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Select Committee on the Constitution

11th Report of Session 2021–22

Nationality and Borders Bill

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Select Committee on the Constitution

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Nationality and Borders Bill

Introduction

1. The Nationality and Borders Bill was introduced in the House of Commons on 6 July 2021 and brought to the House of Lords on 9 December 2021. Second reading was on 5 January 2022 and committee stage is scheduled to commence on 27 January 2022.

2. The Bill is intended to counter illegal immigration and false asylum claims. It also changes nationality law and the law on modern slavery. The Government says the 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 United Kingdom, 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 rights to be in the UK.[1]

3. The Joint Committee on Human Rights has also reported on a number of concerns with the Bill. We make reference to that Committee's reports in this report, endorsing a number of their findings and recommendations.

4. The Committee has previously noted the impact of unclear immigration law on the rule of law.[2]

5. **This Bill makes the law even more complex and, in several areas, less clear. This is problematic in terms of the rule of law and disadvantages those affected by it in whatever capacity, including immigration practitioners.**

Consultation and placeholder clauses

6. Although the Bill makes significant changes to many areas of the law on nationality, migration and asylum, a number of provisions are drafted in vague terms and there are concerns about the time available for meaningful consultation.

7. The Government issued the *New Plan for Immigration* policy statement in March 2021. It was open to public consultation for six weeks.[3] The process was described as a "sham" in an open letter signed by over 200 civil society bodies. A House of Commons briefing paper described the main concerns as follows:

    - An absence of reliable or publicly available supporting data to evidence the assertions in the policy statement;

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1 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 1

2 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), paras 110–23

3 Home Office, 'New Plan for Immigration': https://www.gov.uk/government/consultations/new-plan-for-immigration [accessed 12 January 2022]

- A lack of clarity and detail about many of the proposals which compromised respondents' ability to meaningfully engage and respond;
- Additional information was subsequently provided to certain stakeholders at invitation-based consultation events and has not been made publicly available;
- The online model for consultation was unsuitable for gathering the views of people seeking asylum.[4]

8. Our Committee's report on *The Legislative Process: Preparing Legislation for Parliament* made recommendations on good practice in the pre-legislative period, recommending the publication of green and white papers and consultation with stakeholders.[5] We concluded:

> "While we recognise that there are occasions on which it will be necessary for ministers to initiate legislation in the absence of a detailed evidence base …, we do not believe that such decisions should be taken lightly, or be viewed as an easy option when the Government feels it must be seen to do something."[6]

9. Until 2012, the Code of Practice on Consultation recommended a 12-week period for consultations. The House of Lords Secondary Legislation Scrutiny Committee, in its 2013 report *The Government's Review of Consultation Principles*, concluded: "six weeks should be regarded as the minimum feasible consultation period, save in very exceptional cases."[7]

10. The lack of time for consultation is compounded by late additions to the Bill. When the Bill was published, it contained a large number of "placeholder clauses". These were merely provisional provisions, replaced at Committee stage in the Commons.

11. ***The House should express concern that the Government has not followed the recommendations of this Committee and of the Secondary Legislation Scrutiny Committee on the time available for consultation on the proposals which became the Bill.***

12. **While on occasion the use of placeholder clauses is understandable, the delayed introduction of so many significant clauses, the legal implications of which are in some cases far from clear, is unacceptable. This must not become a normal way of legislating.**

Part 1: Nationality

13. Clauses 1–10 and Schedule 1 address various anomalies in UK citizenship and nationality law and the status of 'stateless' children born in the UK, amending the British Nationality Act 1981.

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4 House of Commons Library, Nationality and Borders Bill, Library Note Number 9275, July 2021, pp 12–13

5 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27)

6 *Ibid.*, para 14

7 Secondary Legislation Scrutiny Committee, *The Government's Review of Consultation Principles* (17th Report, Session 2013–14, HL Paper 75), para 9

14. The Government's stated intention is to correct existing discrimination in the acquisition of nationality based on gender or marital status, or to adjust time limits that have disadvantaged people.

15. Clause 1 provides that a person is entitled to be registered as a British overseas territories citizen if a number of conditions are met. This clause corrects the historical inability of mothers to transmit citizenship. It is unclear what fees will be charged for registration applications under this clause and similar provisions in clauses 2, 3 and 7. In a recent case the Court of Appeal held that a fee of £1,012 for certain registration applications by children was so high as to be unlawful.[8]

16. ***The Government should clarify its intentions on the amount of fees to be charged under clauses 1, 2, 3 and 7.***

17. Clause 7 inserts a new provision into the British Nationality Act 1981, giving the Secretary of State discretion to register a person as a British citizen if, in the Secretary of State's opinion, the person "would have been, or would have been able to become, a British citizen but for—(a) historical legislative unfairness, (b) an act or omission of a public authority, or (c) exceptional circumstances relating to [the person]."

18. Clause 9 was tabled by the Government at committee stage in the Commons. At present, under section 40(5) of the British Nationality Act 1981, a person who is to be deprived of citizenship must be given written notice of a deprivation order, the reasons for the order and a notification of the person's right of appeal. Clause 9(2) specifies circumstances in which the Secretary of State will be able to deprive a person of British citizenship without giving notice.

19. This is a potentially very broad power, enabling the Secretary of State to deprive a person of citizenship without giving notice on grounds including national security or the public interest. It is unclear how it will operate or who might be caught by it. Accordingly, the appeal process is potentially important. Clause 9 provides a right of appeal to the First-tier Tribunal. However, if a person has not been given notice of the deprivation of citizenship it is difficult to see how he or she would be able to appeal the decision.

20. **If a person is to be deprived of citizenship without notice there ought to be additional safeguards. For example the Secretary of State should have to apply to a court to dispense with service of a notice or obtain an order of substituted service so as to give the person affected the best opportunity of responding to the notice.**

21. The clause will have retrospective effect: a deprivation order made before the new provision comes into effect is not invalid on the grounds that it does not comply with the duty under section 40(5) of the 1981 Act.

