



Law Society
of Scotland

Law Society of Scotland (NBB11)

Evidence to the Nationality and Borders Bill Public
Bill Committee with Amendments to be tabled in
Committee

August 2021





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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership. Our Immigration and Asylum Sub-Committee welcomes the opportunity to comment on the Nationality and Borders Bill. Whilst we agree with some of the bill's objectives there are parts of the bill where we do not share the Government's view. Our approach to the bill will be characterised by promoting the rule of law, equality and compliance with the UK's international obligations — values which we can all share.

General Comments

PART 1

NATIONALITY

British Overseas Territories citizenship

1 Historical inability of mothers to transmit citizenship.

Our Comment

We agree with clause 1 subject however to the registration process being free. In this connection we acknowledge and agree with the report by British Futures: Barriers to Britishness 2020 which recommended (pages 10/11): "Citizenship by registration should be free for those who become British by this route. This group mostly comprises children and those with subsidiary categories of British nationality, such as British Overseas Territories Citizens and British National (Overseas) passport holders from Hong Kong who now have a route to citizenship through the bespoke British National (Overseas) visa. Nationality law should be amended to allow children born in the UK to British citizens automatically, restoring a policy that applied before 1983. Vulnerable groups of people should be encouraged to take legal advice, which should be affordable and widely available in all parts of the UK":

<https://www.britishfuture.org/publication/barriers-to-britishness-report-of-the-alberto-costa-inquiry-intocitizenship-policy/> We note the case of *PRBC & O v Secretary of State for the Home Department* [2021] EWCA Civ 193 where the Court of Appeal held that the fee of £1012 for certain applications by children to

register is unlawfully high. This appeal in this case has recently been heard in the United Kingdom Supreme Court and we await the decision in due course.

2 Historical inability of unmarried fathers to transmit citizenship.

Our Comment

We agree with the proposal to remove this discriminatory provision.

3 Sections 1 and 2: related British citizenship

Our Comment

We have no comment to make.

4 Period for registration of person born outside the British Overseas Territories

Our Comment

We agree with clause 4.

British citizenship

5 Disapplication of historical registration requirements

Our Comment

We agree with clause 5.

6 Citizenship where mother married to someone other than natural father

Our Comment

We agree with clause 6.

Our Comment

Powers of the Secretary of State relating to citizenship etc.

7 Citizenship: registration in special cases

Our Comment

We agree with clause 7 subject to clarification about what “exceptional” means where it occurs in new sections 4L and 17H. It is important that criteria for the exercise of the Secretary of State’s discretion is set out in Guidance published by the Home Office.

8 Requirements for naturalisation etc

Our Comment

We agree with clause 8.

Registration of stateless minors

9 Citizenship: stateless minors

Our Comment

Whilst we commend the concept of ensuring “that those who are genuinely stateless can benefit” [from the new registration route], this clause suffers from some serious defects. For example, subsection (4) applies to “minors aged 5 to 17”. Would it not be more consistent to use the definition of child contained in Article 1 UN Convention on the Rights of the Child (UNCRC) <https://www.gov.uk/government/publications/united-nations-convention-on-the-rights-of-the-child-uncrc-how-legislation-underpins-implementation-in-england> that “a child means every human being below the age of eighteen years...”? We question the use of the word “acquire” in clause 3A(d). What exactly does the Government mean to “acquire” citizenship? This approach fails to take into account the challenges that many parents have in evidencing the citizenship of their children. We take the view that it is not the child’s fault if the parent cannot evidence the child’s nationality. There may be many reasons for this including chaotic circumstances in the country of origin such as war or natural disaster. The system of nationality administration in the country of origin may not be able to provide the required documentation and there may be consular or other representational difficulties. Furthermore, the Government should explain how this proposal complies with the Refugee Convention and the UNCRC. Another issue is the cost of registration and our earlier remarks about cost apply to this proposal also.

PART 2

ASYLUM

Treatment of refugees; support for asylum-seekers

10 Differential treatment of refugees

Our Comment

Clause 10 provides for “differential treatment of refugees” depending on their mode of arrival. The Home Secretary already has power to treat refugees differently depending on their mode of arrival, but this power should not be used in a discriminatory way. The distinction made in subsection (1) between types of refugee based on how they arrived in the UK has been criticised by the UNHCR who has stated that this provision threatens “to create a discriminatory two-tier asylum system, undermining the 1951 Refugee Convention and longstanding global cooperation on refugee issues”:

<https://www.unhcr.org/uk/news/press/2021/5/6097bce14/unhcr-deeply-concerned-at-discriminatory-twotier-uk-asylum-plans-urges.html>.

The Government are aware of the Convention as the clause adopts the wording of Article 31 of the Refugee Convention in subsection (2) on “coming directly from a territory where their life or freedom was threatened”. This wording was interpreted broadly and in line with the intentions of the drafters of the Refugee Convention in the case of *R v Uxbridge magistrates’ Court and Another ex parte Adimi* [2001] QB 667, Simon Brown LJ identified the purpose: “To provide immunity for genuine refugees whose quest for asylum reasonably involved”.

Professor Goodwin-Gill in his paper on Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection notes “So far as the references in Article 31(1) to refugees who ‘come directly’ and show ‘good cause’ may be ambiguous, the travaux préparatoires illustrate that these terms were not intended to deny protection to persons in analogous situations” (Paragraph 12):<https://www.unhcr.org/3bcfdf164.pdf>.

Clause 34 of the bill which deals with the interpretation of Article 34(1) of the Refugee Convention, seems to adopt a restricted meaning:

A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

Examples of how the differential treatment may be applied are given in clause 10(5) including length of leave, requirements to meet for settlement, conditions attached to leave and treatment of family members.

We take the view that how a person enters the UK should not impact on family reunion.

Safe and legal routes have been reduced since the UK left the European Union with the removal of the Dublin III Regulation. This provision appears to be actually reducing the prospect of families using one of only the two safe and legal routes the Asylum seeker has i.e., refugee family reunion – the other being UNHCR resettlement. Fewer safe and legal routes are likely to result in more unsafe and perilous journeys.

11 Accommodation for asylum-seekers etc

Our Comment

Clause 11 allows for differential provision of accommodation to asylum seekers depending on the stage of their claim and their compliance with various conditions. There does not seem to be any particular need for this to be in an Act of Parliament as the Home Secretary could already do this.

