justification is comparable to that for the procedure for the power in Schedule 10, paragraph 2. Paragraph 21 of new Schedule A1 provides that rules for Employment Appeal Tribunal proceedings under ETA 1996 section 30 are subject to the same procedure as applies to procedure rules made by the Committee for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 Schedule 5, Part 3.

147. Under TCEA 2007 Schedule 5, Part 3 the Committee must consult such persons as they consider appropriate to do so (and the Lord President of the Court of Session if rules concern Scotland) and meet before making rules unless inexpedient to do so. The Rules must be signed by a majority of the Committee and then submitted to the Lord Chancellor who may allow or disallow them. If allowed by the Lord Chancellor, the rules come into force in a statutory instrument subject to annulment by resolution of either House of Parliament. The Government considers that the proposed level of scrutiny is appropriate given that these are procedural rules and there is nothing to justify departure from the procedure in the TCEA 2007 Schedule 5, Part 3.

Clause 49: Employment Tribunal Procedure

Schedule 10, paragraph 2, 3: power to amend legislation in connection with Procedure Rules

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: Affirmative resolution procedure for any amendments or repeals of an enactment comprised in an Act, otherwise negative resolution procedure

148. Schedule 10, paragraph 2 inserts new section 7AZA in ETA 1996 which enables the Lord Chancellor to make an order amending, repealing or revoking any enactment to the extent the Lord Chancellor considers necessary or desirable to facilitate employment tribunal procedural rules made by the Tribunal Procedure Committee or in consequence of ETA 1996 section 7, Schedule A1 or employment tribunal procedural rules. Schedule 10, paragraph 3 inserts new section 30A in ETA 1996 which confers an equivalent power on the Lord Chancellor in respect of Employment Appeal Tribunal procedural rules.

Justification for the power

149. The Lord Chancellor currently has an equivalent power to amend enactments in relation to procedural rules for proceedings in the First-tier Tribunal and Upper Tribunal under TCEA 2007 Schedule 5, Part 4, paragraph 30. The intention is to align the provision made in the ETA 1996 with the TCEA 2007. The aim of this provision is to ensure that the employment tribunal system operates smoothly and without conflicting with legislation on the statute book.

Justification for the procedure

150. TCEA 2007 section 49 provides that the Lord Chancellor's power under TCEA 2007 Schedule 5, Part 4, paragraph 30 is subject to negative procedure unless it is exercised to amend or repeal enactments comprised in an Act in which case affirmative resolution procedure applies (see TCEA 2007 section 49(6)(d)). The Government considers that the proposed level of scrutiny is appropriate and there is nothing to justify departure from the procedure set down in TCEA 2007 section 49.

Clause 49: Employment Tribunal Procedure

Schedule 10, paragraph 3: power to make procedure rules in national security cases in Employment Appeal Tribunal

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

151. Section 10 of the ETA 1996 provides that regulations made by the Secretary of State may make provision about the composition of the tribunal in a case where a Minister of the Crown makes a direction or a President or Regional Employment judge makes an order in cases where it is expedient in the interests of national security or at issue is Crown employment proceedings. This can ensure, for example, the tribunal sits in private; will exclude the applicant or their representatives from all or part of Crown employment proceedings; or will keep secret all or part of the reasons for their decision in particular Crown employment proceedings. Section 10B sets out offences relating to breaches of those requirements.

152. The amendment at Schedule 10, paragraph 3, inserting the new section 30B, ensures that the same arrangements can apply in the Employment Appeal Tribunal, aligning it with the employment tribunals.

Justification for taking the power

153. This amendment brings the Employment Appeal Tribunal into line with the employment tribunals, and ensures that when responsibility for making procedure rules is transferred to the Tribunal Procedure Committee, provision regarding national security cases can continue to be made. It transfers the existing power under section 10 so that it is exercisable by the Lord Chancellor rather than the Secretary of State and the new power under section 30B is exercisable by the Lord Chancellor. It is usual for the Lord Chancellor rather than the Secretary of State to be responsible for tribunal procedure, given her duty under section 39 of the Tribunals, Courts and Enforcement Act 2007 to ensure that there is an efficient and effective system to support the carrying on of the business of the tribunals.

Justification for the procedure

154. The regulation making power in section 10 ETA 1996 is subject to the negative resolution procedure due to section 41(3) of the ETA 1996. The Government considers that this is also therefore the appropriate level of scrutiny for the exercise of the same power in the Employment Appeal Tribunal context

PART 3: ORGANISATION AND FUNCTIONS OF COURTS AND TRIBUNALS

Court and tribunal staff

Clause 50 Court and tribunal staff: legal advice and judicial functions, Schedule 11 – new section 67A(1) Courts Act 2003: Power for rules of court to provide for the jurisdiction of any court within the scope of the rules to be exercised by an authorised person

Power conferred on: *Procedural Rule Committees and Lord Chief Justice*

Power exercisable by: *Rules of Court made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

155. In the Government's paper 'Transforming our Justice system – a summary of proposals and consultation' it set out its intention to increase the routine judicial work undertaken by 'case officers' (staff employed under section 2(1) of the Courts Act 2003 (CA 2003) or section 40(1) of the Tribunal, Courts and Enforcement Act 2007 (TCEA 2007)) to enable judges to concentrate on more complex matters. It is the also the intention to enable greater cross-deployment of staff between jurisdictions according to need. One consequence of this is to amend legislation which refers to jurisdiction specific posts such as justices' clerks. Each jurisdiction has provision for the carrying out of some functions by court staff or officers, but provision is not identical. The Government's aim of the reforms is to facilitate greater use of such staff, but it will be for the relevant procedural rules (rules of court, or tribunal procedure rules), to set out what functions can be performed and the Lord Chief Justice (or Senior President of Tribunals) to assign staff or officers to such functions.

156. The means by which the Government intends to achieve this is set out in Schedule 11, paragraph 28 of which inserts a new Part 6A into the CA 2003. The purpose of new section 67A of the CA 2003 is to ensure that any power to make rules of court in relation to which section 1 CA 2003 applies, includes the power for the rules to make provision for the exercise of functions of the court or any judge of the court by court or tribunal staff. The model for this power is paragraph 2 of Schedule 1 to the Civil Procedure Act 1997 (CPA 1997) which as a consequence is repealed (see paragraph 17 of Schedule 11). Rules of court may also require a function to be exercised by staff with specified qualifications or experience. However, a person who is a court or tribunal staff will not be able to exercise the jurisdiction of the court unless he or she is authorised to do so by the Lord Chief Justice or his nominee.