22. **The power to remove a person's citizenship without notice is significant. It is unclear what the reach of the provision will be, how its retroactive scope might operate or how feasible it will be for affected persons to appeal a deprivation order when they have no notice of it. We have previously commented on the unacceptability of**

8 Court of Appeal, *PRBC & O v Secretary of State for the Home Department* [2021], EWCA Civ 193. The decision of the Supreme Court on appeal is awaited.

retrospective legislation other than in very exceptional circumstances and no justification has been offered in this case. *The House may conclude that this clause is unacceptable and should be removed from the Bill.*

23. Clause 10 was tabled by the Government at Committee stage in the Commons. It concerns the citizenship of 'stateless minors' and gives the Secretary of State a power that potentially inhibits the acquisition of citizenship by these children. The Joint Committee on Human Rights questioned the compliance of this provision with the UK's obligations under the 1961 UN Stateless Convention and the UN Convention on the Rights of the Child.[9] That committee proposes two amendments, one inserting a 'best interests of the child clause' and the second to ensure that British citizenship is withheld only where the nationality of a parent is available to the child immediately, without any legal or administrative hurdles.[10]

24. **Compliance with the United Kingdom's international obligations is a constitutional issue. We endorse the Joint Committee on Human Rights' recommendations on clause 10.**

Part 2: Asylum

Treatment of refugee applicants

25. Clause 11 allows the Secretary of State to attach conditions to how a refugee applicant is treated depending on how they arrived in the UK and the timing of their application. In doing so it creates two categories of refugees. A refugee is a Group 1 refugee if they "have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention), and … they have presented themselves without delay to the authorities".[11] If a person does not satisfy both of these criteria he or she is a Group 2 refugee.

26. Clause 11(5) and (6) provide that the Secretary of State or an immigration officer may treat Group 1 and Group 2 refugees and their families differently, and gives examples of how they might do so. Differences in treatment can be set out in "immigration rules".[12] This refers to the immigration rules under section 3(2) of the Immigration Act 1971, which follow a process similar to the negative resolution procedure.

27. This provision raises questions about the human rights of individuals affected by this categorisation and the compatibility of the new regime with international law. The Government states: "All individuals recognised as refugees by the UK will continue to be afforded the rights and protections required under international law, specifically those afforded by the 1951 Refugee Convention."[13] It argues that the Bill is compatible with the Refugee Convention, including Article 3 which contains an obligation to apply the Convention "without discrimination as to race, religion or country of origin", and Article 31 which protects refugees from penalties.

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9 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 1) - Nationality*, (Seventh Report, Session 2021–22, HC 764, HL Paper 90), paras 56–58

10 *Ibid.*

11 Nationality and Borders Bill, Clause 11(2)(a) and (b)

12 Nationality and Borders Bill, Clause 11(8)

13 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) – EN], para 160

28. However, others including United Nations Refugee Agency (UNHCR),[14] the Law Society of England and Wales[15] and the Law Society of Scotland[16] argue that this provision is not compatible with the UK's obligations under the 1951 Refugee Convention.

29. Clause 11 is drafted broadly. Clause 11(8) states that "Immigration rules may include provision for the differential treatment allowed for by subsections (5) and (6)". In effect, this leaves to the Government the power to define how the two-tier system will work, and to set out in detail the differential treatment that will apply between two different groups of people claiming asylum.

30. **The grounds for, and the nature of, differential treatment of refugees under clause 11 should be set out clearly on the face of the Bill.**

31. ***We recommend that the Government removes or at least redrafts clause 11 to ensure that the Bill does not run counter to the UK's obligations under the 1951 Refugee Convention. We also recommend that immigration rules in this area should be subject to a higher level of scrutiny than what is in effect negative resolution procedure.***

Asylum claims and appeals

32. Clause 17 is aimed at encouraging prompt claims and deterring unmeritorious claims. It allows an "evidence notice" to be served on a claimant, requiring the person to provide evidence in support of a protection claim or human rights claim before a specified date. Under clause 18, providing late evidence with no good reason, or any relevant behaviour by the claimant that the deciding authority thinks is not in good faith, are factors decision-makers can take account of which will affect the claimant's credibility.

33. Clauses 19–24 make provision for "priority removal notices" (PRNs). Such a notice is intended to be served to anyone liable for removal or deportation. The Government states: "[t]he aim of this clause is to reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action."[17]

34. A recipient of a notice may set out their reasons for remaining in the UK and any grounds on which they should be permitted to do so. They must provide evidence in support of their claim.[18] Late provision of information can damage a person's credibility, unless there are good reasons why it was provided late.[19]

35. Clause 25 concerns late provision of evidence in asylum or human rights claims. Clause 25(2) provides: "Unless there are good reasons why the evidence was provided late, the deciding authority must, in considering

14 UNHCR, *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom* (May 2021), para 12: https://www.unhcr.org/uk/60950ed64.pdf [accessed 10 January 2022]; See also: House of Commons Library, Article 31 of the Refugee Convention, Research Briefing Number 9281 (15 July 2021).

15 Law Society, *Parliamentary Briefing: Nationality and Borders Bill: Committee Stage* (19 October 2021), p 2: https://www.lawsociety.org.uk/topics/immigration/parliamentary-briefing-nationality-and-borders-bill-house-of-commons-committee-stage [accessed 10 January 2022]

16 Law Society of Scotland, *Nationality and Borders Bill: Second Reading Briefing* (19 October 2021), p 5: https://www.lawscot.org.uk/media/371323/1572021-second-reading-briefing-on-nationality-and-borders-bill.pdf [accessed 10 January 2022]

17 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) – EN], para 233

18 Nationality and Borders Bill, Clause 19(3)

19 Nationality and Borders Bill, Clause 21(4)

it, have regard to the principle that minimal weight should be given to the evidence."

36. In the public bill committee in the Commons the Minister argued that these measures introduce a principle concerning only what weight to give to evidence; decision makers can choose to disregard the fact that the evidence was late.[20]

37. If clauses 18, 21(4) and 25(2) are not intended to be prescriptive it is unclear what purpose they serve. In any event, the text of the provisions suggests that they are regulatory and specific in their effect.

38. A related provision is clause 23. It is intended to expedite appeals relating to PRNs. If a person who is subject to a priority removal notice and an expedited appeal has another appeal outstanding, that appeal will also be subject to the same expedited appeal procedure: in effect related appeals will be joined so that one appeal cannot follow another as a way of prolonging the removal process.