Place of claim

12 Requirement to make asylum claim at “designated place”.

Our Comment

The Home Secretary is currently able to designate specific places from which to claim asylum. Clause 12 slightly adjusts the existing Immigration Rules part 11: Rule 327B which defines a “designated place of asylum claim” where refugees may claim asylum. The bill omits “an airport” as a designated place. Clause Page 6 12 (6) redefines “asylum claim” to exclude making a request for international protection which brings the Immigration Rules into conformity with section 113 of the Nationality, Immigration and Asylum Act 2002.

Inadmissibility

13 Asylum claims by EU nationals: inadmissibility.

Our Comment

The New Plan for Immigration Consultation Paper noted that since the UK has left the European Union, “protection claimants who have sought international protection in an EU member state can no longer join family members in the UK using EU law”. The bill provides that the Secretary of State must (subject to an exceptional circumstances provision) declare an asylum claim made by a person who is a national of a member State inadmissible. The mandatory provision which applies to the Secretary of State in clause 13 can be distinguished from the permissive provision in clause 14 where the asylum claimant has a connection to a safe third country. The amendments are contained in clauses 13 and 14 by adding a new Part 4A containing new sections 80A to 80C to the Nationality, Immigration and Asylum Act 2002.

This provision currently exists in the Immigration Rules part 11: asylum 326A procedure which came into effect on 1 January 2021. This means those seeking international protection from a Member State of the EU must apply to join family members in the UK under the Immigration Rules like those from the ‘rest of the world’. Whilst we agree with the principle of equal treatment why is Clause 13 of the bill considered necessary? New Section 80A is in substance a reproduction of Asylum Rules 326E and 326F.

14 Asylum claims by persons with connection to safe third State: inadmissibility.

Our Comment

The bill provides that the Secretary of State may declare an asylum claim made by a person who has a connection to a safe third country. This permissive provision which applies to the Secretary of State in clause 14 can be distinguished from the obligation on the Secretary of State in clause 13.

15 Clarification of basis for support where asylum claim inadmissible.

Our Comment

Clause 15 removes the right to normal asylum support where an asylum claim is declared inadmissible.

We have no comment to make.

Supporting evidence

16 Provision of evidence in support of protection or human rights claim

Our Comment

Clause 16 reflects the terms of Regulation 339L which places a duty on an asylum claimant to substantiate the claim for asylum. Accordingly why is Clause 16 of the bill considered necessary?

17 Asylum or human rights claim: damage to claimant's credibility

Our Comment

Clause 17 seeks to amend Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (claimant's credibility) by inserting new subsections 3A and 3B which provide that behaviour not in good faith can affect the assessment of credibility including behaviour in connection with an asylum or human rights claim, towards an immigration officer or in connection with judicial review proceedings. The Claimant's credibility is already comprehensively covered by section 8 of the 2004 Act and these provisions may not enhance the existing law.

Priority removal notices

18 Priority removal notices

Our Comment

We have no comment to make at this time.

19 Priority removal notices: supplementary

Our Comment

We have no comment to make at this time.

20 Late compliance with priority removal notice: damage to credibility

Our Comment

We have no comment to make at this time.

21 Priority removal notices: expedited appeals

Our Comment

We have no comment to make at this time.

22 Civil legal services for recipients of priority removal notices

Our Comment

Clause 22 does not apply to Scotland. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply in Scotland and therefore these provisions will have no effect to applicants whose legal aid provision is under the Legal Aid (Scotland) Act 1986.

Late evidence

23 Late provision of evidence in asylum or human rights claim: weight

Our Comment

We have no comment to make at this time.

Appeals 24 Accelerated detained appeals

Our Comment

We have no comment to make at this time.

25 Claims certified as clearly unfounded: removal of right of appeal.

Our Comment

We have no comment to make at this time.

Removal to safe third country

26 Removal of asylum seeker to safe country

Our Comment

We have no comment to make at this time.

Interpretation of Refugee Convention

27 Refugee Convention: general

Our Comment

We have no comment to make at this time.

28 Article 1(A)(2): persecution

Our Comment

We have no comment to make at this time.

29 Article 1(A)(2): well-founded fear

Our Comment

The leading case for the standard of proof test to determine a 'well-founded fear in persecution' for asylum cases is *Ravichandran v SSHD [1996] Imm AR 97*.

In *Karanakaran v. Secretary of State for the Home Department, [2000] EWCA Civ. 11*, the Court of Appeal affirmed that the standard of proof in civil proceedings (the balance of probabilities referred to in clause 29(2)) was not suitable for immigration matters.

Instead, what was important was making an assessment of all material considerations such that it 'must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur'. Sedley LJ described the balance of probabilities as '...part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones'.

For the last 20 years, the *Karanakaran* approach has consistently been followed. The Outer House of the Court of Session re-affirmed *Karanakaran* as the correct standard of proof approach to be applied in the 2020 case of *MF (El Salvador) v Secretary of State for the Home Department [2020] CSOH 84*. In that case, it was held the First-Tier Tribunal Judge had erred in law by applying the wrong standard of proof in respect of an application for permission to appeal brought by an asylum seeker.

In *Kaderli v. Chief Public Prosecutor's Office of Gebeze, Turkey [2021] EWHC 1096*, the High Court re-affirmed (while referencing *Karanakaran*) that the question as to determining a well-founded fear of persecution is that of an evaluative nature about the likelihood of future events. In this case it was held that 'the judge erred in holding that it was for the appellant to prove on the balance of probabilities that the corruption alleged had occurred. The true test involved the application of a lower standard: whether there was a real risk that the appellant's conviction was based on a trial tainted by corruption. This was consistent with the approach to the fact-finding in the immigration context.'

In summary, we take the view that the change in clause 29 appears to go against the intention of the New Plan for Immigration, and flies in the face of 25 years judicial scrutiny.

30 Article 1(A)(2): reasons for persecution

Our Comment

We have no comment to make at this time.

31 Article 1(A)(2): protection from persecution

Our Comment

We have no comment to make at this time.

32 Article 1(A)(2): internal relocation

Our Comment

We have no comment to make at this time.