157. In some courts this new provision mirrors the current powers, but in some it provides a new or different power requiring amendment or repeal of existing powers. Examples of this are set out below:

a) Magistrates' courts - Currently section 28 of the CA 2003 sets out that it is for the Lord Chancellor to make rules authorising which functions of a single justice can be exercised by a justices' clerk or assistant[12]. Such rules are made with the concurrence of the Lord Chief Justice, and after having consulted with the Criminal Procedure Committee. This power is repealed
b) Family Court - Similar provision applies to the Family Court by virtue of section 31O(1) Matrimonial and Family Proceedings Act 1984 (MFPA 1984) and section 76 CA 2003. These powers will be repealed.
c) Crown Court - There is no existing power enabling a member of court staff or officer to undertake judicial functions. Section 82 of the Senior Courts Act 1981 limits activities of court officers to 'formal and administrative matters'.
d) Magistrates' courts (non-criminal matters) – section 144 of the Magistrates' Court Act gives a power to the Lord Chief Justice to make rules regulating the practice and procedure to be followed by justices' clerks. This power is amended to remove references to justices' clerks.
e) County Court, High Court, and civil division of the Court of Appeal. The CPA 1997 provides a power for rules to make provision for staff or officers to exercise the jurisdiction of the court. This will be repealed.
f) District Probate Registries – section 127 of the Senior Court Act 1981 currently does not provide such a power.
g) Court of Protection – section 51 of the Mental Capacity Act 2005 does make provision for court functions to be exercised by court staff and will be repealed.

Justification for the power

158. The Government believes that as far as possible, it is preferable for rules of court, or tribunal procedure rules, to govern the practice and procedure of the courts or tribunals within their scope, and that the provision as to the functions that can be performed by court staff is rightly a matter for procedural rules. However, rule committees have evolved differently, and legislation reflects a range of powers and approaches in relation

[12] See Justices' Clerk Rules S.I. 2005/545

to the question of how and which functions of the court or tribunal may be exercised by staff. This has resulted in different levels of utilisation of court and tribunal staff. The Government believes that there is a strong case that all relevant rules of court should have an equal power, so that each committee can then decide the appropriate functions that can be performed by staff. Rules of court are usually made by committees with expertise in the relevant court, or by persons with expertise such as the Lord Chief Justice. As such they are best placed to determine which functions of the court are appropriate to be exercised by staff and, as is currently the case in the magistrates' and family courts, this is no longer a matter that should be determined by the Lord Chancellor.

159. On its face, the Government acknowledges that this is a wider power for some jurisdictions (but no wider than the current provision in paragraph 2 of Schedule 1 to the CPA 1997). Currently the Lord Chancellor only has power to authorise that functions of a single justice can be done by justices' clerks and assistant clerks in the magistrates' court. In relation to a magistrates' court, the Criminal Procedure Rules will be able to provide for anything that is the function of one or more justices of the peace.

160. But the power also has important safeguards. Firstly the Committees will be acting on the basis of expertise and experience. The Lord Chancellor will still retain any necessary input to the rules by virtue of having to agree the rules and having the power to direct the rules (though rarely used). The Lord Chief Justice or his nominee will have to authorise individual members of staff before they can exercise any function prescribed in the rules. Finally, the rules will remain subject to the same level of parliamentary scrutiny.

161. In relation to the Crown Court, the provision of a power to authorise the exercise of judicial functions by court or tribunal staff is new. The Government considers it is long overdue to provide a power to facilitate greater efficiency in the Crown Court and to bring it into line with other jurisdictions. It also considers that, for the same reason as applies to the magistrates' courts, the Criminal Procedure Rule Committee's expertise in the procedure and practice of the criminal courts makes it the right body to exercise the power. The Government considers that the Committee will do so carefully and with the consent of the judiciary.

162. It could be argued that qualifications required for the exercise of certain judicial functions by court or tribunal staff could be dealt with administratively. However, the Government considers that it will give confidence and coherence to the new reforms if it is clear that rules of court can specify the qualifications or experience that are considered necessary for the exercise of certain judicial functions. Whilst this would be a new power for some of the rule committees such as the Criminal Procedure Rule Committee, it already exists in tribunals[13] and so is not without precedent. It is also closely related to the power to authorise functions.

Justification for the procedure

163. Schedule 11 does not amend the parliamentary procedure for making rules of court which are governed by relevant legislation. The Government does not consider that the addition of a general power for rules of court to authorise functions relating to courts or judges justifies any change.

164. Although the power in relation to some courts, such as the Crown Court, is new, the Government does not consider that it justifies a different procedure to that which normally would apply. The Criminal Procedure Rules will be subject to consultation, agreement by the Lord Chancellor, and the negative resolution procedure.

165. The rule-making power for the Lord Chancellor in relation to the Family Court is also by negative resolution procedure. It should be noted that the first exercise of this power was subject to the affirmative resolution procedure[14], but subsequent rules are subject to the negative resolution procedure. Again the Government considers that given the authorisation of functions is properly an area for the expertise of the Family Procedure Rule Committee, there is no justification for a higher level of scrutiny than that which currently applies (to the Lord Chancellor's power, or to the Committee's rule-making powers generally).

[13] The Tribunal Procedure Rule Committee has the power to specify functions to be delegated to certain types of staff, which could include those with a specified qualification: Rules may (in particular) – (a) provide for the function to be exercisable by a member of staff only if the member of staff is, or is of a description, specified in exercise of a discretion conferred by Rules; (b) provided for the function to be exercisable by a member of staff only if the member of staff is approved, or is of a description approved, for the purpose by a person specified in the Rules.

[14] S. 31P(2) Matrimonial and Family Proceedings Act 1984

New Section 31O(2)(b) Matrimonial and Family Proceedings Act 1984, and section 28(3)(b) Courts Act 2003 – Power to specify qualifications required to exercise legal advisory functions

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution procedure*

Context and purpose

166. Currently, an important function of justices' clerks and assistant clerks is the provision of legal advice to justices of the peace in a magistrates' court and lay judges in a Family Court (see section 28(4) and (5) CA 2003, and section 31O(2) MFPA1984). The Schedule, at paragraphs 14 and 22 ensures this function will continue, but will be performed by court or tribunal staff who are authorised to provide advice by the Lord Chief Justice or his nominee. The Lord Chief Justice or his nominee can only authorise a person if they have qualifications prescribed by the Lord Chancellor in regulations. Currently there are two provisions governing the qualifications required by justices' clerks and assistant clerks (section 27(2) CA 2003 regarding justices' clerks, and section 27(6) regarding assistant clerks). Section 27(6) CA 2003 currently gives the Lord Chancellor power to specify the qualifications required before a person can be designated as an assistant clerk[15].