39. ***The House may wish to consider the effect of clause 23 on the functioning of the appeals process and consequently on access to justice.***

40. Clause 26 which provides for "accelerated detained appeals" is intended to speed up appeals and deter those which are unmeritorious.[21] The original clause was replaced in Committee in the Commons by the Government to include a broader range of appeals which will be subject to the new accelerated detained appeals process. The clause also provides for changes to the rules regarding these appeals. The Tribunal Procedure Rules Committee, which is responsible for drafting procedural rules for tribunal cases, is to make rules for an accelerated timeframe for certain appeals.[22]

41. While some "relevant appeals" are set out in clause 26(6), the Secretary of State is given the power by regulations to define the decisions which will fall under this new procedure. These regulations are subject to negative resolution procedure. The clause provides that: "The Secretary of State may only certify a decision under this section if the Secretary of State considers that any relevant appeal brought in relation to the decision would likely be disposed of expeditiously."

42. The Court of Appeal has previously found fast-track procedures for processing asylum claims, introduced by the Tribunal Procedure Rules, "unfair and unjust".[23] The Law Society is critical of the new "accelerated detained appeals" procedure, arguing that "this may well amount to a new 'Detained Fast Track' procedure which [alluding to *The Lord Chancellor v Detention Action*] was found to be unlawful in 2015 due to being 'structurally unfair'." As with clause 23, the Law Society believes this measure will "undermine access to justice, increase pressure on the courts, and nullify any efficiencies by creating strain elsewhere in the system."[24] It remains to be seen what the

20 HC Deb, 26 October 2021, col 372 [Public Bill Committee]
21 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 297
22 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 297
23 Court of Appeal, *The Lord Chancellor v Detention Action*, EWCA Civ 840 (2015), para 49
24 Law Society, *Parliamentary Briefing: Nationality and Borders Bill: Committee Stage* (19 October 2021), p 6: https://www.lawsociety.org.uk/topics/immigration/parliamentary-briefing-nationality-and-borders-bill-house-of-commons-committee-stage [accessed 10 January 2022]

courts will make of the new rules, although there is now explicit statutory authority for such a scheme which if nothing else does appear to clarify the law.

43. The Government states that the rules may need to be changed frequently and therefore, "in view of the flexibility required, and the need to change the regulations quickly, the negative procedure is more appropriate."[25]

44. **In our view the Government's justifications for the use of the negative procedure under clause 26 are not sufficient. It is unclear how the powers under the clause will be exercised: in particular, the respective roles played by the Tribunal Procedure Rules Committee and the Secretary of State. *Given the significance of the consequences of losing an appeal the House may wish to seek clarity on this, and to and to amend the Bill to ensure that any changes are made via the affirmative resolution procedure.***

Removal to safe third countries

45. Clause 28 and Schedule 3 provide for the removal of an asylum seeker, and those who have had asylum claims refused, to a safe country. This makes it easier to remove someone from the UK while their claim is being processed. It has been called "off-shore processing". The Government says that these measures are compatible with international law:

> "The UK Government is committed to upholding its international obligations under the Refugee Convention and the ECHR, therefore any such removal of asylum seekers will be considered in line with these obligations."[26]

Furthermore:

> "Any such removal is only permitted to states where the individual will not be at risk of persecution for reasons of race, religion, nationality, membership to a particular social group or political opinion, in line with the Article 1A(2) of the Refugee Convention, and from where they will not be returned to the country from which they are seeking protection, in keeping with the principle of 'non-refoulement'."[27]

46. Schedule 3 provides more detail on safe third countries. Paragraph 10 of Schedule 3 provides that any additions to the list of safe countries are to be made by statutory instrument, subject to the affirmative resolution procedure. Removals from that list are subject only to the negative resolution procedure.

47. **From the perspective of the rule of law and the rights of individuals involved, the House may be concerned that the Bill lacks detail on how the new system in Schedule 3 will work, who might be affected and which other countries may be involved. *The House may take the view that the affirmative procedure should also be used for removal of countries from the list of safe third countries, a decision which could have implications for the safety of asylum seekers.***

25 Delegated Powers Memorandum to the Nationality and Borders Bill, para 41
26 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 312
27 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 760

Interpretation of the 1951 Refugee Convention

48. Clauses 29–37 concern the interpretation of the Refugee Convention. The provisions set out how Home Office officials, as well as courts and tribunals, should interpret and apply the 1951 Refugee Convention. Such an approach is well-precedented. The "Qualification Directive", as part of the EU's Common European Asylum System, has the same purpose in the EU, and the UK had opted-in to this directive while a member of the EU. The regulations which gave effect to this directive are revoked by clause 29(4).

49. These clauses are intended to guide any person, court or tribunal in determining whether an "asylum seeker" is in fact a refugee within the meaning of Article 1(A)(2) of the Refugee Convention. To this end the Bill gives direction on how to interpret certain key terms in Article 1(A)(2): persecution,[28] well-founded fear,[29] reasons for persecution,[30] protection from persecution[31] and internal relocation.[32]

50. Clause 31 has provoked controversy for the way in which it introduces a balance of probabilities test with which to assess the basis for a person's fear and whether or not it is well-founded. The Government justifies the test because it applies to the subjective element in the assessment: whether the asylum seeker has a characteristic which could cause them to fear persecution or does in fact fear such persecution in their country of nationality.[33] A second test still applies: "The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality … they would be persecuted".[34]

51. The Law Society has criticised this provision:

> "the Bill changes the evidentiary threshold for asylum claims, in a way that will likely see genuine refugees barred from being granted asylum, as well as delays and an increase in litigation as the parameters of the new requirement are established."[35]

52. The Law Society of Scotland is similarly critical, arguing that clause 31 "appears to go against the intention of the New Plan for Immigration, and flies in the face of 25 years judicial scrutiny."[36]

53. ***The House may consider that the new test in clause 31(2) is unclear and unduly complex. If the House takes the view that it is also a potential risk to justice it may be minded to replace it with a single test of, for example, reasonable likelihood.***