33 Article 1(F): disapplication of Convention in case of serious crime etc

Our Comment

34 Article 31(1): immunity from penalties We have no comment to make at this time.

Our Comment

See our comments in relation to clause 10 above.

35 Article 33(2): particularly serious crime

Our Comment

We have no comment to make at this time.

Interpretation

36 Interpretation of Part 2

Our Comment

We have no comment to make at this time.

PART 3

IMMIGRATION OFFENCES AND ENFORCEMENT

Immigration offences and penalties

37 Illegal entry and similar offences

Our Comment

Clause 37 of the Bill adds a new component to the existing offence of illegal entry. Subsection (2) adds new subsections to section 24 of the Immigration Act 1971. Subsection (C1) makes it an offence for someone who requires entry clearance to arrive in the UK without *valid entry clearance*.

An entry clearance is a visa issued before travel (it becomes “leave to enter” when the person enters the UK). The burden of proving that a person holds valid entry clearance lies on that person. This is concerning, given that EU citizens are not routinely given any physical evidence of their entry clearance (if they apply using the UK Immigration: ID Check app, no visa vignette is placed in their passport). The key addition to the offence provision is to make “arrival” an offence. The Explanatory Notes, state:

The concept of ‘entering the UK without leave’ has caused difficulties about precisely what ‘entering’ means in the context of the current section 24(1)(a) of the 1971 Act’ paragraph 384.

Entering is defined in section 11(1) of the Immigration Act 1971 as disembarking and subsequently leaving the immigration control area. “Arrival” is not given any technical legal definition, so will simply mean reaching a place at the end of a journey or a stage in a journey.

It is unclear whether a person needs to reach the mainland in order to “arrive in the United Kingdom”. The Explanatory Notes, and the separate definitions of “United Kingdom” and “United Kingdom waters”, seem to suggest arrival on the mainland is necessary:

This will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don’t technically “enter” the UK” paragraph 388.

Although entering UK territorial waters has not been criminalised, the status of migrants in UK waters is likely to be significantly altered by the new power to regulate work in territorial waters.

The current maximum sentence for illegal entry is six months’ imprisonment. This is being increased to four years (or five years for entering in breach of a deportation order).

38 Assisting unlawful immigration or asylum seeker.

Our Comment

Clause 38 increases the minimum sentence from 14 years to life imprisonment and criminalises helping an asylum seeker to arrive in the UK, even if not for gain. At the moment it is only a criminal offence to help an asylum seeker to arrive in the UK if this is done for gain (i.e., if done by a people smuggler). The “for gain” element is being removed. As a result, almost anyone who helps an asylum seeker to arrive in the UK will potentially be guilty of an offence, subject to whatever defences may be available under criminal law. How will this affect organisations such as the Royal National Lifeboat Institution? We are also concerned about the effect on Ships’ Masters who save asylum seekers from drowning as they are obliged to do by the Duty

to Render Assistance under Article 98 of the UN Convention on the Law of the Sea: [UNCLOS and Agreement on Part XI - Preamble and frame index](#)

It is also possible that this provision will engage Article 2 (Right to Life) of the European Convention on Human Rights https://www.echr.coe.int/documents/convention_eng.pdf

39 Penalty for failure to secure goods vehicle

Our Comment

We have no comment to make at this time.

Enforcement

40 Power to search container unloaded from ship or aircraft.

Our Comment

We agree with this clause which provides an immigration officer with powers to search containers for people attempting to enter the UK illegally including those containers which are no longer on board a ship, or aircraft, and are not on any vehicle on which they were removed from a ship or aircraft. We take the view that rather than creating new criminal offences the Government should focus on properly enforcing the current criminal offences in the Immigration Act 1971.

41 Maritime enforcement

Our Comment

Clause 41 and Schedule 5 of the Bill introduce amended maritime enforcement powers, with the explicit intention of stopping small boats crossing the Channel (Explanatory Notes, paragraph 450). Existing powers to divert migrant vessels will, in future, apply to ships that are in foreign or international waters (rather than just those in UK waters, as is currently the case). “Ship” will be redefined to include:

... any ‘other structure... constructed or used to carry persons, goods, plant or machinery by water’, which is intended to include anything which may be used to cross the English Channel [Explanatory Notes, paragraph 468].

The Home Office’s maritime enforcement powers are not new. They were first introduced by the Immigration Act 2016. This Bill reforms and expands them.

42 Authorisation to work in the territorial sea.

Our Comment

Clause 42 creates a new power to make regulations about the right to work in the UK’s territorial sea.

At the moment, section 8 of the Immigration Act 1971 allows a ship's crew to enter the UK without leave, and remain here until the departure of that ship. Neither the 1971 Act nor the Immigration Rules regulate where the crew can work after departure. However, guidance requires that the vessel operates “wholly or mainly” outside of UK territorial waters.

To regulate work which takes place inside territorial waters, clause 42 will create a system of “authorisation”. No details have been provided yet. At the moment, there is a power to

make regulations about the right to work in the territorial sea of the United Kingdom [including] prohibiting people who require leave to enter or remain in the United Kingdom from working in the territorial sea without authorisation...

The House of Commons Library describes this as a “placeholder” clause that the government will seek to amend before the Bill reaches committee stage.

On one view, the regulations would not apply to crew covered by section 8 as such crew are not “people who require leave to enter or remain”. However, if the regulations are not aimed at preventing vessels with foreign crew from operating within UK territorial waters then it is not clear what they are aimed at. Possibly people working on offshore installations in the oil and gas or renewable energy sectors, but they would most likely already have a Skilled Worker or similar visa, so it is unclear what this work “authorisation” would add.

The Government should explain how this clause will affect the fishing industry and vessels operating from a foreign port, that stop off at a UK port temporarily.

At the moment, if a foreign vessel, with foreign crew, stops off at a British port it is not necessary to apply for visas for everyone. The foreign crew do not “enter” the UK (as defined above) if they remain on the vessel. But what happens once “arriving” in the UK becomes a criminal offence? Will it also be necessary to obtain “authorisation” for all crew members on a ship coming anywhere near the UK?

Removals

43 Removals: notice requirements

Our Comment

Clause 43 amends the power to remove people from the UK when they do not have a visa.

Currently some people are given only 72 hours' notice of their removal. Some are given no notice at all, instead being given a three-month “removal window”. They can be removed at any time, without further notice, during this three-month period.