Justification for the power

167. Taking section 27(6) CA 2003 as a precedent, the Government thinks it is appropriate for qualifications to provide legal advice in the magistrates' court and family court to be set out in regulations made by the Lord Chancellor. The Government does not envisage that this regulation making power will need to be updated regularly, but the power would be able to reflect any developments in the legal profession as to qualifications required to practice. The requirement for the agreement of the Lord Chief Justice is also important to ensure that there is senior judicial input to the level of qualifications required.

Justification for the procedure

[15] Assistant to Justices' Clerks Regulations S.I. 2006/3405, as amended by S.I. 2007/1448.

168. The existing power is subject to the negative resolution procedure. The government believes that the changes to the power, which is a result of the removal of justices' clerks and assistants to justices' clerks, does not merit increasing the level of parliamentary scrutiny; the agreement of the Lord Chief Justice to the regulations should assure parliament that the negative resolution is appropriate.

Power to direct an authorised person when exercising judicial and legal functions – new sections 31O(4) MFPA 1984, 29(1) CA 2003, s67B(1) CA 2003, and 29B(1) Tribunals, Courts and Enforcement Act 2003.

Power conferred on: Lord Chief Justice (or his nominee) in relation to judicial and legal functions, and Senior President of Tribunals (or his delegate) in relation to judicial functions.

Power exercisable by: Judicial Direction

Parliamentary procedure: None

Context and Purpose

169. Schedule 11 extends the independence in the exercise of functions (advisory and judicial) that currently applies to justice's clerks, but extends it to all authorised persons providing legal advice in the magistrates' court or Family court, or exercising the jurisdiction of a judge, court or tribunal. However, Schedule 11 makes the exercise of those functions subject to the direction of the Lord Chief Justice (the Senior President of Tribunals for judicial functions in tribunals) or his nominee. The Government believes this will provide appropriate judicial leadership and supervision of legal and judicial functions undertaken by authorised court and tribunal staff.

Justification for taking the power

170. In accordance with the Government's intention to increase the leadership role of the judiciary over the court and tribunal staff authorised to exercise judicial functions, the Government considers it appropriate to make the exercise of these functions subject to the Lord Chief Justice (or Senior President of Tribunals), or their nominee. The Government does not consider this diminishes the independence when making decisions. Rather the power of direction will provide clarity as to how staff should approach certain decisions and factors they should take into account. The Government considers that this will improve the quality of decision-making. Where the Lord Chief

Justice nominates (or the Senior President of Tribunals delegates) a member of court or tribunal staff to exercise his functions, the nominee (or delegate) is also independent from direction of any person other than the Lord Chief Justice (or Senior President of Tribunals).

Justification for the procedure

171. The Government considers that the power to direct is a judicial power, and the exercise of it essentially regards how judicial or legal functions are exercised which is not a matter requiring parliamentary scrutiny.

New section 67D(4) CA 2003 and new section 29D(4) TCEA 2007 - Power to specify the circumstances in which the Court can order the Lord Chancellor to pay costs in proceedings against an authorised person

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution procedure*

Context and purpose

172. One element of the reforms in relation to court and tribunal staff authorised to exercise the jurisdiction of the court or tribunals is to strengthen the protection afforded to them when exercising judicial functions. New section 67B to E CA 2003 and section 29A to E TCEA 2007 makes provision to apply the same protections (independence, immunities, costs protection in legal proceedings and indemnities) that currently apply to justices' clerks and assistants to justices' clerks, to authorised persons exercising judicial functions in other jurisdictions.

173. One consequence of this is the extension of a delegated power given to the Lord Chancellor which currently applies only in the magistrates' courts and family court. Section 34 of the CA 2003 provides costs protection in proceedings brought against a justices' clerk or an assistant clerk for an action or omission in the execution of their duties (or purported execution) in exercising the functions of a single justice. Section 34(5) provides that the Lord Chancellor may by regulations (after consulting the Lord Chief Justice) prescribe: i) the circumstances in which a court must or must not order that the Lord Chancellor make a payment in respect of the costs of a person in the

proceedings; and ii) the how the amount of any such payment is to be determined. The costs protection is to be maintained for court and tribunal staff in the magistrates' courts and family court, but now will be also applied to all persons authorised under new section 67A CA 2003, and section 29A TCEA 2007

Justification for taking the power

174. This power has not yet been exercised and it would be for the Court to determine whether to order the Lord Chancellor to make a payment and determine the amount. However, given the intended increase in functions exercised by staff across jurisdictions the Government considers it could be a useful power to use. In any event, the Government sees merit in providing as closely as it can parity of provision for authorised persons across jurisdictions, and therefore considers it appropriate to maintain the power, and extend it to the other relevant jurisdictions.

Justification for the procedure

175. The current regulation making power is subject to the negative resolution procedure. The Government considers that this remains the appropriate level of scrutiny, and has expressly provided for this procedure at section 49 of the TCEA 2007.

Clause 51: Abolition of local justice areas and Schedule 12

Power for the Lord Chief Justice to make arrangements as to the organisation of the magistracy, training, appraisals, and approval for magistrates to preside in court and authorisation to act as judges of the family court or as members of the youth court

Power conferred on: *Lord Chief Justice*

Power exercisable by: *Directions*

Parliamentary procedure: *None*

Context and purpose

176. Under section 7 of the Constitutional Reform Act 2005, the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales, and the maintenance of appropriate arrangements for the welfare, training and guidance of

the judiciary of England and Wales are the responsibilities of the Lord Chief Justice, which he exercises through practice directions and delegation.

177. Sections 17-20 Courts Act 2003 (CA 2003) make separate provision for organisation of the magistracy e.g. selection of chairman and deputy chairmen, rights to preside in court and size of bench, authorisation to act as judges of the family court or as members of the youth court, training, development and appraisal of justices. The Lord Chief Justice has a power (in consultation with the Lord Chancellor, the Criminal Procedure Rule Committee and the Family Procedure Rule Committee) to make rules in this regard (subject to the negative resolution procedure). Under this reform, sections 17 – 20 CA 2003 will be repealed, enabling the Judiciary to organise magistrates in accordance with the provisions of the 2005 Act and creating a more unified judiciary.

