

Delegated Powers Memorandum – Nationality and Borders Bill

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Nationality and Borders Bill (“the Bill”). It has been drafted taking into account the conclusions and recommendations set out in the [report on The Legislative Process: The Delegation of Powers](#), and subsequent correspondence between the Leader of the House of Commons and the Chairs of the House of Lords Committees principally concerned with the scrutiny of legislation.
2. The Bill was introduced in the House of Lords on 9 December 2021. 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

3. The Nationality and Borders Bill has three main objectives:
 - to increase the fairness of the system to better protect and support those in need of asylum;
 - to deter illegal entry into the UK, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger; and
 - to remove more easily those with no right to be in the UK.

Delegated Powers

4. On introduction to the House of Lords, the Bill will contain 19 substantive clauses creating new or amending existing delegated powers across:
 - a) A power to make provision in Immigration Rules for the **differential treatment of refugees**.
 - b) A power to enable the category of individual to be accommodated in a certain **location or type of accommodation**, and the time limit for their stay, to be set out in regulations.
 - c) A power to add by regulations a designated place to the list of **places where asylum may be claimed**.
 - d) An amendment to the current order-making power to enable amendment to the number of hours of **legally-aided advice** available for individuals served with the Priority Removal Notice, and a new power to make an order to make provision as to the operation of any overall time limit.
 - e) A power to make regulations specifying further criteria that a case must satisfy in order for any appeal against a decision in that case to be subject to the **accelerated detained appeals route**.
 - f) Amendments to current order making powers in Schedule 3 of the Asylum and Immigration (Treatments of Claimants, etc.) Act 2004 to

provide for **the removal of countries from the list of safe countries for asylum purposes.**

- g) Powers to specify in regulations the steps required to ensure that a **transporter is adequately secure against unauthorised access by clandestine entrants** and the level of penalties that may be issued where this is not done and the circumstances (time-limits and service of documents).
- h) Amendments to the power to make regulations regarding the **service of notices relating to enforced removal.**
- i) Amendments to Modern Slavery Act 2015 provisions on the **reasonable grounds and conclusive grounds tests.**
- j) A power to set out the **definition of a victim of slavery or human trafficking.**
- k) A power to amend immigration legislation in order to make **pre-consolidation changes** to facilitate a consolidation bill.
- l) A power to make **transitional and consequential** provision
- m) A power for provisions in the Bill **to extend to the Channel Islands and the Isle of Man.**
- n) **Commencement** powers.
- o) A power to make regulations requiring an offshore worker or, if they have one, their sponsor to provide notice to the Secretary of State or an Immigration Officer of the dates of the **offshore workers arrival, entry and departure** from the UK.
- p) A power to require **information about individuals travelling to or from, and voyages and flights to or from UK Waters** in the same way as is presently possible in relation to those travelling to or from the UK landmass.
- q) A power to make regulations specifying a **scientific method or methods that may be used for age assessments** conducted under Clauses 49 and 50.
- r) A power to make regulations about a person who can give **consent on behalf of an age-disputed person.**
- s) A power to make regulations about the **way in which age assessments are conducted** under Clauses 49 and 50.
- t) A power to make provisions in the Immigration Rules to **impose visa penalties** on countries who do not cooperate on the matter of returning their nationals who have no right to be in the UK and a power to vary the level of the surcharge penalty through regulations.
- u) A power to set out the detail of the **Electronic Travel Authorisation (ETA) scheme** in the Immigration Rules.
- v) An amendment to the powers which allow secondary legislation to govern the **compulsory provision of physical data** alongside an immigration application, to include an application for an ETA in this category.
- w) A power to **mutually recognise an ETA issued by a Crown Dependency.**

5. This includes four Henry VIII powers in respect of: consolidating primary immigration legislation; amending the hours of legally-aided advice available to

individuals served with a Priority Removal Notice; making transitional and consequential provision; and varying the level of the surcharge in relation to visa penalties. Further details are provided in the relevant sections below, but in all three cases the power and associated procedure is considered necessary and appropriate given that the powers are tightly drafted with limited scope and based on other similar powers.

6. Beyond the measures set out above, the Bill also contains five provisions which impose a duty on the Tribunal Procedure Committee (TPC) to exercise its existing powers, under section 22 and Schedule 5 to the Tribunal Courts and Enforcement Act 2007, to make rules for the procedure to be followed in the Immigration and Asylum Chamber for: (a) accelerated detained appeals; (b) judicial oversight for certain appeals following a Priority Removal Notice, through (i) expedited appeals and (ii) expedited related appeals in the Upper Tribunal; (c) statements on credibility findings in final rulings; and (d) cost orders. These provisions are intended to clarify the role of the TPC in setting out the Rules for these Bill measures. The making of the procedure rules by the TPC will be governed by the powers and procedure set out in the Tribunal Courts and Enforcement Act.
7. On introduction into the House of Commons on 6 July 2021, the Bill contained 6 placeholder clauses which were, by default, drafted as Regulation-making powers subject to the affirmative procedure. However, the Government did not intend to use these powers as drafted, but to replace them with substantive provisions ahead of Committee stage in the House of Commons. In the interest of transparency, and to allow full examination of the Bill, all placeholder clauses were included in the first [Delegated Powers Memorandum](#). A total of 16 new clauses and two schedules were accepted for inclusion in the Bill by the Public Bill Committee as replacements for the placeholder clauses. Of these, six clauses and one schedule contain delegated powers. The details and justifications for taking these powers are set out in the analysis section of this memorandum.
8. The placeholder clauses were as follows:
 - a) Authorisation to work in the territorial sea (replaced by Clause 42 and Schedule 5)
 - b) Prisoners liable to removal from the United Kingdom (replaced by Clause 46 and Schedule 7)
 - c) Age assessments (replaced by Clauses 48 to 56)
 - d) Processing of visa applications from nationals of certain countries (replaced by Clauses 69 and 70)
 - e) Electronic Travel Authorisations (ETAs) (replaced by Clauses 71 and 72)
 - f) Special Immigration Appeals Commission (replaced by Clause 73)

ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 11 (8) – Differential treatment of refugees

Power conferred on: Secretary of State

Power exercised by: Immigration Rules

Parliamentary Procedure: specific to Immigration Rules (see section 31(2) of the Immigration Act 1971) but similar to Negative procedure

Context and Purpose

9. The clause contains a power for the Secretary of State or an immigration officer to treat a refugee differently depending on whether or not they satisfy three conditions relating to the circumstances of their claim for asylum. The three conditions are set out in subsections (2) and (3) and are aligned with the conditions in Article 31(1) of the Refugee Convention. Under Article 31(1), Contracting States are prohibited from penalising a refugee on account of his or her illegal entry or presence, where the three conditions are met. Clause 11 provides instruction on how certain of the conditions in Article 31(1) are to be construed and applied, including in the context of the use of the power under this clause. The conditions are: that the refugee has come directly to the UK from a territory where their life or freedom was threatened; that they presented themselves without delay to the authorities (and claimed asylum as soon as practicable after arrival); and that, where they are present in the UK unlawfully, they have demonstrated good cause for their unlawful presence.
10. The purpose of taking this power is to clarify the more restrictive set of rights, including in relation to the length of any period of leave to remain or enter to be granted, that may be afforded to refugees who fail to satisfy at least one of the three conditions, as compared to those who satisfy all three conditions (so-called group 2 and group 1 refugees, respectively). The clause does not limit the ways in which refugees may be treated differently as between the two groups, rather it contains a non-exhaustive list of examples of the forms differential treatment may take. These are: the length of any grant of limited leave to enter or remain given to a refugee; the requirements that the refugee must meet in order to be given indefinite leave to remain; whether a “no recourse to public funds” condition is attached to any grant of limited leave to remain given to a refugee; and whether leave to enter or remain is given to members of the refugee’s family. Subsection (6) allows differentiation of treatment for the family members of refugees, based on the group to which the refugee belongs.
11. Relying on the power in subsection (8), detailed provision will be set out in the Immigration Rules on the use of the differentiation power, the assessment of whether the three Article 31(1) conditions are met in the case of a particular refugee, and the more restrictive set of rights that group 2 refugees and their family members may receive.

12. The overarching policy purpose of this is to discourage asylum seekers from travelling to the UK from safe countries or overstaying their visas. It also aims to influence the choices that migrants may make when leaving their countries of origin – encouraging individuals to seek asylum in the first safe country they find after fleeing persecution, avoiding dangerous and unnecessary journeys.