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28 Nationality and Borders Bill, Clause 30
29 Nationality and Borders Bill, Clause 31
30 Nationality and Borders Bill, Clause 32
31 Nationality and Borders Bill, Clause 33
32 Nationality and Borders Bill, Clause 34
33 Nationality and Borders Bill, Clause 31(2)
34 Nationality and Borders Bill, Clause 31(4)
35 Law Society, *Parliamentary Briefing: Nationality and Borders Bill: Committee Stage* (19 October 2021), p 1: https://www.lawsociety.org.uk/topics/immigration/parliamentary-briefing-nationality-and-borders-bill-house-of-commons-committee-stage [accessed 10 January 2022]
36 Law Society of Scotland, *Nationality and Borders Bill: Second Reading Briefing* (19 October 2021), p 9: https://www.lawscot.org.uk/media/371323/1572021-second-reading-briefing-on-nationality-and-borders-bill.pdf [accessed 10 January 2022]

Part 3: Immigration control

54. Clauses 39–45 and Schedules 4 and 5 offer new immigration controls while also strengthening existing rules.

55. Clause 39 amends section 24(1)(a) of the Immigration Act 1971 to create a new criminal offence of arriving in the UK without a valid entry clearance (a visa) where this is required, in addition to entering without leave. At present the term 'enter' is ambiguous and does not necessarily cover those detained upon arrival. The Government explains that the new provision "will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically 'enter' the UK."[37]

56. The clause also broadens the offence in section 25 of the 1971 Act of assisting unlawful immigration to cover those who assist arrival as well as entry to the UK. At Committee stage in the Commons the Government amended clause 39 to introduce a further offence of knowingly arriving in the UK without an electronic travel authorisation (ETA) where such authorisation is required (the Bill makes separate provision for the introduction of ETAs in clause 71).

57. The maximum penalty for those returning to the UK in breach of a deportation order is also increased from 6 months to 5 years, and for entering without leave or arriving without a valid entry clearance from 6 months to 4 years.

58. The Joint Committee on Human Rights has said:

> "The introduction of an offence of illegal arrival under clause 39 would effectively criminalise the act of seeking asylum in the UK. This is inconsistent with the UK's obligations under the Refugee Convention, including Article 31, which prohibits the penalisation of refugees for unauthorised entry. To ensure that it does not violate the UK's obligations in international law, clause 39 should be amended to remove the offence of arriving in the UK without valid entry clearance. The Bill should also provide for the amendment of section 31 of the Immigration and Asylum Act 1999 so that the defence it contains is available in respect of all offences relating to unauthorised entry, including offences under section 24 of the Immigration Act 1971."[38]

59. **Compliance with the UK's international obligations is a constitutional issue. We endorse the findings of the Joint Committee on Human Rights.**

60. Clause 44 and Schedule 6 expand maritime enforcement powers to enable enforcement action to take place outside of UK waters in order to detect, prevent, investigate and prosecute the illegal entry of migrants as well as its facilitation. The Joint Committee on Human Rights has questioned the compatibility of this provision with human rights law[39], and the extent to which Schedule 6 provides specific defences or immunities from prosecution for immigration officers or enforcement officers.

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37 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 394

38 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 3) - Immigration offences and enforcement* (9th Report, Session 2021–22, HC 885, HL Paper 112), para 137

39 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 3) - Immigration offences and enforcement* (9th Report, Session 2021–22, HC 885, HL Paper 112), para 85

61. A Government amendment in the Commons removed a limitation on authorising the use of maritime enforcement powers to circumstances where the Secretary of State considers that their exercise is permitted by the UN Convention on the Law of the Sea. The Government insists that it remains fully committed to upholding the Convention, stating:

> "We want to make it explicit that operating these maritime enforcement powers in UK waters or international waters to simply divert a migrant vessel from UK territorial seas does not require the permission of a foreign state where that vessel may then enter their waters."[40]

62. **The explicit removal of the UN Convention on the Law of the Sea limitation creates a perception that the Secretary of State might allow enforcement powers even when the Government considers this to be a violation of international law. *The House may wish to seek confirmation of the Government's intention to respect the UK's international obligations.***

Part 4: Age assessments

63. This is a new part of the Bill, originally a series of 'placeholder' provisions, tabled as government amendments at Committee stage in the Commons. It introduces new processes for conducting age assessments in respect of people who require leave to enter or remain in the UK. The provisions set a 'balance of probabilities' test as the standard of proof in making these assessments.

64. Clause 49 empowers certain public authorities to refer 'an age-disputed person' (defined in the Bill) to a designated person for an age assessment. It sets out when this must happen and the circumstances that give rise to it. The clause also proposes that a National Age Assessment Board (NAAB)) will be established to require and conduct age assessments.

65. Clause 50 provides for the conduct of an age assessment and confirms that such an assessment "is binding on the Secretary of State and immigration officers when exercising immigration functions."[41]

66. Clause 52 gives the Secretary of State a regulation-making power about age assessments which may include provision about the processes to be followed, including the information and evidence that must be considered and the weight to be given to it, the circumstances in which an abbreviated age assessment may be appropriate and protections or safeguarding measures for the age-disputed person. These regulations are subject to affirmative resolution procedure.[42]

67. The test for coming within the proposed definition of an age-disputed person seems to be cast very widely. There are also potentially delicate issues here of child protection and welfare, and it is not clear how these will be addressed. It can be very difficult to assess age accurately and that evidence may not be readily attainable. A further area of uncertainty is the respective responsibilities of the Home Secretary and the NAAB, and also how each of these will interact with local authorities.

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40 HC Deb, 28 October 2021, col 445 [Public Bill Committee]
41 Nationality and Borders Bill, clause 50(3)
42 Nationality and Borders Bill, clause 52 (3)

68. The Bill also lacks detail as to how the NAAB will be established, how it will operate and its relationship with the Home Office in terms of accountability and independence. We have frequently criticised the establishment of public bodies where the statute provides inadequate detail. This is arguably such a situation, exacerbated by a lack of time for adequate scrutiny.

69. **The House may be concerned that such significant measures were brought forward at such a late stage, leaving little time for scrutiny. The bill also lacks detail about how the National Age Assessment Board will be established. Had this Bill been through pre-legislative scrutiny some of these issues might have been resolved and the House may wish to consider these provisions very carefully.**

Part 5: Modern slavery

70. Provisions in this part of the Bill are designed to identify victims of modern slavery or trafficking; but they are also focused upon preventing abuse of the asylum system. There is already legal provision in this area, principally the Modern Slavery Act 2015.