Justification for removing the power

178. The clause removes statutory constraints and parliamentary scrutiny surrounding an existing power because the primary objective of de-regulating the organisation of magistrates as set out in the CA 2003 is to give magistrates parity with other members of the judiciary in terms of how they are managed. This will ensure that the magistracy can be organised more flexibly in a way that maintains the principles of local and accessible justice by ensuring that courts can adapt the size and makeup of benches in accordance with population density and in order to meet the specific needs of victims, witnesses and other court users. These arrangements will also enable the organisation of magistrates to be more closely aligned to that of the Crown Court with the aim of strengthening the leadership role of the Lord Chief Justice over both the magistracy and magistrates courts.

Justification for the procedure

179. The Government considers that the recruitment, induction, training, development and management of magistrates should be a matter for the judiciary. In common with similar arrangements for other judges, The Government intends that the formal aspects of these arrangements should be put into practice directions, and that parliamentary scrutiny is not required given the nature of the provisions.

Clause 52: Composition of Tribunals

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

180. This clause amends the ETA 1996 and substitutes a new section 4 and a new section 28.

181. In the employment tribunals currently, section 4(1) of the ETA 1996 provides that a panel will generally consist of a judge and two non-legal members. Section 4(3) of the ETA 1996 sets out the proceedings where a judge sitting alone may currently hear and determine a case (breach of contract, holiday and redundancy pay, and since 2012, unfair dismissal). In each of these areas the judge retains the discretion to convene a panel with additional members if they consider that the circumstances of the particular case merit this.

182. Section 4(4) of the ETA 1996 currently provides for the Secretary of State and the Lord Chancellor, acting jointly, by Order to amend the list of cases that may currently be heard by a single judge. Whilst it is therefore possible for the general requirement for multi-member panels in employment tribunals to be modified in specific proceedings, this is currently a Ministerial decision and one which is not flexible to the individual requirements of a case. This contrasts with the practice in the First-tier Tribunal (FTT) and Upper Tribunal (UT).

183. Panel Composition in the FTT and UT is governed by paragraph 15 of Schedule 4 to the TCEA 2007. That paragraph states that the Lord Chancellor must, by Order, make provision for the number of members to determine any matter that falls to be dealt with by the FTT or UT. The Order must also state whether the matters are to be dealt with by a judge or other members, and what qualifications the other members must have. This provision for determining panel composition and qualifications of panel members may be delegated to the Senior President of Tribunals (SPT) or the Chamber President.

184. The current Order, made under paragraph 15 of Schedule 4, is the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (the 2008 Order). With regards to the FTT, the 2008 Order provides that is for the SPT to decide the number of members with regard to the historic panel composition before the functions of tribunals

were transferred to the FTT, and the need for members of tribunals to have particular expertise, skills or knowledge. In relation to the UT, the number on the panel is to be one unless otherwise determined by the SPT. The SPT issues practice statements alongside the Order which set out precise arrangements specific to the needs of each Chamber.

185. This amendment confers the power for setting composition, equivalent to the power in paragraph 15 of Schedule 4 to the TCEA 2007, to the Lord Chancellor alone to deal with by way of secondary legislation. As with the power for setting panel composition in the FTT and the UT the Lord Chancellor must consult with the SPT, has the ability to delegate this duty to the SPT and has the ability to set out provisions by which the SPT must exercise the power by Order. The intention is that this duty will be delegated to the SPT, in the same way as it is for the FTT and UT using the power in Paragraph 15 of Schedule 4.

Justification for taking the power

186. This amendment brings the practice in employment tribunals and the Employment Appeal Tribunal into line with the practice in the FTT and the UT. Taking a power in this way ensures that the Lord Chancellor can continue to have oversight to ensure that the tribunal system is properly functioning, as well as ensuring that the determination of panel composition in the employment tribunals and Employment Appeal Tribunal can rest with the SPT, or a leadership judge who he delegates it to, who is closer to understanding the needs of the tribunal and the particular cases at hand. Allowing for determination of panel composition through secondary legislation ensures a flexible approach.

Justification for the procedure

187. The Government sees no reason to depart from the affirmative resolution procedure which applies to the exercise of the power in Paragraph 15 of Schedule 4 to the TCEA 2007. This procedure allows full parliamentary scrutiny of the exercise of the power.

Clause 55 (1): Extension of power of High Court to make attachment of earnings orders – increase in scope of court rule making powers

Power conferred on: *Civil Procedure Rule Committee*

Power exercisable by: *Rules of Court made by statutory instrument*

Parliamentary Procedure: Negative resolution procedure (section 3 of the Civil Procedure Act 1997)

Context and purpose

188. Clause 55(1) amends section 1(1) of the Attachment of Earnings Act 1971 (AEA 1971), to enable the High Court to make attachment of earnings orders (AEOs) to secure payment of a judgment debt other than a debt of £5 or such other sum as may be prescribed by rules of court. Currently, under the AEA 1971, the County Court has the power to make such orders in relation to judgment debts; the intention of clause 55(1), and of the supporting amendments contained in Schedule 14 to the Bill is to replicate, as far as practical, the County Court judgment debt attachment of earnings structure for the High Court. At present, there are a series of court rule making powers that apply in relation to the County Court. Section 25 of the AEA 1971 provides that "prescribed" means prescribed by rules of court, and further provides that any power to make rules of court contained in the Act is without prejudice to any other power to make rules of court. The scope of rule-making powers in the AEA 1971 will be extended to the High Court in relation to judgment debt AEOs in consequence of the current County Court structure being extended to the High Court. The location and purpose of those powers are set out below:

a) Section 1(2)(b) AEA 1971: enables rules of court to alter the £5 minimum threshold of judgment debt in relation to which the court may order recovery by attachment of earnings;
b) Section 6(3) AEA 1971: this section requires that AEOs contain particulars, prescribed by rules of court, sufficient to enable the debtor to be identified by the employer;
c) Section 9(3) AEA 1971: this section provides that rules of court may make provision as to when the court may vary or discharge an AEO of its own motion;
d) Section 9A(5) AEA 1971: provides that rules of court may make provision as to the circumstances in which the County Court may, of its own motion, make or revoke a suspension order, being an order that suspends an AEO that is calculated on the basis of the fixed deductions scheme. Notwithstanding the general amendment to section 1(1) of the AEA 1971, section 9A(5) is specifically amended by paragraph 6(d) of Schedule 14 to the Bill, so that rules of court may also make provision for the High Court to make or revoke a

suspension order of its own motion. Again, section 9A, including subsection (5), was introduced by section 91 of and Schedule 15 to TCEA 2007. Section 9A is not yet in force, but it is intended to bring it into force in relation to both the High Court and the County Court at the same time;