Clause 43 changes this and provides that a person can only be removed after:

1. They have been given a written removal notice which specifies the date they will be removed and the country they will be removed to.

2. At least five working days have elapsed since the notice was given.

This is a welcome change with which we agree and will hopefully mean fewer unlawful removals will take place.

44 Prisoners liable to removal from the United Kingdom

Our Comment

Clause 44 is a 'placeholder' clause. The Government intends to table amendments to those clauses to set out its intentions in more detail before the bill reaches the House of Commons Committee stage.

Immigration bail

45 Matters relevant to decisions relating to immigration bail.

Our Comment

Clause 45 sets out new criteria for those deciding whether to release a person from detention on immigration bail. The decision-maker will have to factor in whether the person has "failed without reasonable excuse to cooperate" in various ways. These factors seem reasonable when deciding whether or not to grant immigration bail.

PART 4

MODERN SLAVERY

46 Provision of information relating to being a victim of slavery or human trafficking.

Our Comment

We have no comment to make at this time.

47 Late compliance with slavery or trafficking information notice: damage to credibility

Our Comment

We have no comment to make at this time.

48 Identification of potential victims of slavery or human trafficking

Our Comment

Indicators that a person is a victim of trafficking can be missed by First Responders, meaning a referral to the NRM is not made. If a referral is made, the Reasonable Grounds (RG) stage is a sift to determine whether someone may be a victim of trafficking and further investigation is needed. Home Office statistics

reveal that 92% of RG decisions are positive, and 89% of Conclusive Grounds (CG) decisions (on the balance of probabilities) are positive. The evidence basis for “over identification” is not made out. The low standard of proof at the RG decision stage helps ensure that potential victims do not miss out from being properly investigated and progressed to the CG stage of the NRM. Raising the standard of proof at RG stage – were minimal information is collected by the Competent Authority – could foreseeably result in fewer referrals being made and will increase the prospect of potential victims not being identified by the NRM, without an investigation even taking place.

49 Identified potential victims of slavery or human trafficking: recovery period.

Our Comment

We have no comment to make at this time.

50 No entitlement to additional recovery period etc

Our Comment

We have no comment to make at this time.

51 Identified potential victims etc: disqualification from protection.

Our Comment

This clause appears to divide victim into worthy and unworthy victims. No one should be disqualified from being a victim of one crime because they may have been a perpetrator of another. Victims of trafficking could be criminalised for conduct relating to their trafficking, in breach of Article 26 of the Council of Europe Trafficking Convention. A violation of Article 4 ECHR was recently found against the UK in this regard by the European Court of Human Rights in *V.C.L. and A.N. v. The United Kingdom (applications nos. 77587/12 and 74603/12)*. This clause introduces a higher risk of double punishment for those presumed victims who have received convictions. Moreover, disqualifying certain victims from protection increases the prospect that they will be further exploited by organised criminal groups, as they will be unable to access protection from the state.

52 Identified potential victims etc in England and Wales: assistance and support

Our Comment

Clause 52 does not apply to Scotland but extends only to England and Wales.

53 Leave to remain for victims of slavery or human trafficking.

Our Comment

54 Civil legal aid under section 9 of LASPO: add-on services in relation to the national referral mechanism

Our Comment

Clause 54 does not apply to Scotland. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply in Scotland and therefore these provisions will have no effect to applicants whose legal aid provision is under the Legal Aid (Scotland) Act 1986.

55 Civil legal services under section 10 of LASPO: add-on services in relation to national referral mechanism.

Our Comment

Clause 55 does not apply to Scotland. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply in Scotland and therefore these provisions will have no effect to applicants whose legal aid provision is under the Legal Aid (Scotland) Act 1986.

56 Disapplication of retained EU law deriving from Trafficking Directive.

Our Comment

We have no comment to make at this time.

57 Part 4: interpretation

Our Comment

We have no comment to make at this time.

PART 5

MISCELLANEOUS

58 Age assessments

Our Comment

We note that age assessments will be carried out by Immigration Officers, the Secretary of State and Local Authorities. However, we consider that any regulations should be consulted upon. Where this provision is deployed to place duties on Scottish Local Authorities the regulations should be made with the consent of Scottish Ministers. We note that Clause 58 is a 'placeholder' clause. The Government intends to table amendments to those clauses to set out its intentions in more detail before the bill reaches the House of Commons Committee stage.

59 Processing of visa applications from nationals of certain countries

Our Comment

Clause 59 is a 'placeholder' clause. The Government intends to table amendments to those clauses to set out its intentions in more detail before the bill reaches the House of Commons Committee stage.

60 Electronic travel authorisations

Our Comment

Clause 60 is a 'placeholder' clause. The Government intends to table amendments to those clauses to set out its intentions in more detail before the bill reaches the House of Commons Committee stage.

61 Special Immigration Appeals Commission

Our Comment

Clause 61 is a 'placeholder' clause. The Government intends to table amendments to those clauses to set out its intentions in more detail before the bill reaches the House of Commons Committee stage.

62 Tribunal charging power in respect of wasted resources.

Our Comment

We consider that clause 62 is problematic, unnecessary and unacceptable. The First-tier or Upper Tribunal is to be given powers to charge a person exercising rights of audience or rights to conduct litigation if that person is found to have acted improperly, unreasonably or negligently. Under current statutory and common law powers professional regulators have sufficient powers to deal with matters of professional discipline such as improper or unreasonable conduct, and it is in the public interest that such powers rest with the regulators. It is inappropriate that the determination of negligence should be included in the clause when that is properly the province of the civil courts. Furthermore, we note that any amounts charged under this clause are to be paid to the Consolidated Fund rather than to the client who may have suffered as a result of any alleged negligence or improper or unreasonable conduct. This appears to be more in the nature of a tax rather than compensation for an affected party.

This clause needs to be reconsidered.

63 Tribunal Procedure Rules to be made in respect of costs orders etc.

Our Comment

We refer to our comments in respect of clause 62. We agree that if clause 62 proceeds unamended there will be a need for due process provisions to be put in place.

64 Good faith requirement

Our Comment

We refer to earlier comments on good faith.