Slavery or trafficking information notices

71. Under clause 57 the Secretary of State may serve a 'slavery or trafficking information notice' on a person who has made a protection claim or a human rights claim. Such a notice requires the recipient to provide the Secretary of State (and any other competent authority specified in the notice), before the specified date, with any relevant status information the recipient has.

72. As with evidence notices in clause 17 and 'priority removal notices' (PRNs) in clause 19, clause 58 states that late compliance must be treated as damaging the credibility of an applicant.[43] The Joint Committee on Human Rights queried how this clause will be used, and argued that any guidance should allow for sufficient time for victims to provide the required information and ensure that the 'slavery or trafficking information notices' are not issued in a discriminatory way. It also suggested that clause 58 be amended to specify that it "does not apply to child victims and victims of sexual exploitation, given the well-documented impact of trauma in delaying disclosure, especially on those two categories of victim" and has proposed amendments to these clauses in light of human rights concerns.[44]

73. The Joint Committee on Human Rights concluded:

> "We consider that clause 58 should be amended so that it does not inadvertently remove protection from victims of slavery or human trafficking, contrary to the UK's obligations to combat slavery and human trafficking. This would also bring it closer in line with the established caselaw of the Courts in relation to how the words in this provision should be read. Clause 58 should be amended to replace 'must take account, as damaging the person's credibility, of the late provision of the relevant status information' with 'may take account, as potentially

43 Nationality and Borders Bill, clause 58

44 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 5) - Modern Slavery* (11th Report, Session 2021–22, HC 964, HL Paper 135), paras 16–17, 22 and 25. For other criticisms of this part of the Bill see: Independent Anti-Slavery Commissioner, *Letter to the Home Secretary regarding the Nationality and Borders Bill* (7 September 2021): http://www.antislaverycommissioner.co.uk/media/1668/iasc-letter-to-the-rt-hon-priti-patel-mp-home-secretary-march-2021.pdf [accessed 11 January 2022].

damaging the person's credibility, of the late provision of the relevant status information'."[45]

74. **We endorse the Joint Committee on Human Rights' concerns regarding clauses 57 and 58 of the Bill. In particular we endorse their recommendation that clause 58(2) should be amended to replace the requirement that the competent authority "must" take account of the late provision of information with provision that it "may" take account of this factor.**

75. The Government, as it did in relation to evidence notices and PRNs, argues that issues of possible concern will be dealt with in policy guidance. The Minister has declared that the Government would work with stakeholders to develop that guidance.[46]

76. **We have repeatedly been critical of 'guidance' provisions and the drift towards making regulation without parliamentary scrutiny.**[47] ***The House may be concerned that such an important area of policy is to be left to development by way of guidance. This is a poor substitute for detailed rules or guidelines made by regulations and bearing legal authority.***

Amendment of reasonable grounds threshold

77. Clause 59 amends the Modern Slavery Act 2015 concerning the threshold for giving assistance and support to potential victims of slavery or trafficking in England and Wales. Under the new provision support will be provided where there are reasonable grounds to believe that a person "is"—the current test is "may be"—a victim under the Modern Slavery Act 2015. The test will operate on a balance of probabilities.

78. Clause 62 provides that a person in receipt of a positive reasonable grounds decision can be disqualified from the protections given to trafficking or slavery victims if they are a threat to public order or have raised their referral "in bad faith".

79. The Government stated:

> "The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) contains provisions for an exemption to the protections conferred during the recovery period on public order grounds or if it is found that victim's status is being claimed improperly. This clause puts these exemptions into primary legislation."[48]

This provision may affect people with only minor convictions and, in general, could leave people with criminal records open to exploitation by traffickers. The Joint Committee on Human Rights concluded:

> "Excluding certain victims from protection increases the likelihood that their cases will not be adequately investigated or prosecuted and, therefore, that action will not be taken against organised gangs exploiting

45 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 5) - Modern Slavery* (11th Report, Session 2021–22, HC 964, HL Paper 135), para 25
46 HC Deb, 28 October 2021, col 481 [Public Bill Committee]
47 For example: Constitution Committee, *COVID-19 and the use and scrutiny of emergency powers* (3rd Report, Session 2021–22, HL Paper 15), paras 165–67.
48 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 597

> these victims of slavery or human trafficking. Such an approach therefore runs counter to the UK's obligations under ECAT and Article 4 ECHR, as well as leaving gaps in enforcing action against traffickers. We are concerned that such an approach will leave a loophole for those responsible for exploiting people in slavery and human trafficking to evade investigation and prosecution, by targeting those with a criminal past."[49]

It commented on how the removal of protections here could fall foul of international legal obligations, including a wide definition of "public order".[50]

80. **We endorse the Joint Committee on Human Rights' concerns on clause 62 and draw to the attention of the House the risk that these provisions are incompatible with international law.**

81. **The grounds for exclusion of protection under clause 62 are broad. In particular, "bad faith" is not explained and the notion of "public order" is wide.** ***Given the potential implications of clause 62 for victims of trafficking, and hence for the rule of law, the House may seek to have these terms more clearly defined in the Bill, in order to demonstrate explicitly the Government's intention to comply with the UK's international obligations under the Council of Europe Convention on Action against Trafficking in Human Beings.***

82. Clause 63 provides that necessary assistance and support must be provided to a potential victim of slavery or human trafficking following a further reasonable grounds decision, where the Secretary of State determines that it is "appropriate to do so".

83. **Clause 63(4) contains a subjective test; it is unclear how it will operate.** ***The Secretary of State should be asked to explain how clause 63(4) will work in practice and to confirm that the Government will provide necessary assistance to potential victims as required under Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings.***

Part 6: Miscellaneous

Electronic Travel Authorisation Scheme

84. Clause 71 introduces an Electronic Travel Authorisation (ETA) scheme. ETAs are part of a wider Home Office policy to have a universal "permission to travel" scheme in place by 2025. This system will operate for people visiting the UK who do not need a visa for short stays or who do not have an immigration status prior to travelling. This system will be set out in immigration rules.