Justification for taking the power

13. The Immigration Rules set out the details of the conditions attached to refugee leave. For example, paragraph 339Q(i) currently sets out the length of leave given to those granted refugee status. It would therefore be inconsistent to have conditions of leave set out in the Bill for those in group 2, whilst the conditions attached to group 1 were in the Immigration Rules. Including the details in the Immigration Rules also allows for changes to the conditions attached to a grant of temporary protection to be amended more easily in future.
14. Prior to 31 December 2020, the procedure for deciding whether to grant a person refugee status, and minimum standards of treatment to be afforded to a person granted such status, were regulated by EU law, transposed in part through Immigration Rules laid down in accordance with the Immigration Act 1971. Neither the relevant EU law nor the domestic rules implementing them allowed for a differentiated system. It is therefore necessary to make changes to the Immigration Rules, relying on the power in subsection (8), to give effect to the new policy.

Justification for the procedure

15. As the power is a power to include provision in immigration rules, the appropriate procedure is the one set out in section 3(2) of the Immigration Act 1971, which applies whenever the Secretary of State makes changes to the rules. This is therefore consistent with previous practice.

Clause 12 (9) – Accommodation for asylum-seekers etc

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

16. Part 2 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) enables the Secretary of State to provide accommodation centres as a means of support to asylum seekers and failed asylum seekers who are or may become destitute.
17. Section 25 (1) of the 2002 Act provides that individuals may be resident in an accommodation centre for a continuous period of six months. Section 25(2) of

the 2002 Act allows this period to be extended to nine months by agreement with the individual and where the Secretary of State deems it appropriate because of the circumstances of the case.

18. Clause 12(9) amends section 25(4) of the 2002 Act to allow the Secretary of State, through the use of affirmative regulations, to extend or reduce the period of time during which an individual may be accommodated in an accommodation centre. As set out in the following paragraphs, the amendment to this power will give the Secretary of State the flexibility to ensure appropriate support is provided to destitute asylum seekers for as long as it is required and, in turn, enable asylum claims to be handled more expediently and facilitate the removal of those who do not require asylum in the UK.

Justification for taking the power

19. The amendment to the existing delegated power will enable the Secretary of State to respond swiftly to new and changing factors that affect the appropriate length of time for which certain categories of people in the asylum support system can be housed in an accommodation centre. As an example, the practical arrangements needed to facilitate the departure of those found inadmissible or refused asylum, for example resolving documentation issues, will vary according to individual circumstances.
20. Amending the existing power, rather than setting out the details on the face of the Bill, will help maintain a coherent statute book and ensure that any changes can be implemented swiftly and benefits can be realised without the need to make further primary legislation.

Justification for the procedure

21. This is an amendment to an existing power in section 25(4) of the 2002 Act, which is currently subject to the affirmative procedure. The Department considers therefore that maintaining this procedure will provide appropriate parliamentary scrutiny.

Clause 13(2)(f) – Requirement to make asylum claim at “designated place”

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

22. This clause stipulates the places where asylum claims must be made for the purposes of the Immigration Rules. These places are an asylum intake unit, an immigration removal centre, a port or airport, a location where an officer authorised to accept an asylum application is present (except anywhere in the

territorial seas of the United Kingdom), or a location to which the person has been directed by the Secretary of State to make an asylum claim, within the UK.

23. Clause 13(2)(f) confers a power on the Secretary of State to be able to add designated places to this list by statutory instrument.

Justification for taking the power

24. The requirement to make an asylum claim in person has been in place in [guidance](#) since 2003, with applicants expected to make their claim for asylum at the port of entry on arrival in the UK, or at an asylum intake unit for in-country applicants. However, there are circumstances where asylum claims need to be registered at other locations. These provisions clarify those circumstances and locations where a claim may be accepted.

25. It is acknowledged that migrant behaviour may evolve in future, and therefore this power will provide the flexibility to add designated places where asylum claims may be accepted in the future, where appropriate. While there is some flexibility in the provisions already – for example, a person can be directed to a place by the Secretary of State – if asylum-seekers are regularly directed to that place, there is greater operational efficiency in designating that place by way of regulations made under this power, rather than requiring primary legislation to make any future changes.

Justification for the procedure

26. The clause legislates, with only minor modification, for provisions which have been an administrative requirement since 2003. The fact that the Secretary of State has the power to specify procedure to be followed in making or pursuing an application or claim is uncontroversial and therefore the negative procedure is considered appropriate. Any concerns with regards to any specific, new designated place can be sufficiently addressed through this procedure.

Clause 24(2) – Civil legal aid: services for recipients of priority removal notices

Power conferred on: Lord Chancellor

Power exercised by: Order made by statutory instrument

Parliamentary Procedure: Affirmative resolution

Context and Purpose

27. The Bill expands the scope of legal aid to provide for a number of hours of legally-aided advice to individuals who are served with a Priority Removal Notice (PRN). The number of hours will be on the face of the Bill, and so the purpose of Clause 24(2) is to amend the Lord Chancellor's power in section 9(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO 2012') for this power to also allow the time limit to be changed by order at a later date. This may

be an increase or decrease in the number of hours. Clause 24(2) also provides a power to allow the Lord Chancellor to make an order to show how the time limit could operate in practice, which could include the circumstances where a certain number of hours may be provided.

Justification for taking the powers

28. The justification for amending the Lord Chancellor's power under LASPO 2012 is to provide flexibility so that the Government can ensure that the measure remains operationally effective following implementation. The PRN is a new Notice created through this Bill and, as with any new operational process, adjustments are likely to be needed to address emerging issues or changes in circumstances. For example, the PRN may be served on a different range of individuals, at a different point in time or on a changing (larger or smaller) volume of individuals than currently envisaged; or changes to immigration law and rules may affect the number of hours required to be provided under the PRN to ensure the purpose is still met.
29. These powers will allow the Lord Chancellor to respond to such operational impacts in the years to come. These impacts may necessitate a change in the number of hours of legally-aided advice provided under the measure, or a change for a certain group of people in certain circumstances, to ensure the purpose of the measure continues to be fulfilled and legally-aided advice is effectively provided to all individuals in receipt of a PRN.

Justification for the procedure

30. The powers could be used to amend a single provision of primary legislation. It enables a change to the number of hours of legally-aided advice and the circumstances in which a certain number of hours can be provided. These powers will enable the Lord Chancellor to respond to future changes in the immigration or legal aid systems that necessitate a change in the number of hours of advice. Although a Henry VIII power, it is tightly drafted so that it cannot be used more widely to make other changes to the legislation governing either system.
31. Given the power to amend the time limit and the circumstances in which a certain number of hours could be claimed could be used to amend primary legislation (albeit limited to a single, specific provision) and could result in access to a number of hours of legal aid being reduced, the affirmative procedure provides appropriate Parliamentary scrutiny before the change can be made. If Parliament approves the principles of affording legal aid to recipients of a PRN, these powers enable Parliament – via prior scrutiny of an order made under it – to change the number of hours of that advice and the circumstances in which a certain number of hours can be claimed. Furthermore, it is in line with other powers that amend Part 1 of LASPO 2012, which are also affirmative (see s.41(6) and (7) LASPO).

Clause 26 – Accelerated detained appeals

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

32. This clause imposes a duty on the Tribunal Procedure Rules Committee to introduce procedural rules for determining within an accelerated timeframe immigration and asylum appeals (and any permission to appeal stages) made by a certain subset of appellants detained under immigration powers. The bill contains some cohort criteria but the purpose of this power is to enable further criteria to apply, which may be subject to amendment over time. It means that, in addition to the criteria in the bill, only cases of a prescribed description may be included in the accelerated route.
33. The regulations will specify the locations at which the accelerated detained appeals route (ADA) will operate (i.e. places of detention). This will provide certainty to appellants and ensure that they are located in places where they can be provided with the access to legal advice necessary to support the accelerated appeal timescale.
34. It will also specify that the Secretary of State will provide written reasons to an individual when their appeal has been certified for inclusion in the accelerated detained appeals route, which will include consideration of the criteria set out in the regulations, and reasons why the Secretary of State considers that the appeal would likely be disposed of expeditiously.
35. It is anticipated that the regulations will also specify that only first-time appeals brought under Section 82 of the Nationality, Immigration and Asylum Act 2002 will be appropriate for the accelerated detained appeals route. This is because the nature of a first-time appeal is more likely to be “straightforward” and, in turn, suitable for determination within the specified timescales, in comparison to repeat or further claims.

Justification for taking the power

36. The justification for taking this power is to provide flexibility so that the Government can ensure that over time the measure continues to deliver its objective of improving speed and certainty for appellants in detention while also ensuring fairness. For example, certain immigration removal centres are currently deemed most suitable for operating ADA, but this may change as the detention estate evolves over time.
37. By setting out suitability criteria in regulations, the Department will be able to respond to operational information about the types of cases which tend to be removed from the accelerated route by the Tribunal, and amend the criteria so

that they are not put into the route in the first place, improving certainty and fairness.