e) Section 12(1) AEA 1971: among other things, this subsection provides that rules of court can prescribe which court is to give notice when an AEO ceases to have effect by reason of the making or issue of an order or warrant of commitment under section 8(4) of the AEA 1971;

f) Section 14(4) AEA 1971: by virtue of this subsection as amended, rules of court may provide that where notice of an application for an AEO is served on the debtor, it must include a requirement that the debtor give a written statement to the court of certain information. The statement must be given in the period and manner as prescribed by rules of court. The information to be contained in the statement is the name and address of the debtor's employer, and specified particulars to enable the employer to identify the debtor. Subsection (4) is amended, and subsections (1A) and (4B) that are relevant to subsection (4) were introduced, by the TCEA 2007 (see section 91; Schedule 15). The amendments and new provisions are not yet in force, but it is intended to bring them into force in relation to both the High Court and the County Court at the same time;

g) Section 15B(7) AEA 1971: this subsection relates to obtaining data from the Commissioners of Her Majesty's Revenue and Customs to find the debtor's current employer, where an AEO has lapsed due to the employer no longer having the debtor in his employ. Under section 15B (2), it is an offence to use or disclose the shared data in an unauthorised manner. An authorised manner includes under section 15B(7): access to or supply of the shared data, or access to or supplying copies of an AEO which has been directed to an employer using the shared data, in accordance with rules of court. However, the rules of court must comply with regulations made under section 15B (8). The power to make those regulations is examined in paragraphs 192 to 195 of this memorandum. Section 15B was introduced by the TCEA 2007 (section 91; Schedule 15). The section is not yet in force, but it is intended to bring it into force in relation to both the High Court and the County Court at the same time;

h) Section 17(3) AEA 1971: section 17 relates to the making of consolidated attachment orders, whereby the County Court and, after the changes made by the Bill, the High Court, may group together a number of judgment debts

incurred by a debtor and secure the payment of all of those debts under one AEO – a "consolidated attachment order". Subsection (3) provides that the power to make a consolidated attachment order must be exercised in accordance with rules of court. The subsection further specifies that rules of court made for the purpose of section 17 may provide:

i. for the transfer of an AEO or related proceedings, or of enforcement functions related to the AEO;
ii. on transfer, for the variation, suspension[16] or discharge and replacement of an AEO with a consolidated attachment order;
iii. for the exercise of the power under section 17 to be on the court's on motion or on application of a person prescribed in rules of court;
iv. for requiring the court officer who receives payments in compliance with an AEO, to deal with them as directed by the court or rules of court, instead of as prescribed by section 13 of the AEA 1971;
v. for modifying or excluding provisions of the AEA 1971 (or the fixed deductions scheme for calculating payments[17]), but only so far as is necessary or expedient for securing conformity with rules made under section 17.

189. While the powers referred to in paragraph 188 above include the power to override the provisions of the AEA 1971, these are limited powers as they can only be exercised in a specific context, namely the establishment and operation of consolidated attachment orders. The powers have been in place since the coming into force of the AEA 1971. Even without the amendments made by the Bill, they are capable of applying in relation to judgment debts determined in the High Court: at present, High Court judgment debts can be transferred to the County Court for enforcement, which includes by way of consolidated attachment order.

Justification for taking the power

[16] The reference to suspending an order has been inserted by section 91 and Schedule 15 to the TCEA 2007. It is not yet in force, but the intention is to bring it into force at the same time for the High Court and County Court.

[17] The reference to the fixed deduction scheme has been inserted by section 91 and Schedule 15 to the TCEA 2007. It is not yet in force, but the intention is to bring it into force at the same time for the High Court and County Court

190. It is standard practice that matters of court procedure should be left to rules of court. The AEA 1971 conforms to standard practice. Currently, Part 89 of the Civil Procedure Rules contains the rules of court in relation to County Court judgment debt AEOs. The intention is that the Civil Procedure Rule Committee (CPRC) will be invited to amend Part 89 to accommodate the ability of the High Court to make judgment debt AEOs. To the extent that the 1971 Act provisions are in force, it is anticipated that the CPRC will amend the rules so that the High Court provisions will mirror the existing provisions in relation to the County Court as far as is practicable. In relation to the 1971 Act provisions that are not in force, it is anticipated that the CPRC will exercise its rule making powers for a consistent approach between the High Court and the County Court.

Justification for the procedure

191. The Government sees no justification to depart from the usual parliamentary procedure for Civil Procedure Rules. See paragraphs 13-16 above.

Clause 55(1): Extension of power of High Court to make attachment of earnings orders – increase in scope of data sharing regulation making powers

Power conferred on: Lord Chancellor, only with the agreement of Commissioners of HMRC (section 15C (1) and (2) of the AEA 1971)

Power exercisable by: Regulations made by statutory instrument (section 15B (5) and (8) of the AEA 1971)

Parliamentary Procedure: Affirmative resolution procedure (section 15C (4) of the AEA 1971).

Context and Purpose

192. Section 9(4) of the AEA 1971 provides that if a debtor ceases to be employed then, except for certain purposes, an AEO lapses, unless and until the court again directs the AEO to a person appearing to be the debtor's employer, whether that person is a new employer or the same employer as before (the replacement employer). Sections 15A to 15D of the AEA 1971 provide a mechanism to help the court identify whether there is a replacement employer, and who that employer is. Section 15A allows the court to request that Her Majesty's Revenue and Customs (HMRC) disclose to the court whether the debtor has a replacement employer, and if so the details of the employer, sufficient to

enable the court to redirect the AEO to the replacement employer. That section then allows HMRC or its agents to disclose information to the court sufficient to comply with the court's request for information. The use and disclosure of this information is subject to a number of safeguards. A person to whom the information is disclosed commits an offence if he or she uses or discloses the information in a way that does not comply with certain conditions. These conditions are set out in section 15B(3), (5), (6) and (7) and are that the use or disclosure is:

a) for a purpose connected with the enforcement of a lapsed order and with the consent of HMRC, which can be given on a case by case basis, or can be a general consent that applies in certain circumstances as set out in the consent;
b) in accordance with an enactment, court order or for court proceedings, and is in accordance with regulations;
c) of information that has previously been lawfully disclosed to the public;
d) in accordance with rules of court that comply with regulations about access to or the supply of the debtor information and access to or copies of AEOs that have been directed to a replacement employer because of debtor information.