85. ***The House may question why the detail of the Electronic Travel Authorisation scheme introduced under clause 71 is not set out in the Bill. If it is appropriate to make such provision in immigration rules, the House may expect it to be subject to a form of affirmative procedure, at least for the establishment of the scheme.***

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49 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 5) - Modern Slavery* (11th Report, Session 2021–22, HC 964, HL Paper 135), para 53

50 Joint Committee on Human Rights, *Nationality and Borders Bill (Part 5) - Modern Slavery* (11th Report, Session 2021–22, HC 964, HL Paper 135), paras 69–72; and on possible implication for children, para 79.

86. The clause gives the Secretary of State additional regulation-making powers by inserting a new section 11D into the Immigration Act 1971 to the effect that the Secretary of State "may by regulations make provision about the effects in the United Kingdom of the grant or refusal under the law of any of the Islands of an authorisation in electronic form to travel to that island."[51] These regulations are subject to annulment.

87. **The process of making regulations for the Channel Islands and Isle of Man should respect the constitutional status of the Crown Dependencies and established conventions on consultation and consent. *On that basis regulations under section 11D of the Immigration Act 1971 (inserted by clause 71 of the Bill) should be subject to the affirmative procedure.***

88. Clause 82 (territorial extent) allows for provision made by regulations under various clauses to extend to the Channel Islands or the Isle of Man.

89. ***The same principles on consultation and consent should apply to clause 82(5) and (6).***

Special Immigration Appeals Commission

90. Clause 73 extends the Special Immigration Appeals Commission's (SIAC) remit to include immigration decisions that can be challenged only through judicial review. SIAC is a judicial tribunal which hears appeals against immigration decisions which are based on, or supported by, sensitive material which is often provided by the Security Services.

91. Immigration reforms between 2007 and 2014 significantly reduced the number of immigration decisions that attract a right of appeal. There is therefore a category of immigration decisions that could previously have been certified and heard as an appeal by SIAC which can now be challenged only by an application for judicial review. The Government notes: "This leaves a gap known as the 'SIAC gap' because [judicial reviews] which relate to immigration decisions where there is no right of appeal cannot be certified to be heard by SIAC."[52] Clause 73 means that any decision which could be challenged by judicial review can now be certified by the Secretary of State so that it is heard by SIAC in the same way that any decision that may be challenged by appeal can be certified. This applies to decisions which should not be made public in the interests of national security or international relations, or in the public interest.

Tribunal costs

92. Clause 76(1) inserts a new section 25A in the Tribunals, Courts and Enforcement Act 2007 which provides that if the First-tier Tribunal or Upper Tribunal considers that a participant in proceedings before it has acted improperly, unreasonably or negligently, and as a result the Tribunal's resources have been wasted, it may charge the participant an amount under this section. Clause 77 is a supplementary provision concerning Tribunal Procedure Rules which can be made to provide for costs etc.

93. The Law Society of Scotland has criticised clause 76:

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51 The islands are the Channel Islands and Isle of Man as defined by section 1(3) and 33 of the Immigration Act 1971.

52 Delegated Powers Memorandum to the Nationality and Borders Bill, para 124

> "We take the view that this clause is unnecessary. There are existing statutory and common law powers to deal with such issues as matters of professional discipline by the appropriate regulators following existing complaints procedures. It is inappropriate that the determination of negligence should be included in the clause when that is properly the province of the civil courts. Furthermore, we note that any amounts charged under this clause for negligence are to be paid to the Consolidated Fund rather than for example the client who may have suffered as a result of any alleged negligence. This clause needs to be reconsidered."[53]

94. There is at least the potential that these new rules could discourage legal representatives and immigration advisers regulated by the office of the Immigration Services Commissioner, as well as applicants, from raising or engaging in legitimate proceedings.

95. **The House may consider that clauses 76 and 77 require further clarification as to why they are necessary.**

Henry VIII powers

96. Clause 78 is a wide Henry VIII clause allowing regulations to facilitate the consolidation of immigration legislation:

> "The Secretary of State may by regulations make such amendments and modifications of the Acts relating to immigration as in the Secretary of State's opinion facilitate, or are otherwise desirable in connection with, the consolidation of the whole or a substantial part of the Acts relating to immigration."[54]

97. The regulation-making power is not a consolidation power itself. As the Government explains:

> "Regulations made under this section do not come into force unless an Act is passed consolidating the whole or a substantial part of the Acts relating to immigration … 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."[55]

These regulations are subject to affirmative procedure given that their exercise is a Henry VIII power, albeit a limited one.

98. As noted above, in the first of our recent reports on the legislative process we observed that immigration law is "remarkably inaccessible and difficult for practitioners to comprehend, let alone the average citizen".[56] In relation to this and other complex areas of law we recommended: "the Government should, as a priority, provide the Law Commission with the necessary resources to start consolidating those areas of the law where consistent application of the law is now under threat from the sheer complexity of the existing statute

53 Law Society of Scotland, *Nationality and Borders Bill: Second Reading Briefing* (19 October 2021), p 16: https://www.lawscot.org.uk/media/371323/1572021-second-reading-briefing-on-nationality-and-borders-bill.pdf [accessed 10 January 2022]

54 Nationality and Borders Bill, clause 78(1)

55 Delegated Powers Memorandum to the Nationality and Borders Bill, para 89

56 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 123

book."[57] The need to consolidate immigration law was also a conclusion of the Windrush Lessons Learned Review.[58]

99. **The House may welcome the general purpose of clause 78 and urge the Government to proceed with consolidating immigration law. But this does not get to the root of the problem, which is that the law in this area needs to be simplified and made more intelligible. We urge the Government to prioritise simplification, in addition to consolidation. As part of this process the Government should consider imposing a greater degree of parliamentary scrutiny over delegated powers relating to immigration law, including the immigration rules under section 3(2) of the Immigration Act 1971.**

100. Under clause 80 the Secretary of State may by regulations make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of the Bill or in consequence of the Bill. These are today normal provisions in many bills. However, given the wide and potentially vague delegated powers in the Bill, the consequential power is potentially significant.[59] The Government to some extent acknowledges this: "The Department accepts that the power to make consequential provision is, on the face of it, wide."[60] The powers in clause 80 include a wide Henry VIII power: provision that may be made by regulations includes provision amending, repealing or revoking any enactment. Only the latter regulations are subject to affirmative procedure; negative procedure applies to all other regulations under this clause.