38. The Department will be able to adapt the criteria in response to future changes in related systems and processes, such as the expedited process for claims made in detention which feeds into ADA, and which is set out in guidance rather than legislation and so is likely to evolve over time.
39. The Department will also be able to respond to emerging issues or trends, for example allowing it to further narrow the suitability criteria if asylum volumes or trends were to increase the numbers of appellants eligible for the accelerated route to an extent which risked overwhelming tribunal capacity.

Justification for the procedure

40. These regulations will further limit the exercise of the power to certify decisions that any appeal is subject to the accelerated route. As set out above, it is anticipated that the criteria applied when considering detained appeals for inclusion in the accelerated route will need regular reconsideration and amendment, so that the government's handling of cases is fit-for-purpose and responsive to the types of cases and issues that emerge or become more or less common over time.
41. It is considered that, in view of the flexibility required, and the need to change the regulations quickly, the negative procedure is more appropriate.
42. The cohort who will be eligible for inclusion in the accelerated appeals route is already limited in the primary legislation, and so it is considered proportionate that further limitation by way of these regulations is realised by way of the negative procedure.

Clause 28 and Schedule 3 – Removal of asylum seeker to safe country

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

43. This clause and Schedule amend the existing power in paragraph 20 of Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act"), which allows the Secretary of State, by Order, to add countries to the list of safe countries specified in paragraph 2 of Schedule 3. The clause amends this power so that the Secretary of State can also remove countries from the list of safe countries in paragraph 2.

44. The wider context of this provision is that Section 33 of and Schedule 3 to the 2004 Act together provide a framework for the removal of asylum seekers to safe third countries without substantive consideration of their asylum claims in the United Kingdom. A safe third country is not the country of which the asylum seeker is a national or citizen, but is one where the asylum claim should more properly be considered. The intention of Section 33 and Schedule 3 is to ensure the efficient and effective removal of asylum seekers to safe third countries, ensuring this process cannot be frustrated based on claims that an asylum seeker's right to protection and non-refoulement under the Refugee Convention may be breached in circumstances where the Department has a good evidence base to support that these countries are safe. States listed as safe countries in paragraph 2 of Part 2 of Schedule 3 are places:

- where an asylum seeker's life and liberty will not be threatened in that country by reason of race, religion, nationality, membership of a particular social group or political opinion; and
- from which the government of that country will not send the asylum seeker to another country other than in accordance with the 1951 Convention (the concept of 'non refoulement').

45. The Bill will also amend Schedule 3 of the 2004 Act to add a provision which also relies on the list of safe countries in paragraph 2 of Schedule 3. It provides that, unless the contrary is shown by the claimant to be the case in their particular circumstances, countries listed in paragraph 2 are to be treated as a place:

- a) where a person's Convention rights under Article 3 (no torture or inhuman or degrading treatment or punishment) are respected; and
- b) from which a person will not be sent to another State in contravention of their Convention rights when the question of their removal is being considered.

Justification for taking the power

46. The expansion of the existing power to amend the list of countries in paragraph 2 reflects and acknowledges the fact that the global socio-political situation is not fixed. The governance and laws in a country can change over time and these changes can have a significant impact on how those countries can be assessed in terms of their compliance with international obligations. In the same way that countries may be added to the list, this amendment acknowledges that the situation in a country can change such that it can no longer be considered appropriate to consider it a safe country.

47. Although the general character of the countries currently included in paragraph 2 suggests overall long-term stability (indicated by issues, for example, such as membership of the European Union) it would be inappropriate not to accept that such situations can change, and change relatively quickly. Taking a power to amend this list by Order allows the Secretary of State to act quickly to update

legislation if there were a rapid change in a country's situation. It ensures that paragraph 2 remains entirely relevant and up-to-date, and that it can be relied upon by the Courts. Having to amend paragraph 2 via primary legislation would likely be too slow and leave the list open to inaccuracies, thereby leaving countries not considered safe on the list for longer than is necessary.

Justification for the procedure

48. This is an amendment to an existing power in paragraph 20, Part 2 of Schedule 3 of the 2004 Act allowing the Secretary of State, by Order, to add countries to the list of safe countries in paragraph 2. The current power to add countries to the list is – and will remain – subject to the affirmative procedure. The new element to remove countries from the list will, however, be subject to the negative procedure. This is because the act of removing a country from the list means that the provisions in the 2004 Act which relate to removals to the listed countries, will no longer apply to those countries which have been removed. This in effect limits the reach of the provisions and means that the negative procedure will provide a more appropriate level of oversight from Parliament.

Clause 41 and Schedule 4 – Penalty for failure to secure good vehicle

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

49. The clause and schedule update the existing Clandestine Entrant Civil Penalty Scheme by inserting a new section 31A into Part 2 of the Immigration and Asylum Act 1999 (“the 1999 Act”), which introduces a new civil offence of a failure to adequately secure a goods vehicle, whereupon the Secretary of State may impose a civil penalty. They also make changes to the existing civil penalty provisions at Part 2 of the 1999 Act, which includes amending the existing regime to one of stricter liability, where a clandestine entrant is found concealed.

50. The clause and schedule impose stricter liability for a civil penalty arising under section 32 of the 1999 Act, where clandestines **are** found on board. This will enable liability for a civil penalty to arise in all cases where a clandestine is found aboard a vehicle, regardless of any attempts to secure the vehicle, save for where there is evidence of duress. The Secretary of State would retain a discretion to reduce the amount of the penalty, if the driver and/or haulier were able to demonstrate they took the actions specified in regulations to secure their vehicle against unauthorised access. The Secretary of State will therefore take a power to specify in regulations the actions that a responsible person must have

taken in order to be eligible for a reduction in the amount of a penalty under section 32 of the 1999 Act.

51. The amendment also makes minor changes to the defence available to train operators at section 34(3A) of the 1999 Act, where it would be unsafe to stop the train on discovering a migrant concealed in a rail freight wagon, and therefore the Secretary of State is also taking a power to specify in regulations the actions to be taken in relation to the securing of a rail freight wagon against unauthorised access.
52. These changes are required as a high proportion of drivers and hauliers continue to fail to properly secure their vehicle, often running the risk of being targeted by migrants or relying upon going undetected. In a compliance sampling exercise carried out in March 2021, more than a third of vehicles were found not to have basic security measures in place. When considering how this differs between hard-sided and soft-sided vehicles, 55% of soft-sided vehicles lacked basic security measures. Moreover, as efforts and measures are increased to tackle the small boats issue, there is every likelihood this could lead to an increase in attempts at clandestine entry in vehicles. The intention is to incentivise drivers and hauliers to comply with the regulations and security of the vehicles.
53. The clause and schedule, by inserting a new section 31A into the Act, impose a duty on the Secretary of State to specify in regulations:
 - i. what is meant by a goods vehicle being adequately secured against unauthorised access by clandestine entrants;
 - ii. the actions that must be taken by each person responsible for a goods vehicle in relation to securing the vehicle against unauthorised access on arrival at a place where immigration control is operated, including the juxtaposed controls;
 - iii. the actions to be taken by each person responsible for a goods vehicle in relation to the reporting of any unauthorised access to the vehicle; and
 - iv. the documentation that must be used to establish that the actions specified above have been taken by the person responsible for the goods vehicle.
54. Before exercising the new powers to make regulations set out above, under the negative procedure, the Secretary of State must consult such persons as they consider appropriate.
55. The Secretary of State will determine the level of penalty payable for both civil regimes with reference to a Level of Penalty: Codes of Practice, which will be issued by the Secretary of State and brought into operation by regulations under the negative procedure. It is open to the Secretary of State to bring into operation

by regulations one code of practice for the two civil offences or a separate one for each.

56. The clause and schedule also provide the Secretary of State with a power to prescribe a time limit by which a penalty notice may be issued under both section 32 and section 31A. Further, sections 36 and 36A are amended to insert provisions providing for the service of documents outside of the UK. These include a power for the Secretary of State to provide by regulations when a document issued or served is deemed to have been received.