193. The safeguards, therefore, include compliance with two sets of regulations and rules of court. The rules of court powers are examined at paragraph 13-16 above. Sections 15A to 15D of the AEA 1971 Act were introduced by section 92 of the TCEA 2007 but are not yet in force. As drafted, the sections apply to all AEOs, irrespective of which court they are made by. As a result of the provision of clause 55(1) extending the power to make judgment debt AEOs to the High Court, these sections will, therefore, now apply to those AEOs made by the High Court. The intention is to bring the sections into force in relation to both the High Court and the County Court in relation to judgment debts at the same time. It is anticipated that this will be in 2018. While the amendments to the AEA 1971 in the Bill will not alter the wording of sections 15A to 15D, the effect of the amendments will be that the High Court will, potentially, be able to request details of a larger category of AEOs, being AEOs for the recovery of judgment debts.

Justification for taking the power

194. In order to maintain a consistent approach between the High Court and the County Court, it is considered both necessary and appropriate that the data sharing provisions already contained (but not yet in force) in the AEA 1971 should be capable of applying in

relation to High Court judgment debt AEOs. To do otherwise may undermine the success of introducing for the High Court a power to make a judgment debt AEO: if a creditor in the High Court considers he or she will have a better chance of successfully having a new AEO directed at an appropriate replacement employer if the AEO is made in the County Court in the first place, he or she may request to have the matter transferred to the County Court for enforcement, notwithstanding that (following the Bill) he or she could have the AEO made in the High Court.

Justification for the procedure

195. The regulations under section 15B are to be made by the Lord Chancellor, with the consent of HMRC. The regulations are subject to the affirmative procedure. Given the level of detail required in such a data sharing regime, it is considered appropriate to use secondary legislation. The affirmative procedure is considered to afford a suitable level of parliamentary scrutiny. While HMRC consent will provide an additional level of scrutiny, it is nevertheless considered important that there is active parliamentary scrutiny of the regulations. This is because of the wide public interest in issues surrounding data protection, and the need to ensure that there is an appropriate balance between the legitimate interests of creditors on the one hand, and the proper respect of the privacy rights of debtors on the other.

Clause 55, Schedule [14], paragraphs 3, 4: Amendment to sections 6(1A) and 6A of the AEA 1971 to require High Court judgment debt AEOs to be calculated by way of the fixed deductions scheme

Power conferred on: Lord Chancellor (section 6A (1) of the AEA 1971)

Power exercisable by: Regulations made by statutory instrument (section 6A (2) of the AEA 1971)

Parliamentary Procedure: Affirmative procedure for the first set of regulations; negative procedure thereafter (section 6A (4) and (5) of the AEA 1971).

Context and purpose

196. At present, the rate and frequency of deductions from a debtor's earnings to be made under an AEO to discharge a judgment debt are calculated on a case by case basis, based on the income and personal outgoings of the individual debtor. Section 6A of the

AEA 1971 contains a power for the Lord Chancellor to make a "fixed deductions scheme", being a scheme that sets the rate and frequency of deductions for all judgment debt AEOs. The intention is that, in relation to County Court orders for the recovery of judgment debts, the fixed deductions scheme will replace the current system of the rate and frequency being calculated on a case by case basis. The scheme is to be made by regulations. At present, by virtue of section 6(1A) and (1B) of the AEA 1971, the fixed deductions scheme only has the potential to apply in relation to the calculation of the rate and frequency of deductions under a County Court AEO for the recovery of a judgment debt. The Bill will amend section 6(1A) of the AEA 1971, with a further amendment to section 6A(1), so that the rate and frequency of deductions under a High Court judgment debt AEO will be calculated in accordance with the fixed deductions scheme also. Section 6A and the supporting provisions in the AEA 1971 were introduced into the AEA 1971 by section 91 of and Schedule 15 to, the TCEA 2007 but are not yet in force. The intention is to bring that section into force in relation to both the High Court and the County Court at the same time. This is anticipated to be in 2018.

Justification for taking the power

197. As stated above, while not yet in force, the power to establish a fixed deductions scheme is already in place in relation to the County Court. Once that scheme is commenced in relation to the County Court, it will be the scheme that prevails for the calculation of repayment of judgment debts by way of AEO. Given that it is intended that the fixed deductions scheme will prevail in the County Court in the future, the Government considers that it is appropriate for consistency that calculation of a High Court judgment debt AEO should be on the same basis as the prevailing system in the County Court.

Justification for the procedure

198. These amendments do not affect the procedure currently prescribed in the AEA 1971. The first set of regulations are to be made by the affirmative procedure, to allow close scrutiny of the fixed deductions scheme before it is brought into force. This is considered to continue to be appropriate given the impact that the scheme will have on both debtors and creditors. The fixed deductions scheme is balanced by a power in the AEA 1971 for the court to make an order to suspend a fixed deductions order where the rate or frequency of deductions are inappropriate in any individual case (section 9A of the AEA 1971). The starting position will be, however, the fixed deductions scheme. The Government considers that it is appropriate that subsequent schemes should not need to

be subject to the degree of Parliamentary scrutiny afforded by the affirmative procedure. The detail of the proposed fixed deductions scheme is currently under consideration. It is, however, anticipated that once the underlying structure is in place, any subsequent amendments would be primarily of an updating nature, to alter the amounts or proportions of the deductions.

Part 5: Whiplash [subject to publication of Whiplash consultation response on day of introduction]

Clause 61: "Whiplash injury etc."

Power conferred on *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution procedure*

Context and purpose

199. Clause 61 defines "whiplash" as an injury of the neck or the neck and upper torso that is of a description specified in regulation". The Lord Chancellor may describe the precise nature of the injury by reference to, for example, the manner in which the injury was sustained, its symptoms and the areas of the neck and upper torso so affected. This will ensure an accurate definition on implementation and enable the definition to be revised as more accurate methods of diagnosis are developed.

Justification for taking the power

200. Road traffic accident ('RTA') related whiplash injuries are often difficult to diagnose, the common basis of diagnosis and prognosis being primarily by reference to symptoms (restricted movement, neck pain and tenderness, for example), supported by the circumstances of the RTA and the claimant's own account. The proposed reforms are intended to generate savings by reducing and regulating the damages payable for pain, suffering and loss of amenity suffered as a result of minor whiplash injuries. To ensure that these reforms achieve that aim, 'whiplash' must be defined accurately. Accordingly, it is necessary to consult with experts in this particular field, including medical practitioners, lawyers and the insurance industry to ensure that the definition is accurate

and captures those injuries which are the focus of these reforms. Developments in the diagnosis of such injuries, which might in turn - act to remove certain injuries from these provisions, may be reflected in subsequent amendments to the regulations.