101. **The power to make consequential provision created by clause 80(2) is broad and the scope of its potential application is far-reaching and largely unforeseeable because many of the provisions which it supplements are themselves opaque. *The power in clause 80(2) should not be exercisable by way of a subjective "appropriateness" test, but rather by an objective test such as necessity.*[61] *In an area of law, notable for its obscurity, an "appropriateness" test sets the bar far too low. The test should apply regardless of whether the instrument in question is subject to negative or affirmative procedure.***

57 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 147

58 Home Office, *Windrush Lessons Learned Review: independent review by Wendy Williams* (March 2020), p 18: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf [accessed 11 January 2022]

59 Hansard Society, *The Nationality and Borders Bill: Delegated Powers* (12 October 2021), p 14: https://assets.ctfassets.net/rdwvqctnt75b/5mjdLOFSq1kMhqmh2e0k15/516cec526816fffaac9871713014a2b3/Nationality_and_Borders_Bill_Briefing_FINAL.pdf [accessed 11 January 2022]

60 Delegated Powers Memorandum to the Nationality and Borders Bill, para 95

61 The Delegated Powers and Regulatory Reform Committee has criticised similar subjective tests, for example in relation to the Neighbourhood Planning Bill in 2017: "we observe that that the power has a very wide scope: it is to make whatever provisions – including ones amending and repealing Acts of Parliament – the Secretary of State considers appropriate in consequence of the Bill … We are far from convinced that it is appropriate for Ministers to be given such loosely-drawn powers. We therefore invite the House to consider whether a power to make consequential provision should be restricted by some type of objective test of necessity, rather than leaving this to the subjective judgment of the Secretary of State." See: Delegated Powers and Regulatory Reform Committee, *Neighbourhood Planning Bill*, (15th Report, Session 2016–17, HL Paper 104), paras 54–55.

102. The Henry VIII power extends to enactments of the devolved legislatures.[62] Although most of the Bill concerns only reserved matters,[63] legislating to repeal or revoke devolved legislation warrants close scrutiny. The Government states: "These powers would by definition only be exercisable in consequence of provisions in the Bill, which are either reserved to the UK Parliament or which apply and extend only to England and Wales and which are not within the legislative competence of Senedd Cymru."[64] Accordingly, the Government argues this provision does not involve devolved competence and so the Sewel convention is not invoked.

103. **It is not clear that consequential amendments to devolved legislation made under clause 80 would not be in areas of devolved competence. The Sewel convention does not apply to delegated legislation but it would be constitutionally questionable for Parliament to circumvent that convention by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence. The perception may arise, whether justified or not, that regulation-making powers under clause 80 may be used to avoid the Sewel convention.**[65]

104. **Respect for the principle which underlies the legislative consent process for primary legislation should be applied to the exercise of the power in clause 80(2) in relation to enactments contained in, or instruments made under, legislation passed by the devolved legislatures. This clause should be amended to the effect that the power to amend those provisions may not be exercised without the consent of those legislatures.**

62 Nationality and Borders Bill, clause 80(4)
63 Accordingly, the Bill generally extends across the UK. A number of provisions (contained in clauses 22, 48, 52 and 54) extend only to England and Wales, notably where they concern a policy area that is within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly.
64 Explanatory Notes to the Nationality and Borders Bill [HL Bill 82 (2021–22) - EN], para 86
65 Constitution Committee, *Digital Economy Bill*, (7th Report, Session 2016–17, HL Paper 96), para 7

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

1. This Bill makes the law even more complex and, in several areas, less clear. This is problematic in terms of the rule of law and disadvantages those affected by it in whatever capacity, including immigration practitioners. (Paragraph 5)

Consultation and placeholder clauses

2. *The House should express concern that the Government has not followed the recommendations of this Committee and of the Secondary Legislation Scrutiny Committee on the time available for consultation on the proposals which became the Bill.* (Paragraph 11)

3. While on occasion the use of placeholder clauses is understandable, the delayed introduction of so many significant clauses, the legal implications of which are in some cases far from clear, is unacceptable. This must not become a normal way of legislating. (Paragraph 12)

Part 1: Nationality

4. *The Government should clarify its intentions on the amount of fees to be charged under clauses 1, 2, 3 and 7.* (Paragraph 16)

5. If a person is to be deprived of citizenship without notice there ought to be additional safeguards. For example the Secretary of State should have to apply to a court to dispense with service of a notice or obtain an order of substituted service so as to give the person affected the best opportunity of responding to the notice. (Paragraph 20)

6. The power to remove a person's citizenship without notice is significant. It is unclear what the reach of the provision will be, how its retroactive scope might operate or how feasible it will be for affected persons to appeal a deprivation order when they have no notice of it. We have previously commented on the unacceptability of retrospective legislation and no justification has been offered in this case. *The House may conclude that this clause is unacceptable and should be removed from the Bill.* (Paragraph 22)

7. Compliance with the United Kingdom's international obligations is a constitutional issue. We endorse the Joint Committee on Human Rights' recommendations on clause 10. (Paragraph 24)

Part 2: Asylum

8. The grounds for, and the nature of, differential treatment of refugees under clause 11 should be set out clearly on the face of the Bill. (Paragraph 30)

9. *We recommend that the Government removes or at least redrafts clause 11 to ensure that the Bill does not run counter to the UK's obligations under the 1951 Refugee Convention. We also recommend that immigration rules in this area should be subject to a higher level of scrutiny than what is in effect negative resolution procedure.* (Paragraph 31)

10. *The House may wish to consider the effect of clause 23 on the functioning of the appeals process and consequently on access to justice.* (Paragraph 39)

11. In our view the Government's justifications for the use of the negative procedure under clause 26 are not sufficient. It is unclear how the powers under the clause will be exercised: in particular, the respective roles played by the Tribunal Procedure Rules Committee and the Secretary of State. *Given the significance of the consequences of losing an appeal the House may wish to seek clarity on this, and to and to amend the Bill to ensure that any changes are made via the affirmative resolution procedure.* (Paragraph 44)