Justification for taking the powers

57. In order to make the new civil penalty regime workable and to provide sufficient clarity and legal certainty as to what conduct is required by vehicle operators, failing which a civil penalty may be issued, it is necessary to set out the ways in which the Department expects vehicles to be secured in regulations. It is not appropriate to set this out on the face of the Bill, as vehicle security and standards change over time, necessitating legislative changes that can be made more promptly and flexibly by regulations and following consultation with those impacted by the proposals (e.g. the road haulage industry). Furthermore, the rules and requirements relating to vehicle security do intrinsically contain significant administrative and technical detail and it would not be appropriate or proportionate to set out the detail of these changes in new primary legislation.
58. Given the range of different vehicle types in operation, and the very technical nature of how security systems are operated, the standards under the existing scheme are currently set out in a Prevention of Clandestine Entrants: Code of Practice. However, as the clause creates a new civil offence at section 31A, the Department considers it more appropriate for the new and existing rules to sit in secondary legislation. The clause will achieve this by replacing the Prevention of Clandestine Entrants: Code of Practice with a power to make regulations for the existing regime and to take a power to make regulations in respect of the new civil penalty regime. Taking regulation-making powers therefore enables the Department to follow its policy through.
59. The amendment to the train operator defence at section 34(3A) updates the existing arrangements in the 1999 Act so that it is consistent with the changes made to the provisions for other transporter types. It provides the Secretary of State with a power to specify in regulations the actions that must be taken to secure a rail freight wagon against unauthorised access, in order to raise a defence. As these provisions will be of a technical nature, the Department considers it more appropriate for these actions for train operators, along with actions for other vehicle types, to sit in secondary legislation.
60. The new powers are, however, constrained by the requirement on the Secretary of State to conduct a public consultation with such persons as they consider appropriate before making the regulations.
61. The power to issue a Level of Penalty: Code of Practice in respect of determining the level of penalty payable under section 31A mirrors the existing

powers in Part 2 of the 1999 Act in respect of a penalty issued under section 32. The Department considers this power to be appropriate in the circumstances, noting that a new Code of Practice can be laid more flexibly than primary legislation.

62. The powers to prescribe a time limit for the Secretary of State to issue a penalty and to make regulations specifying when documents are deemed received on persons outside of the UK are considered to be primarily technical and administrative matters that are more appropriately dealt with in secondary legislation.

Justification for the procedure

63. The negative procedure will apply to regulations made under powers contained in the clause. This procedure applies to the existing powers in Part 2 (carriers' liability) of the 1999 Act. The negative procedure is appropriate because the regulations will specify procedural or technical measures that are required of those operating transporters, in order to reflect current and changing transporter security standards and procedures.
64. Regulations made under the proposed powers set out above and prior to bringing a new Level of Penalty: Code of Practice into force can only be laid following a public consultation with the haulage industry, which provides an opportunity for the Secretary of State to seek the views of those affected by any proposed legislative changes. The remaining powers are also considered to be primarily administrative and technical in nature. Therefore, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny.

Clause 45 – Removals: notice requirements

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

65. This clause amends the removal power in section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") by placing in statute a single, standardised minimum notice period for migrants to access justice prior to enforced removal. It confirms in statute that a new notice period does not need to be re-issued within a specified timescale following a previous failed removal or following a judicial review regarding their removal. It also now includes the provision of written notices of intention to remove and departure details. By clarifying and moving the policy into a single piece of legislation in the 1999 Act, it makes it

more straightforward for decision makers, legal representatives and migrants, and provides Parliament with the opportunity to scrutinise these measures.

66. Section 10(10) of the 1999 Act currently provides a power for the Secretary of State to make regulations about the time period during which a family member of another person may be removed from the UK and the service of a notice of the intention to remove the family member.
67. This clause amends the existing removal power by inserting a requirement to serve a person who is liable to removal with a notice of intention to remove and a notice of departure details before their removal is effected.
68. This amendment to the existing power to make regulations is extended to allow provision to be made about the service of these statutory notices.

Justification for taking the power

69. The requirements to serve notices regarding liability to removal and departure arrangements have been in place in the *Judicial Reviews and Injunctions* [policy guidance](#); however, these are now being placed on a statutory footing. Regulations already govern the service of notices for the removal of family members to allow for flexibility regarding when and how such a notice is served. Amending the existing regulation making power, rather than setting out such details on the face of the Bill, will help maintain this flexibility without the need to make further primary legislation.

Justification for the procedure

70. The negative procedure will apply to regulations made under the power contained in the clause. This procedure already applies to the existing power in Section 10(10) of the 1999 Act. The negative procedure is appropriate because the regulations allow for specifying procedural measures that are required for the service of relevant notices.

Clause 59 – identification of potential victims of slavery or human trafficking

Power conferred on: Secretary of State

Power exercised by: guidance (in the case of changes to section 49 of the Modern Slavery Act 2015) and Regulations made by statutory instrument (in the case of changes to section 50 of the Modern Slavery Act 2015)

Parliamentary Procedure: none (in the case of changes to section 49 of the Modern Slavery Act 2015) and the Affirmative procedure (in the case of changes to section 50 of the Modern Slavery Act 2015)

Context and Purpose

71. The UK is and will remain a signatory of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), which sets out our international obligations to identify and support victims of modern slavery.
72. Under ECAT assistance and protection from removal for victims of trafficking should be provided if there are “reasonable grounds to believe that a person has been a (sic) victim of trafficking.” (“RG” and the RG Threshold), subject to exemptions. The main domestic framework for the provision of this support is the National Referral Mechanism (NRM), created mainly by the [Modern Slavery: Statutory Guidance for England and Wales \(under s49 of the Modern Slavery Act 2015\)](#) and [Non-Statutory Guidance for Scotland and Northern Ireland](#). The Government is committed to ensuring that victims are identified through the NRM effectively and that the system is resilient to misuse.
73. The New Plan for Immigration (NPI) Policy Statement set out the proposed legislative change to the Modern Slavery Act 2015 (“the 2015 Act”) to clarify the definition of “reasonable grounds” such that assistance and support are available to someone when there are reasonable grounds to believe the individual “is” (rather than “may be”) a victim of slavery or human trafficking. The NPI also committed to further consultation on the underpinning test to be applied in practice, which will be set out in the Modern Slavery Statutory Guidance. This test is required to be included in the Guidance, under Section 49 (1)(c) of the 2015 Act.
74. Under ECAT, assistance and protection from removal for victims of trafficking should be provided if there are “reasonable grounds to believe that a person has been a (sic) victim of trafficking”, subject to exemptions. The current test for a Reasonable Grounds decision is set out in the Statutory Guidance published under Section 49 of the 2015 Act. Sections 49 and 50 provide for the SSHD to make guidance and regulations respectively on victim identification (section 49 Guidance about identifying and supporting victims and section 50 Regulations about identifying and supporting victims).
75. This clause amends these provisions in section 49 and 50 of the 2015 Act, which make reference to when “there are reasonable grounds to believe that a person *may be* a victim of slavery or human trafficking” to “there are reasonable grounds to believe someone *is* a victim of slavery or human trafficking”. The purpose of this change is to clarify the Reasonable Grounds definition so that it mirrors our obligations under ECAT.
76. Following the Reasonable Grounds decision, a Conclusive Grounds decision should then be made based on whether there is sufficient evidence to decide on the *balance of probabilities* that the individual is a confirmed victim of modern slavery. This clause when it comes into effect will apply to England and Wales only.
77. Regarding the Conclusive Grounds Threshold, the intention is to confirm in primary legislation that the test in guidance is to be based on the balance of probabilities. This is the current test as accepted by the Courts. The balance of

probabilities test for the Conclusive Grounds Threshold is already set out in domestic guidance.

78. To facilitate these changes, the Department is adding to the guidance making power in s49 (1) of the 2015 Act by inserting:

“(d) arrangements for determining whether a person is a victim of slavery or human trafficking.”

Justification for taking the power

79. These clauses provide for minor amendments to existing powers, rather than creating new powers. The power under s49 and s50 of the 2015 Act to provide for the Reasonable Grounds and Conclusive Grounds decisions in guidance and regulations respectively already exists. This Bill makes a slight change to the wording of the power relating to Reasonable Grounds decisions to bring it into line with the requirements in ECAT. Regarding the Conclusive Grounds decision, the clauses add in the requirement that any such determination has as its test the threshold of the balance of probabilities. This clarifies the use of the power rather than extends it.

Justification for the procedure

80. The powers will retain their current procedures. This is appropriate given the relatively minor way in which the powers are being amended and that the powers are not being extended.

Clause 68(1) – Part 4: interpretation

Power conferred on: Secretary of State

Power exercised by: Regulations made via statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

81. Sections 56 (1) and (2) of the Modern Slavery Act 2015 (“the 2015 Act”) define a “victim”, for the purposes of the 2015 Act, as an individual who has been the victim of conduct which would constitute an offence under Sections 1 or 2 of that Act. However, for the purposes of the identification process (Reasonable and Conclusive Grounds) the relevant definitions are those contained within the [Modern Slavery Statutory Guidance for England and Wales and Non Statutory Guidance for Scotland and Northern Ireland](#), rather than in Section 56 of the 2015 Act. The Section 56 definition applies, in practice, only for the purpose of recognising an individual as a victim of a criminal offence, rather than for the identification process (that is the Reasonable or Conclusive Grounds decisions).