65 Pre-consolidation amendments of immigration legislation

Our Comment

This clause gives the Secretary of State power by regulation to amend immigration legislation in order to make pre-consolidation changes to facilitate a consolidation bill. We are in favour of consolidation of the law in general and this applies to Immigration and Asylum law too.

We support Recommendation 21 of the Windrush Lessons Learned Review quoted in the Explanatory Notes: “Reduce the complexity of immigration and nationality law, immigration rules and guidance – Building on the Law Commission’s review of the Immigration Rules the Home Secretary should request that the Law Commission extend the remit of its simplification programme to include work to consolidate statute law. This will make sure the law is much more accessible for the public, enforcement officers, caseworkers, advisers, judges and Home Office policy makers.”

However, we also note the broad, discretionary regulation making powers which the Secretary of State will acquire should this provision come into effect. We believe that in such circumstances the Secretary of State must consult with relevant interests before exercising those regulation making powers.

PART 6

GENERAL

66 Financial provision

Our Comment

We have no comment to make at this time.

67 Transitional and consequential provision

Our Comment

Clause 67 provides that the Secretary of State may by regulations make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act and make such provision as the Secretary of State considers appropriate in consequence of this Act. Regulations under subsection (2) can include amending, repealing or revoking any enactment.

These are very wide powers (for example they permit the Secretary of State to make regulations considered as “appropriate” rather than “necessary”) although it is correct that the Secretary of State should be able to make transitional transitory and saving provisions.

The same argument cannot be made for giving the Secretary of State powers to amend, repeal or revoke *any* enactment as per clause 67(3). In this context “any enactment” includes (a) an Act of Parliament, (b) retained direct principal EU legislation, (c) an Act of the Scottish Parliament, (d) a Measure or Act of

Senedd Cymru, or (e) Northern Ireland legislation. Although such regulations will be subject to affirmative resolution procedure they should be consulted upon within a super-affirmative procedure and, where appropriate require the consent of the devolved legislatures and administrations.

68 Regulations

Our Comment

Our comments in respect of clause 67 apply. We firmly believe that the Secretary of State should be under an obligation to consult such persons as the Secretary considers appropriate before making any regulation under the bill. Furthermore, where appropriate the Secretary of State should also require to consult with such persons as are appropriate and seek the consent of devolved legislatures and administrations.

69 Extent

Our Comment

We have no comment to make.

70 Commencement

Our Comment

We have no comment to make.

71 Short title

Our Comment

We have no comment to make.

Schedule 1 — Waiver of requirement of presence in UK etc

Schedule 2 — Expedited appeals where priority removal notice served: consequential amendments.

Schedule 3 — Removal of asylum seeker to safe country

Schedule 4 — Penalty for failure to secure goods vehicle etc

Schedule 5 — Maritime enforcement We have no comment to make on the Schedules at this time.

Clause 9, page 12, line 30	add at end - “(5) The Secretary of State must not charge a fee for the processing of applications under this section.”
Clause 10, page 12, line 37	leave out “a refugee is a Group 1” and insert “a person is a”
Clause 10, page 12, line 40	leave out line 40.
Clause 10, page 13, line 11	leave out “treat Group 1 and Group 2 refugees differently, for example” and insert “exercise reasonable discretion”
Clause 10, page 13, line 22	leave out “also treat the family members of Group 1 and Group 2 refugees differently for example “and insert “ exercise reasonable discretion”
Clause 29, page 30, line 41	leave out clause 41
Clause 37, page 36, line 2	leave out “arrives” and insert “enters”
Clause 38. page 37, line 22	leave out subsection (2)
Clause 48, Page 43, Line 1	leave out subsection (4)
Clause 51, Page 44, line 31	after “if” insert “in exceptional circumstances”
Clause 51, Page 44, line 33	leave out subsection (b)
Clause 58, page 52, line 5 add at end -	“(2) The Secretary of State must consult with such persons as the Secretary of State considers appropriate before making regulations under this section.”
Clause 62, page 53, line 27	leave out clause 62
Clause 63, page 54, line 17	leave out clause 63
Clause 65, page 56, line 19 add at end -	“(2) The Secretary of State must consult with such persons as the Secretary of State considers appropriate before making regulations under this section.”
Clause 67, page 57, line 17	leave out “appropriate” and insert “necessary”

Clause 67, page 57, line 35

after “to” leave out “affirmative resolution procedure” and insert “the super-affirmative resolution procedure as set out in Schedule 6”

Schedule 6

To move the following Schedule—

Insert the following new Schedule—
“SUPER-AFFIRMATIVE RESOLUTION
PROCEDURE

(1) If the Secretary of State considers it necessary to make regulations under this Act which are subject to the super-affirmative resolution procedure, the Secretary of State must lay before Parliament— (a) draft regulations, and (b) an explanatory document.

(2) The explanatory document must introduce and give reasons for draft regulations.

(3) Subject as follows, if after the expiry of the 40-day period the draft regulations laid under paragraph 1 are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the draft regulations.

(4) The procedure in paragraphs 5 to 8 apply to the draft regulations instead of the procedure in paragraph 3 if— (a) either House of Parliament resolves within the 30-day period, or (b) a committee of either House charged with reporting on the draft regulations so recommends within the 30-day period and the House to which the recommendation is made does not by resolution reject the recommendation within that period.

(5) The Secretary of State must consult the: (1) The Scottish Ministers (2) The Welsh Ministers and (3) The Northern Ireland Executive and have regard to— (4) their representations, (5) any other representations received and (c) any resolution of either House of Parliament, and any recommendations of a committee of either House of Parliament charged with reporting on the draft regulations, made during the 60 day period on the draft regulations.

(6) If, after the expiry of the 60-day period, the draft regulations are approved by each House the Secretary of State may make regulations in the terms of the draft regulations.

(7) If, after the expiry of the 60-day period, the Secretary of State wishes to proceed with the draft regulations but with material changes, the Secretary of State may lay before Parliament— (a) a revised draft of the regulations, and (b) a statement giving a summary of the changes proposed. Which may be approved by each House.

(8) If the revised draft regulations are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the revised draft regulations.

(9) For the purposes of this Schedule regulations are made in the terms of draft regulations or revised draft regulations if they contain no material changes to their provisions.