12. From the perspective of the rule of law and the rights of individuals involved, the House may be concerned that the Bill lacks detail on how the new system in Schedule 3 will work, who might be affected and which other countries may be involved. *The House may take the view that the affirmative procedure should also be used for removal of countries from the list of safe third countries, a decision which could have implications for the safety of asylum seekers.* (Paragraph 47)

13. *The House may consider that the new test in clause 31(2) is unclear and unduly complex. If the House takes the view that it is also a potential risk to justice it may be minded to replace it with a single test of, for example, reasonable likelihood.* (Paragraph 53)

Part 3: Immigration control

14. Compliance with the UK's international obligations is a constitutional issue. We endorse the findings of the Joint Committee on Human Rights. (Paragraph 59)

15. The explicit removal of the UN Convention on the Law of the Sea limitation creates a perception that the Secretary of State might allow enforcement powers even when the Government considers this to be a violation of international law. *The House may wish to seek confirmation of the Government's intention to respect the UK's international obligations.* (Paragraph 62)

Part 4: Age assessments

16. The House may be concerned that such significant measures were brought forward at such a late stage, leaving little time for scrutiny. The bill also lacks detail about how the National Age Assessment Board will be established. Had this Bill been through pre-legislative scrutiny some of these issues might have been resolved and the House may wish to consider these provisions very carefully. (Paragraph 69)

Part 5: Modern slavery

17. We endorse the Joint Committee on Human Rights' concerns regarding clauses 57 and 58 of the Bill. In particular we endorse their recommendation that clause 58(2) should be amended to replace the requirement that the competent authority "must" take account of the late provision of information with provision that it "may" take account of this factor. (Paragraph 74)

18. We have repeatedly been critical of 'guidance' provisions and the drift towards making regulation without parliamentary scrutiny. *The House may be concerned that such an important area of policy is to be left to development by way of guidance. This is a poor substitute for detailed rules or guidelines made by regulations and bearing legal authority.* (Paragraph 76)

19. We endorse the Joint Committee on Human Rights' concerns on clause 62 and draw to the attention of the House the risk that these provisions are incompatible with international law. (paragraph 80)

20. The grounds for exclusion of protection under clause 62 are broad. In particular, "bad faith" is not explained and the notion of "public order" is wide. *Given the potential implications of clause 62 for victims of trafficking, and hence for the rule of law, the House may seek to have these terms more clearly defined in the Bill, in order to demonstrate explicitly the Government's intention to comply with the UK's international obligations under the Council of Europe Convention on Action against Trafficking in Human Beings.* (Paragraph 81)

21. Clause 63(4) contains a subjective test; it is unclear how it will operate. *The Secretary of State should be asked to explain how clause 63(4) will work in practice and to confirm that the Government will provide necessary assistance to potential victims as required under Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings.* (Paragraph 83)

Part 6: Miscellaneous

22. *The House may question why the detail of the Electronic Travel Authorisation scheme introduced under clause 71 is not set out in the Bill. If it is appropriate to make such provision in immigration rules, the House may expect it to be subject to a form of affirmative procedure, at least for the establishment of the scheme.* (Paragraph 85)

23. The process of making regulations for the Channel Islands and Isle of Man should respect the constitutional status of the Crown Dependencies and established conventions on consultation and consent. *On that basis regulations under section 11D of the Immigration Act 1971 (inserted by clause 71 of the Bill) should be subject to the affirmative procedure.* (Paragraph 87)

24. *The same principles on consultation and consent should apply to clause 82(5) and (6).* (Paragraph 89)

25. The House may consider that clauses 76 and 77 require further clarification as to why they are necessary. (Paragraph 95)

26. The House may welcome the general purpose of clause 78 and urge the Government to proceed with consolidating immigration law. But this does not get to the root of the problem, which is that the law in this area needs to be simplified and made more intelligible. We urge the Government to prioritise simplification, in addition to consolidation. As part of this process the Government should consider imposing a greater degree of parliamentary scrutiny over delegated powers relating to immigration law, including the immigration rules under section 3(2) of the Immigration Act 1971. (Paragraph 99)

27. The power to make consequential provision created by clause 80(2) is broad and the scope of its potential application is far-reaching and largely unforeseeable because many of the provisions whichhttps://members.parliament.uk/member/2758/contact it supplements are themselves opaque. *The power in clause 80(2) should not be exercisable by way of a subjective "appropriateness" test, but rather by an objective test such as necessity.* In *an area of law, notable for its obscurity, an "appropriateness" test sets the bar far too low. The test should apply regardless of whether the instrument in question is subject to negative or affirmative procedure. (Paragraph 101)*

28. It is not clear that consequential amendments to devolved legislation made under clause 80 would not be in areas of devolved competence. The Sewel convention does not apply to delegated legislation but it would be constitutionally questionable for Parliament to circumvent that convention

by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence. The perception may arise, whether justified or not, that regulation-making powers under clause 80 may be used to avoid the Sewel convention. (Paragraph 103)

29. Respect for the principle which underlies the legislative consent process for primary legislation should be applied to the exercise of the power in clause 80(2) in relation to enactments contained in, or instruments made under, legislation passed by the devolved legislatures. This clause should be amended to the effect that the power to amend those provisions may not be exercised without the consent of those legislatures. (Paragraph 104)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Doocey
Baroness Drake
Lord Dunlop (until 19 January 2022)
Lord Faulks
Baroness Fookes
Lord Hennessy of Nympsfield
Lord Hope of Craighead
Lord Howarth of Newport
Lord Howell of Guildford
Lord McAvoy
Lord Sherbourne of Didsbury
Baroness Suttie
Baroness Taylor of Bolton (Chair) (until 19 January 2022)

Declarations of interest

Baroness Doocey
No relevant interests declared
Baroness Drake
No relevant interests declared
Lord Dunlop
No relevant interests declared
Lord Faulks
No relevant interests declared
Baroness Fookes
No relevant interests declared
Lord Hennessy of Nympsfield
No relevant interests declared
Lord Hope of Craighead
No relevant interests declared
Lord Howarth of Newport
No relevant interests declared
Lord Howell of Guildford
No relevant interests declared
Lord McAvoy
No relevant interests declared
Lord Sherbourne of Didsbury
No relevant interests declared
Baroness Suttie
No relevant interests declared
Baroness Taylor of Bolton (Chair)
No relevant interests declared