This applies equally with regard to the Scottish and Northern Irish legislation, given that the Single Competent Authority makes Reasonable and Conclusive Grounds decisions across the whole of the UK, using the definitions as set out in guidance.

82. The modern slavery measures in this Bill rely upon the understanding of a victim as being linked to the Reasonable and Conclusive Grounds decisions, using the definitions set out in the Modern Slavery Statutory Guidance for England and Wales and the Non Statutory Guidance for Scotland and Northern Ireland.

83. In order to create legislative clarity, the Department is therefore seeking a power to define in secondary legislation “victim of slavery” and “victim of human trafficking” in a manner that is compatible with the definitions listed at Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and Article 4 of the European Convention on Human Rights to underpin these measures.

84. In order to place this definition into statute, the affirmative legislative procedure will be used and, thus, the definition will be subject to scrutiny by Parliament.

Justification for taking the power

85. The definition needs to encompass everyone caught by the definition in Article 4 of ECAT. This is an international treaty definition which is open to interpretation by the Courts. Given this, and its legal complexity, the Department needs to ensure the definition covers that cohort depending on how the Courts interpret the definition to ensure that it captures the correct group of people, and can continue to so in future.

Justification for the procedure

86. The Bill introduces certain obligations which fall to be delivered to this cohort of people. To ensure that the use of this power by the Secretary of State to define this cohort is therefore subject to appropriate Parliamentary scrutiny, it is proposed that the exercise of the power is subject to the draft affirmative procedure, ensuring regulations using this power are only made with the approval of each House.

Clause 78(1) – Pre-consolidation amendments of immigration legislation

Power conferred on: Secretary of State

Power exercised by: Regulations by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

87. This clause gives the Secretary of State the power by regulations, made by statutory instrument, to make such amendments (to include repeals, revocations

and modifications) to the legislation relating to immigration referred to in subsection (2) as in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or greater part of that legislation (“the consolidating Act”) and (see subsection (4)) regulations made under this clause do not come into force unless an Act is passed consolidating the whole or a substantial part of the Acts relating to immigration. Only one future consolidating Act is anticipated.

88. The regulation-making power in this clause is directly linked to the implementation of the recommendations in the [Windrush Lessons Learned Review \(WLLR\)](#), which was published on 19 July 2018 and found that it is widely accepted that immigration and nationality law is very complex. WLLR Recommendation 21 is to:

“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.”

89. In evidence to the Constitution Committee in 2017, the Senior President of Tribunals, two other immigration judges, the Immigration Law Practitioners Association and other legal representatives said that the need for simplification or consolidation of immigration law was a very pressing problem. The Court of Appeal and the Supreme Court have commented on the complexity of immigration law and how it drives litigation. It is likely that similar representations were made to the WLLR. The need for consolidation was also raised by the [House of Lords Select Committee on the Constitution in the evidence session on the Immigration and Social Security Co-ordination \(EU Exit\) Bill](#). This represented the re-iteration of the [Select Committee on the Constitution’s previous recommendation](#) related to the quality of legislation, which outlined the need of consolidation as a cornerstone in ensuring clarity and accessibility of the law.

90. The main reasons for the need to make pre-consolidation amendments are to:

- (a) ensure that consolidated law is clearer and much more accessible for the public, enforcement officers, caseworkers, advisers, judges and Home Office policy makers;
- (b) reduce the complexity of immigration law;
- (c) simplify, streamline, or make more consistent decision-making procedure;
- (d) ensure the reduction of fluctuations in the interpretation of the law; and
- (e) provide a better foundation for the consolidating Act and future legislation.

Justification for taking the power

91. The regulation-making power in this clause is wide, but is limited in scope by the fact that any pre-consolidation amendments must facilitate the consolidating

Act and that does not extend to allowing the regulations to change the effect of the substantive law.

92. The consolidating Act will follow the consolidated Bill procedure. It is a standard measure to take a regulation-making power to make pre-consolidation amendments to facilitate that process as the consolidation must operate on the current law. Pre-consolidation regulation-making powers are a common feature of consolidation exercises and there are precedents for such powers, including:

- section 36 of the National Health Service Reform and Health Care Professions Act 2002 (now repealed);
- section 76 of the Charities Act 2006 (now repealed); and
- section 2 of the Sentencing (Pre-consolidation Amendments) Act 2020.

93. This approach ensure that desirable changes can be made to facilitate the consolidation but ensures there is parliamentary scrutiny of those changes. In some cases, for example where it is desirable to update terminology, it will be necessary to amend primary legislation and therefore the regulation making power enables that to happen.

94. Regulations are an appropriate way of ensuring that desirable changes can be made to bring the legislation up-to-date and to iron out inconsistencies without changing the substance. The subsequent consolidation (the consolidating Act) would provide clarity and accessibility and therefore a better foundation for future legislation.

Justification for the procedure

95. The regulations are subject to the affirmative procedure. Although the power is limited to amendments which will facilitate, or are desirable in connection with, the consolidation of immigration legislation, the regulations can amend primary legislation and the affirmative procedure ensures appropriate parliamentary scrutiny over the use of this Henry VIII power.

Clause 80 – Transitional and consequential provision

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

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

Context and Purpose

96. Clause 80 enables the Secretary of State by regulations to make transitional, transitory and saving provision in connection with the coming into force of the Bill (subsection 1), and consequential provision in connection with the provisions of the Bill (subsection 2). Such consequential provision may include amending,

repealing or revoking both secondary legislation and primary legislation (fully defined in the definition of “enactment” in subsection (4)).

Justification for taking the power

97. The power to make transitional, transitory and saving provision is necessary to ensure a smooth transition from the existing provision to the provision under the Bill in connection with the commencement of the provisions in the Bill. The Department accepts that the power to make consequential provision is, on the face of it, wide. However, any consequential amendment made under this power must be genuinely consequential on the provisions in the Bill. Some consequential amendments have been provided for on the face of the Bill and the Department will endeavour to identify any further necessary consequential amendments to primary legislation. It is possible that some may be missed, and that there will also need to be consequential amendments to secondary legislation.

98. The Department considers it appropriate to enable true consequential amendments to be made by regulation in order to ensure that the changes effected by this Bill can be effectively delivered, mitigating the risk of undermining the immigration and asylum system if a provision were missed resulting in the need for immediate rectification.

Justification for the procedure

99. Regulations under this clause will be subject to the negative procedure unless they amend the type of enactment listed in subsection (5): an Act of Parliament, an Act of the Scottish Parliament, a Measure or Act of Senedd Cymru, and Northern Ireland legislation (defined in Schedule 1 to, and section 24(5) of, the Interpretation Act 1978). The negative procedure is considered appropriate for regulations making transitional, transitory and/or saving provision, to ensure the smooth transition from the existing position to the position provided for by Parliament in the Bill. If regulations under this clause do amend or repeal primary legislation, it is considered that the affirmative procedure is appropriate for a Henry VIII power of this type, providing the appropriate level of parliamentary scrutiny.

Clause 82: Extent

Power conferred on: Her Majesty in Council

Power exercised by: Order in Council

Parliamentary Procedure: None

Context and Purpose

100. Subsections (4) – (6) of Clause 82 provide a permissive extent clause, so that provisions in the Bill may be extended by Her Majesty in Council, with or without modification, by means of an Order in Council, to any of the Channel Islands or the Isle of Man.

Justification for taking the power

101. The Governments of Jersey, Guernsey and the Isle of Man have advised the Home Office that they consent to the inclusion of such a permissive extent clause in the Bill.

Justification for the procedure

102. There are two ways in which legislation passed by the UK Parliament may be extended to the Channel Islands or the Isle of Man. The first is that the UK Parliament legislates directly, and this is how the nationality provisions in Part 1 of the Bill are being extended to these jurisdictions. The second is that the UK Parliament inserts into its legislation a type of clause known as a ‘permissive extent clause’. The effect of this type of clause is that Her Majesty, by means of an Order in Council, may extend any provision in the legislation, with or without amendment, to any of the Channel Islands or the Isle of Man. This is how the remaining parts of the Bill could be extended to these jurisdictions, subject to the agreement of the relevant Governments. The Bill has its own permissive extent clause at 82 (4). But by means of 82 (5) and 82 (6), where the Bill amends or repeals an existing Act, that amendment or repeal may be extended Her Majesty, with or without modifications, by means of an Order in Council, using the permissive clause in that existing Act.