(10) In this paragraph, references to the “30-day”, “40-day” and “60-day” periods in relation to any draft regulations are to the periods of 30, 40 and 60 days beginning with the day on which the draft regulations were laid before Parliament

EFFECT AND REASONS FOR AMENDMENTS

Clause 1, page 2, line 46

add at end –

“(7) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 1.

Reason

We agree with clause 1 subject however to the registration process being free. In this connection we acknowledge and agree with the report by British Futures: Barriers to Britishness 2020 which recommended (pages 10/11): “Citizenship by registration should be free for those who become British by this route. This group mostly comprises children and those with subsidiary categories of British nationality, such as British Overseas Territories Citizens and British National (Overseas) passport holders from Hong Kong who now have a route to citizenship through the bespoke British National (Overseas) visa. Nationality law should be amended to allow children born in the UK to British citizens automatically, restoring a policy that applied before 1983. Vulnerable groups of people should be encouraged to take legal advice, which should be affordable and widely available in all parts of the UK”: <https://www.britishfuture.org/publication/barriers-to-britishness-report-of-the-alberto-costa-inquiry-intocitizenship-policy/>. We note the case of *PRBC & O v Secretary of State for the Home Department [2021] EWCA Civ 193* where the Court of Appeal held that the fee of £1012 for certain applications by children to register is unlawfully high. This appeal in this case has recently been heard in the United Kingdom Supreme Court and we await the decision in due course.

Clause 2, page 3, line 19

add at end -

“(e) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 2.

Reason

See the reason for the preceding amendment.

Clause 2, page 4, line 3

add at end -

“(6) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 2.

Reason

See the reason for the amendment to clause 1.

Clause 2, page 5, line 16

add at end –

“(3) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 2.

Reason

See the reason for the amendment to clause 1.

Clause 2, page 6, line 40

add at end -

“(8) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 2.

Reason

See the reason for the amendment to clause 1.

Clause 3, page 8, line 18

add at end -

“(4) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 3.

Reason

See the reason for the amendment to clause 1.

Clause 7, page 10, line 25

add at end -

“(5) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 7.

Reason

See the reason for the amendment to clause 1.

Clause 7, page 11, line 8

add at end -

“(5) The Secretary of State must not charge a fee for the processing of applications under this section.”

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 7.

Reason

See the reason for the amendment to clause 1.

Clause 9, page 12, line 30

add at end -

“(5) The Secretary of State must not charge a fee for the processing of applications under this section

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 9.

Reason

See the reason for the amendment to clause 1.

Clause 9, page 12, line 30

add at end -

“(5) The Secretary of State must not charge a fee for the processing of applications under this section.

Effect

This consequential amendment ensures that the Secretary of State must not charge a fee for the processing of applications under clause 9.

Reason

See the reason for the amendment to clause 1.

Clause 10, page 12, line 37

leave out “a refugee is a Group 1” and insert “a person is a”

Effect

This amendment ensures equality of treatment by removing the distinction between class 1 and class 2 refugees.

Reason

Clause 10 provides for “differential treatment of refugees” depending on their mode of arrival. The Home Secretary already has power to treat refugees differently depending on their mode of arrival, but this power should not be used in a discriminatory way. The distinction made in subsection (1) between types of refugee based on how they arrived in the UK has been criticised by the UNHCR who has stated that this provision threatens “to create a discriminatory two-tier asylum system, undermining the 1951 Refugee Convention and longstanding global cooperation on refugee issues”:

<https://www.unhcr.org/uk/news/press/2021/5/6097bce14/unhcr-deeply-concerned-at-discriminatory-twotier-uk-asylum-plans-urges.html>

The Government are aware of the Convention as the clause adopts the wording of Article 31 of the Refugee Convention in subsection (2) on “coming directly from a territory where their life or freedom was threatened”. This wording was interpreted broadly and in line with the intentions of the drafters of the Refugee Convention in the case of *R v Uxbridge magistrates’ Court and Another ex parte Adimi* [2001] QB 667, Simon Brown LJ identified the purpose: “To provide immunity for genuine refugees whose quest for asylum reasonably involved”. Professor Goodwin-Gill in his paper on Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection notes “So far as the references in Article 31(1) to refugees who ‘come directly’ and show ‘good cause’ may be ambiguous, the travaux préparatoires illustrate that these terms were not intended to deny protection to persons in analogous situations” (Paragraph12):

<https://www.unhcr.org/3bcfdf164.pdf>

Clause 34 of the bill which deals with the interpretation of Article 34(1) of the Refugee Convention, seems to adopt a restricted meaning: A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country. Examples of how the differential treatment may be applied are given in clause

10(5) including length of leave, requirements to meet for settlement, conditions attached to leave and treatment of family members. We take the view that how a person enters the UK should not impact on family reunion. Safe and legal routes have been reduced since the UK left the European Union with the removal of the Dublin III Regulation. This provision appears to be actually reducing the prospect of families using one of only the two safe and legal routes the Asylum seeker has i.e., refugee family reunion – the other being UNHCR resettlement. Fewer safe and legal routes are likely to result in more unsafe and perilous journeys.



Clause 10, page 12, line 40

leave out line 40.

Effect

Consequential amendment.

Clause 10, page 13, line 11

leave out “treat Group 1 and Group 2 refugees differently, for example” and insert “exercise reasonable discretion”

Effect

This amendment is consequential on the removal of the distinction between Class 1 and Class 2 refugees and ensures that the Secretary of State or an immigration officer must exercise discretion in a reasonable manner.

Clause 10, page 13, line 22

leave out “also treat the family members of Group 1 and Group 2 refugees differently for example
“and insert “exercise reasonable discretion”

Effect

This amendment is consequential on the removal of the distinction between Class 1 and Class 2 refugees and ensures that the Secretary of State or an immigration officer must exercise discretion in a reasonable manner.

Clause 29, page 30, line 41

leave out clause 41

Effect

This amendment deletes clause 29.