Justification for the power

201. The affirmative procedure is considered appropriate for this power given that it relates to the substantive rights to compensation of victims of tort, and in exercising it the Lord Chancellor will be performing an exercise of determining the RTA related injuries which will be subject to other provisions under this part of the Act, including levels of compensation previously to be applied to such injuries, which were previously assessed by the courts.

Clause 62: **Damages for whiplash injuries**

Power conferred on *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution procedure*

Context and Purpose

202. Clause 62 will limit the power of the courts to award damages for pain, suffering and loss of amenity ('PSLA') for minor whiplash injuries sustained in road traffic accidents ('RTA') by imposing, in regulations, a statutory tariff of compensation (subsection 1). The tariff will provide for an ascending scale of fixed sum payments with the relevant tariff for a particular case identified by reference to the duration of the injury. Subsection (5) provides that the regulations may specify different sums for different descriptions of injury: it is intended that the power will enable the Lord Chancellor to (a) set and describe each category of duration of injury on the tariff; and (b) set the amount of fixed sum payment for each such category.

203. The Lord Chancellor may amend the categories, and/or the size of the payments (subsection (6)). The Lord Chancellor may also include within, or in addition to, the specified sums, an additional sum for minor psychological injuries (often referred to as 'travel anxiety') arising from the same accident (subsections (3) and (4)).

Justification for taking the power

204. It is appropriate for the content of the tariff to be established through regulations rather than in primary legislation because the setting of compensation in this way requires review from time to time. This is for a number of reasons. First a fixed sum on money will not maintain its value over time and adjustment will be necessary from time to time to make reasonable allowance, for example, for the effect of inflation. Since the proposed reforms would not be implemented before October 2018, it is the possibility that the figures might be subject to change, that they have not been placed on the face of the Bill. Secondly, PSLA is not capable of precise quantification in the way that a financial loss is, and there is an element of flexibility needed to reflect possible changes in society's perception of the value of such a loss over time. Thirdly, possibility of a need to change the parameters of the categories of the tariff to adjust or refine the approach to different severities of injury should this become necessary in future and in the light of experience over time.

Justification for the procedure

205. The affirmative procedure is considered appropriate for this power given that it relates to the substantive rights to compensation of victims of tort, and in exercising it the Lord Chancellor will be performing an exercise of assessing levels of compensation previously undertaken by the courts. The enhanced level of scrutiny permitted by the affirmative procedure is also appropriate given the purpose of the policy, which is to strike a more appropriate balance between the interests of accident victims and wider interests of society in controlling the cost of motor insurance premiums.

Clause 63 Uplift in exceptional circumstances

Power conferred on *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Affirmative resolution procedure*

Context and purpose

206. Clause 62 enables the Lord Chancellor to prescribe in regulations the damages to be awarded for PSLA in respect of minor RTA related soft tissue injury claims. Clause 63(1) and (2) respectively permit the Lord Chancellor to provide in regulations that the court

may, in its discretion, increase the prescribed sum and may also require that the court may only do so in exceptional circumstances. Regulations must specify, by reference to a percentage of the prescribed sum, the maximum increase that might be applied (subsection (3)) and may increase and decrease the maximum increase (subsection (4)). Subsection (5) requires the Lord Chancellor to consult with the Lord Chief Justice before making such regulations.

Justification for the power

207. It is recognised that there may exceptionally be circumstances where the prescribed sums for damages for PSLA for RTA related whiplash injuries, might not adequately compensate the injured party. In those circumstances it is appropriate for the court to recognise this by way of additional sum. Such sums should, however, only be awarded in exceptional circumstances if such the additional award is not to be claimed or awarded as a matter of course, given the purpose of the policy in respect of regulating these damages. Accordingly, any additional sum will be case specific, and will need to be justified by reference to the PSLA endured by the injured party. Similarly, such increases should be limited so as to avoid increased payments which exceed the additional PSLA endured.

Justification for the procedure

208. The affirmative procedure is considered appropriate for this power given that it relates to the substantive rights to compensation of victims of tort, and in exercising it the Lord Chancellor will be performing an exercise of assessing levels of compensation which may be applied by the courts. The enhanced level of scrutiny permitted by the affirmative procedure is also appropriate in the absence of any specific duties of consultation attached to the exercise of the power, and given the purpose of the policy mentioned above.

Proposed Clause 64: Rules against settlement before medical report

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and purpose

209. Clause 64 bans the offer and acceptance of settlements in RTA related whiplash claims by regulated persons (i.e. insurers and legal services providers) prior to receipt of a medical evidence ('pre-medical offers'). Subsection (4) enables the Lord Chancellor, by regulations, to make provision about what constitutes appropriate evidence of an injury. Subsection (5) provides that the regulations may, in particular, specify the form the evidence should take and those who may provide such evidence, as well as requiring such experts to be accredited for the purpose of providing such evidence and to make provision about their accreditation.

Justification for the power

210. As part of its wider reforms in respect of the provision of medical evidence in RTA related soft tissue injury claims, the government has introduced accreditation of those medical experts who provide such evidence, by making provision in both the Civil Procedure Rules 1998 and the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Experts providing initial reports in such cases are required to be accredited by MedCo Registration Solutions ('MedCo'). The government wishes to ensure, not only that offers should not be made until medical evidence is received, but also that such evidence is provided by medical experts currently accredited by MedCo. While it is envisaged that MedCo will continue to be responsible for accreditation, it was considered inappropriate to make such provision on the face of primary legislation. Moreover, it was considered appropriate to ensure that such provisions may be amended to take account of any changes around the issue of accreditation in the future. The provisions in subsection (5), in particular, will ensure that that what is currently required and permitted by way suitable evidence may apply to these reforms.

Justification for the procedure

211. The affirmative procedure is considered appropriate for this power given that it relates to provision elsewhere in the Bill concerning the substantive rights to compensation of victims of tort and that the regulations may impact on some medical practitioners.