Clause 83 – Commencement

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: none

Context and Purpose

103. Subsection (1) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations, other than the provisions which commence on Royal Assent (subsection (3) and subsection (4)) and the provisions which subsection (5) provides come into force at the end of the period of two months beginning with Royal Assent.

104. Subsection (2) allows those commencement regulations appoint different commencement dates for different purposes or areas.

Justification for taking the power

105. Leaving a subset of provisions in the Bill, other than those for which the Bill itself provides the commencement date (see above), to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

106. As is usual with commencement powers, regulations made under clause 83 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

PLACEHOLDER CLAUSES

Placeholder Clause 42 – Authorisation to work in the territorial sea

Replaced by Clause 42 – Working in United Kingdom waters: arrival and entry

42(1)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

107. This clause clarifies the point at which a person who is coming to work in UK waters without transiting the landmass (“an offshore worker”) arrives in and enters the UK, and consequently makes clear the point at which a person who requires leave to enter the UK must obtain that leave. This provision builds on the existing provisions of the Immigration Act 1971 and will allow existing frameworks to be used. In particular this includes existing frameworks for obtaining entry clearance, leave to enter and leave to remain and for requiring those using the immigration system to bring in workers to act as sponsors for those workers. Those who are working as crew on a ship that is exercising the right of innocent passage or transit passage or who are covered by section 8(1) of the Immigration Act 1971 will not be affected by this provision. The power in section 8(2) of the Immigration Act 1971 may be used to make further exemptions, including any exemptions required to ensure the UK complies with any relevant international agreements.

108. Subsection (1) inserts a new section 11A and 11B into the Immigration Act 1971, and new section 11B(1) contains a regulation making power. This allows the Secretary of State to require an offshore worker or, if they have one, their sponsor to provide information about the dates of arrival, entry and departure of the offshore worker. New section 11B(2) provides that the regulations may, in particular, include provision for the failure of an offshore worker to comply with the requirement as being a ground for the variation or cancellation of their leave, or of a refusal of leave. Where the sponsor fails to comply with an obligation imposed on them, this may be taken into account by the Secretary of State when operating the arrangements that are put in place for sponsors to obtain authorisation from the Secretary of State to act as a sponsor (the immigration skills arrangements).

Justification for taking the power

109. A person who requires leave to enter the UK will normally be required to obtain an entry clearance (commonly referred to as a visa) prior to travel that will enable them to travel to the UK. The Immigration Rules set out the routes that individuals may use to enter the UK and the conditions that a person must meet to obtain an entry clearance. On arrival in the UK that entry clearance will, in most cases, convert to leave to enter. Where a person arrives on the UK landmass [from outside of the Common Travel Area] they will normally arrive in a port and pass through immigration control, making it possible to establish whether, and when, a person has arrived. The dates of arrival, entry and departure may be needed to establish compliance with immigration laws and may also be relevant to subsequent applications for leave to remain and settlement. As offshore workers will not transit the landmass, this information needs to be provided either by the offshore worker themselves, or their sponsor.
110. The specific information, and the person that needs to provide it, may vary depending on the work route they are applying on and the role the sponsor has in any application process. Most work routes require a sponsor in the UK, either an employer or the person who has contracted services from overseas. However, the sponsorship regime may permit different types of sponsorship licenses, and there may be some work routes where sponsorship is not considered necessary or appropriate. To ensure there is flexibility to respond to changes in the immigration system and impose the obligation on the most appropriate party, either the offshore worker, or their sponsor, it is necessary to use a power rather than set out the obligation on the face of the primary legislation.

Justification for the procedure

111. The negative procedure is appropriate because this is a narrow power enabling the Secretary of State to require a small amount of factual information to be provided and to make limited provision for sanctions to ensure compliance. The scope of the potential obligation is clear and limited and the main flexibility that is needed relates to whether it is the offshore worker or the sponsor who will be required to provide the information, and that may depend on the type of work the offshore worker is doing and the other mechanisms that are in place. The burden on the offshore worker or the sponsor is minimal and the sanctions for a failure to comply with the obligation are consistent with the existing sanctions that are provided for in the immigration system.

Placeholder Clause 42 – Authorisation to work in the territorial sea

New Schedule 5 – Working in United Kingdom Waters: consequential and related amendments

Paragraph 9(5)

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

112. Paragraph 27BA of Schedule 2 to the Immigration Act 1971 contains a power for the Secretary of State to make regulations requiring those responsible for ships or aircraft that have arrived, or are expected to arrive in the United Kingdom, or have left or are expected to leave the United Kingdom, to provide information about the voyage or flight and about the persons on board. Clause 42 inserts new section 11A into the Immigration Act 1971, which confirms that an individual coming for the purpose of work “arrives” in the UK when they arrive in United Kingdom waters. The new regulation-making power in paragraph 9(5) of Schedule 5 provides for the existing power in paragraph 27BA of the 1971 Act (which permits regulations to be made requiring the provision of information about arrivals in or departures from the UK) to be utilised in relation to those responsible for ships or aircraft which have arrived or are expected to arrive in, or have left or are expected to leave United Kingdom waters, if they are carrying offshore workers.

Justification for taking the power

113. The power is necessary to ensure that the Secretary of State can require information about individuals and vessels or aircraft travelling to or from UK Waters in the same way as is presently possible in relation to those travelling to or from the UK landmass. This power is necessary as part of ensuring effective immigration and border security control. It is expedient for the detail of the information required and means of provision to be set out in regulations rather than in the Schedule, in order that the position for those travelling to UK waters can be aligned with that for those travelling via the landmass.

Justification for the procedure

114. The affirmative procedure is currently required for regulations made under paragraph 27BA of Schedule 2 to the Immigration Act 1971. As this power aligns the power for voyages and flights to UK Waters, for consistency the same procedure is also specified here.

Placeholder Clause 58 – Age assessments

Replaced by Clause 51 – Use of scientific methods in age assessments

51(1)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Context and Purpose

115. In view of the inherent difficulty in reliably assessing age, the Government considers it is necessary and appropriate to provide decision-makers with a wider breadth of evidence on which to base their decisions. Assessing someone's age in the absence of documentary evidence is a highly challenging task. Local authorities regularly report difficulties in handling cases that involve age disputes. As the courts have recognised, even comprehensive and thorough holistic age assessments can carry a significant margin of error. Similarly, there have been cases where assessments have been conducted on the same individual by different social workers, which have led to very different conclusions.

116. Currently, scientific age assessments are infrequently used by local authorities or the Home Office, though such information, if presented, can be considered alongside other evidence of age. As part of the Government's wider package of age assessment reforms, it is exploring the use of scientific methods of age assessment to widen the evidence base with which decisions about age may be made.

117. The use of scientific methods offers the opportunity for more informed decision-making around an age disputed person's age. The United Kingdom is one of few countries in Europe that does not routinely make use of scientific methods of age assessment. Many other European countries make use of a variety of scientific techniques to assist in making decisions on age. It is the Government's intention to fully explore the options available.

118. 51(1) stipulates a power for the Secretary of State to make regulations specifying the use of scientific methods of age assessment. If individuals misrepresenting their age were able to freely refuse to undergo a scientific age assessment without consequence, this would undermine the basis for scientific age assessments. Where a person refuses to undergo a method that is specified under 51(1) without reasonable grounds, decision-makers may take that refusal into account as damaging that person's credibility in respect of their claimed age.

Justification for taking the power

119. The Home Office is currently considering scientific methods of age assessment that may be appropriate to utilise for the purposes of conducting age assessments under Clauses 49 and 50. As set out in 51(3), the Secretary of State may only specify a scientific method in regulations if, having sought scientific advice, she determines that the method (or methods) is appropriate for assessing age.

120. The scientific method will need to be specified in regulations, which would state information such as the type and nature of the procedure involved, the part of a person's body to be measured or the type of sample to be acquired. There are a number of well-established methods of scientific age assessment (such as x-rays) currently employed by many countries. However, the Home Office is aware of a number of alternative methods. Scientific age assessment is an area that is the subject of ongoing scientific study. In order to take account of future developments and progress, it is appropriate to make provision to specify a scientific method in secondary legislation, to ensure greater flexibility in order that the specified method and introduction of alternative techniques may be explored and amended over time. Setting out in primary legislation precise details of the scientific method to be employed (which may change over time) would not be an efficient use of parliamentary time.

Justification for the procedure

121. All regulations made under Clause 51 will be subject to the affirmative procedure. This is considered appropriate because the use of scientific methods for age assessments is a controversial matter and a matter on which Parliament can be expected to wish to provide further scrutiny.