Reason

The leading case for the standard of proof test to determine a ‘well-founded fear in persecution’ for asylum cases is *Ravichandran v SSHD [1996] Imm AR 97*. In *Karanakaran v. Secretary of State for the Home Department, [2000] EWCA Civ. 11*, the Court of Appeal affirmed that the standard of proof in civil proceedings (the balance of probabilities referred to in clause 29(2)) was not suitable for immigration matters. Instead, what was important was making an assessment of all material considerations such that it ‘must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur’. Sedley LJ described the balance of probabilities as ‘...part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones’. For the last 20 years, the Karanakaran approach has consistently been followed. The Outer House of the Court of Session re-affirmed Karanakaran as the correct standard of proof approach to be applied in the 2020 case of *MF (El Salvador) v Secretary of State for the Home Department [2020] CSOH 84*. In that case, it was held the First-Tier Tribunal Judge had erred in law by applying the wrong standard of proof in respect of an application for permission to appeal brought by an asylum seeker. In *Kaderli v. Chief Public Prosecutor's Office of Gebeze, Turkey [2021] EWHC 1096*, the High Court reaffirmed (while referencing Karanakaran) that the question as to determining a well-founded fear of persecution is that of an evaluative nature about the likelihood of future events. In this case it was held that ‘the judge erred in holding that it was for the appellant to prove on the balance of probabilities that the corruption alleged had occurred. The true test involved the application of a lower standard: whether there was a real risk that the appellant's conviction was based on a trial tainted by corruption. This was consistent with the approach to the fact-finding in the immigration context.’

In summary, we take the view that the change in clause 29 appears to go against the intention of the New Plan for Immigration, and flies in the face of 25 years judicial scrutiny.

Clause 37, page 36, line 2

leave out “arrives” and insert “enters”

Effect

This amendment deletes “arrives from clause 37 and inserts “enters”

Reason

Clause 37 of the Bill adds a new component to the existing offence of illegal entry. Subsection (2) adds new subsections to section 24 of the Immigration Act 1971. Subsection (C1) makes it an offence for someone who requires entry clearance to arrive in the UK without valid entry clearance. An entry clearance is a visa issued before travel (it becomes “leave to enter” when the person enters the UK). The burden of proving that a person holds valid entry clearance lies on that person. This is concerning, given that EU citizens are not routinely given any physical evidence of their entry clearance (if they apply using the UK Immigration: ID Check app, no visa vignette is placed in their passport). The key addition to the offence provision is to make “arrival” an offence. The Explanatory Notes, state:

The concept of ‘entering the UK without leave’ has caused difficulties about precisely what ‘entering’ means in the context of the current section 24(1)(a) of the 1971 Act’ paragraph 384.

“Entering” is defined in section 11(1) of the Immigration Act 1971 as disembarking and subsequently leaving the immigration control area.

“Arrival” is not given any technical legal definition, so will simply mean reaching a place at the end of a journey or a stage in a journey. It is unclear whether a person needs to reach the mainland in order to “arrive in the United Kingdom”. The Explanatory Notes, and the separate definitions of “United Kingdom” and “United Kingdom waters”, seem to suggest arrival on the mainland is necessary: This will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don’t technically “enter” the UK” paragraph 388. Although entering UK territorial waters has not been criminalised, the status of migrants in UK waters is likely to be significantly altered by the new power to regulate work in territorial waters. The current maximum sentence for illegal entry is six months’ imprisonment. This is being increased to four years (or five years for entering in breach of a deportation order).

Clause 38. page 37, line 22

leave out subsection (2)

Effect

This amendment deletes clause 38(2) from the bill.

Reason

Clause 38 increases the minimum sentence from 14 years to life imprisonment and criminalises helping an asylum seeker to arrive in the UK, even if not for gain. At the moment it is only a criminal offence to help an asylum seeker to arrive in the UK if this is done for gain (i.e., if done by a people smuggler). The “for gain” element is being removed. As a result, almost anyone who helps an asylum seeker to arrive in the UK will potentially be guilty of an offence, subject to whatever defences may be available under criminal law. How will this affect organisations such as the Royal National Lifeboat Institution? We are also concerned about the effect on Ships’ Masters who save asylum seekers from drowning as they are obliged to do by the Duty to Render Assistance under Article 98 of the UN Convention on the Law of the Sea: [UNCLOS and Agreement on Part XI - Preamble and frame index](#)

There is also a possibility that this provision will engage Article 2 (Right to Life) of the European Convention on Human Rights: https://www.echr.coe.int/documents/convention_eng.pdf

Clause 48, Page 43, Line 1

leave out subsection (4)

Effect

This amendment deletes clause 48 subsection (4)

Reason

This provision makes specific reference to the Modern Slavery Act 2015 and amends sections 49, 50 and 51 of that Act. It raises the standard of proof for determining a Reasonable Grounds (RG) decision for a victim of trafficking from “suspect but cannot prove” to “balance of probabilities”. Indicators that a person is a victim of trafficking can be missed by First Responders, meaning a referral to the NRM is not made. If a referral is made, the RG stage is a sift to determine whether someone may be a victim of trafficking and further investigation is needed. Home Office statistics reveal that 92% of RG decisions are positive, and 89% of Conclusive Grounds (CG) decisions (on the balance of probabilities) are positive. The evidence basis for “over identification” is not made out. The low standard of proof at the RG decision stage helps ensure that potential victims do not miss out from being properly investigated and progressed to the CG stage of the NRM. Raising the standard of proof at RG stage – were minimal information is collected by the Competent Authority – could foreseeably result in fewer referrals being made and will increase the prospect of potential victims not being identified by the NRM, without an investigation even taking place.

Clause 51, Page 44, line 31

after “if” insert “in exceptional
circumstances”

Effect

This amendment modifies Clause 51 by ensuring that a competent authority may apply clause 51(2) when “exceptional circumstances” affect a person who may be a threat to public order.

Reason

Clause 51 excludes from the National Referral Mechanism (NRM) persons who have committed criminal offences, as well as other offences relating to terrorism. It also excludes people who have claimed to be Victims of Terrorism in “bad faith”.

This clause appears to divide victim into worthy and unworthy victims. No one should be disqualified from being a victim of one crime because they may have been a perpetrator of another. Victims of trafficking could be criminalised for conduct relating to their trafficking, in breach of Article 26 of the Council of Europe Trafficking Convention. A violation of Article 4 ECHR was recently found against the UK in this regard by the European Court of Human Rights in *V.C.L. and A.N. v. The United Kingdom (applications nos. 77587/12 and 74603/12)*. This clause introduces a higher risk of double punishment for those victims who have received convictions. Moreover, disqualifying certain victims from protection increases the prospect that they will be further exploited by organised criminal groups, as they will be unable to access protection from the state.