Clause 65: Effect of rules against settlement without medical report

Power conferred on: *Regulators specified under clause 65*

Power exercisable by: *Rules made under Clause 65(2)*

Parliamentary Procedure: *None*

Context and purpose

212. Clause 64 bans the offer and acceptance of settlements in RTA related whiplash claims by regulated persons (i.e. insurers and legal services providers) prior to providing medical evidence ('pre-medical offers'). The ban would be enforced by the appropriate regulator, for example the Financial Conduct Authority (FCA) and Solicitors Regulation Authority (SRA). Clause 65 requires regulators, other than the FCA, to ensure that appropriate arrangements are in place for the monitoring and enforcement of the ban (subsection 1) and permits regulators to make rules and to use existing powers to enable them to do so (subsections (2) and (4)). The regulated persons and relevant regulators are specified in clause 67. These provisions adopt the same approach taken in respect of the ban on the payment and receipt of referral fees, introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPOA') and the ban on the offer of inducements introduced by the Criminal Justice and Courts Act 2015 ('CJC').

Justification for the power

213. While those regulators who will be required to monitor and enforce the ban upon the introduction of these provisions might already have sufficient powers under the Legal Services Act 2007 to do so, this provision removes any doubt in that regard and also ensures that any regulator who might be added to the list of regulators under clause 67 may make similar provision if required.

Justification for the procedure

214. Adopting the same approach taken in respect of the ban on the payment and receipt of referral fees, introduced by LASPOA and the ban on the offer of inducements introduced by the CJCA, no procedure applies to the making of rules in this regard. The ban having been imposed by clause 64, it is appropriate to leave monitoring and enforcement to the relevant regulator

Clause 66: Regulation by the Financial Conduct Authority

Power conferred on: *The Treasury*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative resolution procedure*

Context and Purpose

215. This clause would enable the Treasury to make regulations which, in turn, will enable the Financial Conduct Authority (FCA) to monitor and enforce the prohibition on the offer, and payment in respect of settlement of pre-medical offers. These provisions adopt the same approach taken in respect of the ban on the payment and receipt of referral fees, (introduced by LASPOA).

Justification for taking the power

216. As other clauses would enable regulators to use existing powers to enforce the prohibition, so this clause would allow the Treasury to make regulations enabling the FCA to use existing provisions in the Financial Services and Markets Act 2000 for the same purpose.

Justification for the procedure

217. For regulations made under this power, the affirmative resolution procedure is appropriate to ensure sufficient Parliamentary scrutiny given that the regulations will impact on the current commercial practices of some insurance services providers. This reflects the approach to Parliamentary scrutiny adopted in LASPOA.

Clause 67: Interpretation

Power conferred on: *The Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative resolution procedure*

Context and Purpose

218. This clause lists the regulators who are required to monitor and enforce the proposed ban on pre-medical offers and those legal services providers subject to the ban, and also enables the Lord Chancellor to extend the ban, in regulations, to other regulators and regulated persons.

Justification for the power

219. It is appropriate to provide for the extension of the ban by secondary legislation to ensure that, in the future, if other legal service providers offer services in respect of such personal injury claims, the ban will apply in respect of them as it does to current providers of such services and, in consequence, can be enforced by the relevant regulator.

Justification for the procedure

220. It is appropriate for regulations under this power to be subject to the negative resolution procedure as the power is only available to ensure that the relevant provisions reflect regulatory changes, the principle having already been accepted by Parliament. This reflects the approach to Parliamentary scrutiny adopted in the CJCA. In similar provisions in LASPOA the affirmative procedure was adopted, however, in hindsight, it was considered that this approach was both disproportionate and an unnecessary use of Parliamentary time given the scope of the power.

PART 6: FINAL PROVISIONS

Clause 68 Consequential and transitional provision etc

Power conferred on:	*Secretary of State or The Lord Chancellor*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary Procedure:	*Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution*

Context and Purpose

221. This clause enables the Secretary of State or Lord Chancellor by regulations to amend, repeal or revoke primary legislation, or legislation made under primary legislation, which has passed into force prior to the Bill receiving Royal Assent or in the same session, where consequential, supplementary or incidental amendments in consequence of any provision of the bill are required and to make transitional, transitory or saving position.

Justification for the power

222. The Government believes it is necessary to take such a power to avoid any implementation difficulties or legislative inconsistencies, which may otherwise arise. The Bill already contains many amendments to existing legislation, many of which are consequential, supplementary or incidental, but the Bill, especially where it concerns criminal procedure and the organisation of courts, is complex. The need for the further changes may not emerge until the reforms begin to be implemented. The abolition of local justice areas is a potential example of why the power includes the power to make supplemental or incidental provision. It may emerge when implementing the provision, that existing legislation, in the absence of references to local justice areas, requires supplemental provision. Amendments have also been inserted into the Bill relating to fines enforcement, which is incidental to the abolition of local justice areas. Further similar amendments to secondary legislation may be needed, and if so, the wider power will be necessary to achieve the purposes of the Act.

223. The Government therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Act. Use of this power will nonetheless be limited to that which is strictly necessary to implement the provisions of the Act. Where it is used to amend primary legislation, such 'Henry VIII' powers, although seemingly wide, are limited by virtue of being necessarily consequential, supplementary or incidental on the provisions in the Bill, or required to ensure there is no gap in provision between existing and new legislative cover. Additionally, the power does not extend to amending provisions of this bill, or future legislation.

224. Whilst the Government acknowledges that precedents cannot be relied upon for justification, it notes there are various precedents for similar provisions including section 93 of the Criminal Justice and Courts Act 2015, section 53 of the Pensions Act 2014, section 53 of the Offender Rehabilitation Act 2014, and section 149 of the Legal Aid, Sentencing and Punishment Act 2012.

Justification for the procedure

225. The Government recognises that it is generally appropriate that such amendments to primary legislation by secondary legislation requires the affirmative resolution procedure. Where only secondary legislation is in issue the negative resolution will apply.

Clause 69

226. This clause does not confer a power to make regulations, nor affect the procedure which would apply, but does supplement the other regulation making powers in the Bill so that they may include different provision for different purposes or areas; include supplementary, incidental and consequential provision; and make transitional provision and savings. These supplemental powers are required to ensure that the Government is able to fully implement the provisions that Parliament has approved, but provides flexibility as to how they are implemented. They do not in any substantive way change the scope of the power in question, but could be used, for example in relation to virtual hearings to enable measures to be introduced in different courts or different areas to allow phased implementation.

Clause 71 Commencement

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary Procedure: *None*

Context and Purpose

227. It is standard procedure to make provision for commencement by way of regulations unless commencement provision is made for a clause on the face of the Bill. It is also standard that no parliamentary procedure attaches to the regulation. Parliament has approved the provisions and the power enables the Secretary of State to bring them into force at convenient time, and by area if required. The power in clause 71(6)(c) to include transitory and saving provision is also standard to ensure effective and orderly implementation.

Ministry of Justice

Date