Placeholder Clause 58: Age assessments

Replaced by Clause 51: Use of scientific age assessments

51(5)(b)(ii)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

122. Clause 51 states that a scientific method of age assessment that is specified in regulations may only be used if appropriate consent is given by the age-disputed person. If the age-disputed person does not give their consent, without reasonable grounds, the decision-maker must take into account their decision not to consent as damaging to credibility when deciding whether to believe statements regarding their claimed age.

123. However, where it is considered that the age-disputed person does not have capacity to provide consent, the clause states that consent may be given by another person. This may be an age-disputed person's parent or guardian. The

vast majority of age disputes relate to individuals who claim to be unaccompanied asylum-seeking children and therefore are not accompanied by a parent or guardian.

124. 51(5)(b)(ii) provides a power for the Secretary of State to make regulations about another person who is able to give consent on behalf of the age-disputed person in circumstances where they do not have capacity to consent themselves.

Justification for taking the power

125. The Secretary of State will only seek to utilise a specified method of scientific age assessment where appropriate consent is provided. This will ordinarily be the consent of the age-disputed person. However, where the individual does not have capacity to consent themselves, the Secretary of State wishes to provide for another suitable individual who can decide whether to provide consent on their behalf.

126. In addition, it is possible that where adults are falsely claiming to be children, they may also seek to suggest they do not have capacity to consent, in order to avoid having to undergo a scientific age assessment. To mitigate against this risk, the Secretary of State wishes to define in regulations another adult who may be able to provide consent on behalf of the age-disputed person.

127. The appropriateness of an individual to provide consent on behalf of an age-disputed person under 51(5)(b)(ii) is likely to depend on both the age-disputed person's individual circumstances, and the particular method specified in regulations under 51(1). Further consultation is needed to establish an appropriate definition of another person who could provide that consent. It would not therefore be an efficient use of parliamentary time to set this definition out in primary legislation whilst a method is yet to be specified.

Justification for the procedure

128. All regulations made under Clause 51 will be subject to the affirmative procedure. This is considered appropriate because the use of scientific methods for age assessments is a controversial matter which engages fundamental rights (including the rights of children) and is a matter which Parliament can be expected to wish to scrutinise.

Placeholder Clause 58 – Age assessments

Replaced by Clause 52 – Regulations about age assessments

52(1) and (2)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

129. Where there is doubt about the claimed age of a person claiming to be an unaccompanied child, local authorities conduct a 'Merton compliant' age assessment, the outcome of which is assigned significant weight when determining their age for immigration purposes. Over the course of several years, the courts have set out the broad requirements and principles upon which they expect such assessments to be conducted. This started with the original case involving Merton Borough Council in 2003 but has been supplemented by several cases since, which have built upon that original judgment. As a result, the requirements of a Merton compliant assessment are not set out in a single place.

130. In addition to caselaw, best practice guidance has also been issued which provides further assistance to those conducting age assessments. Therefore, local authorities are required to rely on the body of caselaw and the best available guidance to approach the task of age assessment. The absence of an entirely prescribed manner in which these age assessments must be carried out has inevitably meant that the way in which local authorities approach this task can vary – in turn this leads to variance in how age is assigned for immigration purposes.

131. The intention of this clause is to provide more clarity on what an age assessment should entail, including where appropriate, existing elements of age assessment caselaw.

132. Clause 52, provides a power for the Secretary of State to make regulations about the way in which age assessments are conducted under Clauses 49 and 50. It also states that regulations can be made about the referral process by a local authority of an age-disputed person, how and when a local authority must inform the Secretary of State of the outcome of its age assessment decision and the evidence the Secretary of State may require when a local authority conducts an assessment itself or accepts the claimed age of the individual.

Justification for taking the power

133. A delegated power to specify the way in which age assessments are conducted under Clauses 49 and 50 as specified in subsections (1) and (2) is necessary as it provides the flexibility required to ensure that necessary changes can be made and implemented swiftly. This could include changes to the way which age assessments should be conducted to reflect any lessons learnt or feedback from local authorities, the National Age Assessment Board (NAAB) or others involved in the age assessment process. Similarly, flexibility will be necessary to ensure that the various processes that are likely to be required for

the effective administration of the NAAB's functions can be reviewed as necessary. The NAAB will be a newly constituted decision-making function in the Home Office and it will be crucial that the Secretary of State has the flexibility to ensure that the associated processes can be swiftly adapted where changes are considered necessary and appropriate. The matters to be covered in these regulations will also include detail on technical and procedural matters, which would take up a disproportionate amount of parliamentary time if implemented by primary legislation.

134. It is anticipated that the Secretary of State will want to engage, particularly with local authorities, in advance of making regulations under Clause 52.

Justification for the procedure

135. The provision is subject to an affirmative procedure so that Parliament will have an opportunity to scrutinise any regulation made under Clause 52. This level of parliamentary scrutiny is considered appropriate as it is the first time legislation will make detailed provisions about how age assessments should be carried out.

Placeholder Clause 59 – Processing of visa applications from nationals of certain countries

Replaced by Clause 69 – Removals from the UK: visa penalties for uncooperative countries

69(1) and (6)

Powers conferred on: Secretary of State

Powers exercised by: Immigration Rules and Regulations made by Statutory Instrument

Parliamentary Procedure: Specific procedure in respect of Immigration Rules (see section 3(2) of the Immigration Act 1971) but similar to negative procedure; Affirmative and Negative in respect of Regulations.

Context and Purpose

136. Where individuals do not have a legal right to be in the UK, the Home Office may seek to remove them by deportations or administrative removals, usually to their country of nationality. The Government expects cooperation by the country of origin in receiving back their own nationals where a person has no right to be in the UK. However, a small number of countries do not cooperate.

137. Subsection (1) gives the Secretary of State the power to make provisions in the Immigration Rules to impose visa penalties on countries who, in the opinion of the Secretary of State, do not cooperate on the matter of returning their nationals who have no right to be in the UK. Subsection (5) sets out the types of visa penalties which could be imposed on countries who do not cooperate on the matter of returning their nationals. This includes:

- a. Requiring that entry clearance must not be granted pursuant to visa applications before the end of a specific period;
- b. Suspending the power to grant entry clearance to applicants;
- c. Requiring the application to be treated as invalid for the purposes of the Immigration Rules;
- d. Requiring the applicant to pay a surcharge of £190 in connection with the making of a visa application.

138. Subsection (6) gives the Secretary of State the power to vary the level of the surcharge through regulations.

Justification for taking the power

139. It will be necessary to set out in the Immigration Rules the detail of any visa penalties applied including the type of penalty, the country and visa routes on which the penalty is being applied, and any exemptions from the application of the penalty.

140. It is not possible to include this detail on the face of the Bill as visa penalties will be applied, and disapplied, depending on the Secretary of State's assessment of a country's cooperation on the matter of returns on an ongoing basis. We face different cooperation issues with different countries, and the nature of the issues we face currently may change in the future. This clause has been designed to provide a range of options on which it is necessary to retain flexibility so that we can respond appropriately to specific issues as they arise. The Secretary of State will determine the detail of any visa penalties applied (including type of penalty, routes it applies to and exemptions) on a case-by-case basis taking account of the nature of the cooperation issues the UK has with that country, our wider bilateral relationship with that country, and any other relevant context.

141. Subsection (3) sets out the factors the Secretary of State must take into account when forming an opinion as to whether a country is cooperating on the matter of returns. These include any formal or informal arrangements entered into by the government of the relevant country with the UK with a view to facilitating returns, the extent to which the government of the relevant country is promptly taking steps to facilitate returns, and such other matters as the Secretary of State considers appropriate. Subsection (4) also sets out the factors the Secretary of State must take into account in determining whether to impose visa penalties on a country. These include the length of time for which the government has not been cooperating with returns, the extent of the lack of cooperation and the reasons for the lack of cooperation. As such, there is some

transparency around the types of considerations that will be taken into account by the Secretary of State before the power is exercised.

142. The powers are limited to the types of visa penalty available to the Secretary of State in the primary legislation. Any visa penalties applied must be reviewed at least every two months and they must be revoked if the Secretary of State concludes the country is no longer uncooperative.

143. The level of the surcharge has been set with reference to comparative powers elsewhere (for example, the European Union) and the current cost of coming to the UK as a visitor. The power to vary the level of the surcharge through regulations is necessary in case the factors that were considered when setting it are no longer relevant.