Clause 51, Page 44, line 33

leave out subsection (b)

Effect

This is a consequential amendment (following on our previous amendment to clause 51) which removes clause 51(1)(b).

Clause 58, page 52, line 5

add at end -

“(2) The Secretary of State must consult with such persons as the Secretary of State considers appropriate before making regulations under this section.”

Effect

This amendment requires the Secretary of State to consult before making regulations under the bill.

Reason

We note that age assessments will be carried out by Immigration Officers, the Secretary of State and Local Authorities. However, we consider that any regulations should be consulted upon. Where this provision is deployed to place duties on Scottish Local Authorities the regulations should be made with the consent of Scottish Ministers. We note that Clause 58 is a ‘placeholder’ clause. The Government intends to table amendments to those clauses to set out its intentions in more detail before the bill reaches the House of Commons Committee stage.

Clause 62, page 53, line 27

leave out clause 62

Effect

This amendment deletes clause 62 from the bill.

Reason

We consider that clause 62 is problematic, unnecessary and unacceptable. The First-tier or Upper Tribunal is to be given powers to charge a person exercising rights of audience or rights to conduct litigation if that person is found to have acted improperly, unreasonably or negligently. Under current statutory and common law powers professional regulators have sufficient powers to deal with matters of professional discipline such as improper or unreasonable conduct. It is inappropriate that the determination of negligence should be included in the clause when that is properly the province of the civil courts. Furthermore, we note that any amounts charged under this clause for negligence are to be paid to the Consolidated Fund rather than to the client who may have suffered as a result of any alleged negligence. This appears to be a form of taxation rather than compensation for negligence.

This clause needs to be reconsidered.



Clause 63, page 54, line 17

leave out clause 63

Effect

This is a consequential amendment.

Clause 65, page 56, line 19

add at end -

“(2) The Secretary of State must consult with such persons as the Secretary of State considers appropriate before making regulations under this section.”

Effect

This amendment requires the Secretary of State to consult before making regulations under the bill.

Reason

This clause gives the Secretary of State power by regulation to amend immigration legislation in order to make pre-consolidation changes to facilitate a consolidation bill. We are in favour of consolidation of the law in general and this applies to Immigration and Asylum law too. We support Recommendation 21 of the Windrush Lessons Learned Review quoted in the Explanatory Notes: “Reduce the complexity of immigration and nationality law, immigration rules and guidance – Building on the Law Commission’s review of the Immigration Rules the Home Secretary should request that the Law Commission extend the remit of its simplification programme to include work to consolidate statute law. This will make sure the law is much more accessible for the public, enforcement officers, caseworkers, advisers, judges and Home Office policy makers.” However, we also note the broad, discretionary regulation making powers which the Secretary of State will acquire should this provision come into effect. We believe that in such circumstances the Secretary of State must consult with relevant interests before exercising those regulation making powers.

Clause 67, page 57, line 17

leave out “appropriate” and insert “necessary”

Effect

This amendment ensures that the Secretary of State should only make amendments which are necessary.

Reason

Clause 67, page 57, line 35

after “to” leave out “affirmative resolution procedure” and insert “the super-affirmative resolution procedure as set out in Schedule 6”

Effect

This amendment introduces a new schedule and ensures that the Secretary of State must follow super-affirmative when making regulations under this clause.

Reason

Clause 67 provides that the Secretary of State may by regulations make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act and make such provision as the Secretary of State considers appropriate in consequence of this Act. Regulations under subsection (2) can include amending, repealing or revoking any enactment. These are very wide powers (for example they permit the Secretary of State to make regulations considered as “appropriate” rather than “necessary”) although it is correct that the Secretary of State should be able to make transitional transitory and saving provisions. The same argument cannot be made for giving the Secretary of State powers to amend, repeal or revoke any enactment as per clause 67(3). In this context “any enactment” includes (a) an Act of Parliament, (b) retained direct principal EU legislation, (c) an Act of the Scottish Parliament, (d) a Measure or Act of Senedd Cymru, or (e) Northern Ireland legislation. Although such regulations will be subject to affirmative resolution procedure they should be consulted upon within a super-affirmative procedure and, where appropriate require the consent of the devolved legislatures and administrations.

Schedule 6

To move the following Schedule—

Insert the following new Schedule—

“SUPER-AFFIRMATIVE RESOLUTION
PROCEDURE

- (1) If the Secretary of State considers it necessary to make regulations under this Act which are subject to the super-affirmative resolution procedure, the Secretary of State must lay before Parliament— (a) draft regulations, and (b) an explanatory document.
- (2) The explanatory document must introduce and give reasons for draft regulations.
- (3) Subject as follows, if after the expiry of the 40-day period the draft regulations laid under paragraph 1 are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the draft regulations.
- (4) The procedure in paragraphs 5 to 8 apply to the draft regulations instead of the procedure in paragraph 3 if— (a) either House of Parliament resolves within the 30-day period, or (b) a committee of either House charged with reporting on the draft regulations so recommends within the 30-day period and the House to which the recommendation is made does not by resolution reject the recommendation within that period.
- (5) The Secretary of State must consult:
 - (a) The Scottish Ministers
 - (b) The Welsh Ministers and
 - (c) The Northern Ireland Executive and have regard to—

- (i) their representations,
 - (ii) any other representations received and
 - (iii) any resolution of either House of Parliament, and
 - (iv) any recommendations of a committee of either House of Parliament charged with reporting on the draft regulations, made during the 60 day period on the draft regulations.
- (6) If, after the expiry of the 60-day period, the draft regulations are approved by each House the Secretary of State may make regulations in the terms of the draft regulations.
- (7) If, after the expiry of the 60-day period, the Secretary of State wishes to proceed with the draft regulations but with material changes, the Secretary of State may lay before Parliament— (a) a revised draft of the regulations, and (b) a statement giving a summary of the changes proposed. Which may be approved by each House.
- (8) If the revised draft regulations are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the revised draft regulations.
- (9) For the purposes of this Schedule regulations are made in the terms of draft regulations or revised draft regulations if they contain no material changes to their provisions.
- (10) In this paragraph, references to the “30-day”, “40-day” and “60-day” periods in relation to any draft regulations are to the periods of 30, 40 and 60 days beginning with the day on which the draft regulations were laid before Parliament



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