Justification for the procedure

144. The clause provides powers to impose visa penalties on uncooperative countries through provision in the Immigration Rules. The Immigration Rules set out the practice to be followed for regulating the entry into and stay in the United Kingdom of persons required to have leave to enter. Including the detail of the visa penalty to be applied in the Immigration Rules affords the Government flexibility to apply and disapply penalties promptly in response to the actions of other countries. The appropriate procedure is the one set out in section 3(2) of the Immigration Act 1971, which applies whenever the Secretary of State makes changes to the rules.

145. Regulations made under subsection (6) will vary the level of the surcharge in the primary legislation. Where the Government seeks to increase that level, the affirmative procedure will apply ensuring appropriate parliamentary scrutiny over the use of this Henry VIII power. Where the level is decreased, the negative procedure will apply. The negative procedure is considered appropriate for regulations decreasing the level of the surcharge to less than was provided for by Parliament in the Bill.

Placeholder Clause 60: Electronic travel authorisations

Replaced by Clause 71: Electronic travel authorisations

71(2)

Power conferred on: Secretary of State

Power exercised by: Immigration Rules

Parliamentary Procedure: Negative

Context and Purpose

146. Clause 71 adds a new Part 1A to the Immigration Act 1971 to insert new sections 11C and 11D. In doing so, the Bill lays the legislative foundation which will allow the Secretary of State to introduce and operate an Electronic Travel Authorisation (ETA) scheme.
147. The clause contains provisions which build on the powers provided to the Secretary of State in Section 3 of the Immigration Act 1971. Section 3(2) of the Immigration Act 1971 confers the power to make Immigration Rules which set out the practice to be followed in the administration of the powers conferred by that Act and which regulate the entry into and stay of persons required to have leave to enter the United Kingdom.
148. New Subsection 11C(2) provides the Secretary of State with the power to make Immigration Rules which will set out the detail of the ETA scheme. Subsections 11C(3), (5), (6), (7) and (8) provide details about how the power conferred by 11C(2) should be exercised. Specifically, they make the following provision:
- a. Subsection 11C(2) specifies that the Immigration Rules may set out who is required to apply for and obtain an ETA prior to travelling to the United Kingdom;
 - b. Subsection 11C(3) stipulates that the Immigration Rules may not require an ETA for an individual who is a British citizen, or an individual who would, on arrival in the United Kingdom, be entitled to enter without leave.
 - c. Subsection 11C(5) stipulates that where a person has leave to enter or remain in a Crown Dependency, the requirement for an ETA will only apply on local journeys from the Crown Dependencies to the United Kingdom if the immigration laws of the Crown Dependency diverge from the rules of the United Kingdom.
 - d. Subsection 11C(6) stipulates the various elements that the Immigration Rules must take account of and provide for – for example, the grounds on which an ETA may or must be refused, the validity period of an ETA once granted;
 - e. Subsection 11C(7) provides the Secretary of State with the power to also make Immigration Rules which provide for exceptions to the requirement; and, to make rules covering other provisions relevant to the ETA scheme; and,
 - f. Subsection 11C(8) affords the power to make Immigration Rules which account for different cases; for example, different types of Electronic Travel Authorisations.

Justification for taking the power

149. The provisions introduced by Clause 71 build upon Section 3(2) of the Immigration Act 1971, which confers the power to make Immigration Rules onto the Secretary of State. Section 3(2) provides for the Immigration Rules, as laid before Parliament, to act as a statement of practice to be followed in the administration of regulating the entry and stay of those without the right of abode in the United Kingdom. However, as currently drafted section 3(2) does not provide the power to establish in the rules a scheme governing permission to travel to the UK separate to granting leave to enter and/or remain. As a result, there is a need to take a new power which allows the Secretary of State to make Immigration Rules which set out the practice to be followed when administering an Electronic Travel Authorisation scheme.

150. The power to make Immigration Rules to administer the ETA scheme, as introduced by Clause 71 is compatible with the current, well-established procedure as provided for by Section 3(2) of the Immigration Act 1971. By taking a compatible power the Government is ensuring it can update the Immigration Rules in a responsive way, to make sure our immigration system can meet the UK's needs, commands the confidence of the public and reflects the wider economic, social and political context in the UK at any time.

151. Changes to the Immigration Rules will always be published with a comprehensive Explanatory Memorandum, explaining the policy changes being made as well as the effect the changes will have.

Justification for the procedure

152. The Immigration Rule making powers contained within Clause 71 are subject to the negative procedure. This approach is consistent with the provisions of the Immigration Rule making power provided to the Secretary of State by Section 3(2) of the Immigration Act 1971. As such it is considered appropriate to retain this procedure for reasons of consistency.

153. The negative procedure provides Parliament with the option of scrutinising the Immigration Rules if members feel that the delegated power is not being used appropriately, rather than requiring parliamentary time whenever the rules are laid.

Placeholder Clause 60 – Electronic travel authorisations

Replaced by Clause 71 – Electronic travel authorisations

71(2)

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument (The Immigration (Provision of Physical Data) Regulations 2006)

Parliamentary Procedure: Affirmative Procedure

Context and Purpose

154. New Section 11D(6) amends section 126 of the Nationality, Immigration and Asylum Act 2002, to provide the Secretary of State with a power to make regulations requiring a person making an application for an Electronic Travel Authorisation (ETA) to provide physical data (in the form of biometric information) in connection with that application. The amendment adds an application for an ETA to the existing list of types of immigration application which must be accompanied by physical data. This will allow the existing regulations made under this power to be amended to include the ETA scheme.

Justification for taking the power

155. It is now long-standing, common practice for immigration applications to be accompanied by physical or biometric data.

156. In addition, there are different regulations governing the provision of physical or biometric data depending on type of application being made (for example short-term vs. longer-term entry clearances). Each set of regulations contain a considerable level of detail regarding the manner and form in which such applications are to be made and the circumstances in which such applications will be granted. By making provision for existing regulations, which apply to those applying for short-term entry clearance as visitors, to also be able to require applications for Electronic Travel Authorisations to be accompanied by physical data, ensures that each set of regulations are as comprehensive as possible with all details relating to temporary, short-term visits being located in one place.

Justification for the procedure

157. Regulations made under Section 126 of the Nationality, Immigration and Asylum Act 2002 are, and will continue to be, subject to the affirmative procedure which require the approval of both House of Parliament.

158. On the basis that this provision will amend the existing regulation-making power and in view of the details which will be included when the regulations are amended, it is considered appropriate to retain this procedure on the basis it has provided an adequate level of Parliamentary scrutiny to date.

Placeholder Clause 60 – Electronic travel authorisations

Replaced by Clause 71 – Electronic travel authorisations

71(2)

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument (The Immigration (Provision of Physical Data) Regulations 2006)

Parliamentary Procedure: Negative procedure

Context and Purpose

159. Clause 71 of the Bill inserts a new section 11D of the Immigration Act 1971 about Electronic Travel Authorisations and the Islands (i.e. the Channel Islands and the Isle of Man, collectively known as the Crown Dependencies). Section 11D(1) provides a regulation-making power for the Secretary of State to make provision for the UK to recognise an electronic authorisation granted by any of the Crown Dependencies, as well as: the conditions that are to apply in the UK to such an authorisation; the effects in the UK of such an authorisation being varied or cancelled by a Crown Dependency, and enabling the UK to cancel or vary an electronic authorisation (so far as it has effect in the UK).

160. New subsection 11D(3) provides that the Secretary of State may carry out functions on behalf of a Crown Dependency in relation to authorisations to travel to that Crown Dependency, where requested to by that Crown Dependency.

Justification for taking the power

161. In support of maintaining the integrity and security of the Common Travel Area, each Crown Dependency (The Bailiwick of Guernsey, the Bailiwick of Jersey, the Isle of Man) will establish its own, legally distinct, electronic travel authorisation scheme.

162. Whilst the UK and Crown Dependencies are working closely to ensure the underlying policy of all four schemes are identical, a regulation-making power is needed to ensure that the UK can effectively recognise, vary or cancel (as far as they have effect in the UK) ETAs granted under a Crown Dependency Scheme. The Crown Dependencies will put in place similar legislation in their own jurisdictions to recognise UK ETAs and those granted by the other Crown Dependencies. It is considered appropriate to include these provisions in secondary legislation to allow for flexibility to cease recognition of an electronic authorisation issued by the Crown Dependency in the event of any future deviation between the immigration laws of the UK and one, or more, of the Crown Dependencies.

Justification for the procedure

163. The level of parliamentary scrutiny proposed is that the regulations are subject to negative procedure. It is considered that the negative procedure is appropriate for these regulations as many of the matters which may be covered by the regulations are set out on the face of the Bill. The negative procedure gives Parliament the option of scrutinising if Members feel that the delegated power is not being used appropriately rather than requiring further parliamentary time.

Home Office

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