

# **ILLEGAL MIGRATION BILL**

## **DELEGATED POWERS MEMORANDUM**

### **Introduction**

1. This memorandum has been prepared by the Home Office for the Delegated Powers and Regulatory Reform Committee (DPRRC) to assist with its scrutiny of the Illegal Migration Bill. The Bill was brought forward from the House of Commons and introduced in the House of Lords on 27 April 2023. The memorandum identifies the provisions of the Bill which confer new or amended powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

### **Background and purpose of the Bill**

2. The purpose of the Bill is to deter illegal entry into the United Kingdom; break the business model of the people smugglers; and promptly remove those with no legal right to remain in the UK.
3. The Bill includes measures which:
  - a) Place a duty on the Secretary of State to make arrangements as soon as reasonably practical to remove any person who enters or arrives in the UK illegally, and has not come directly from a territory where their life and liberty was threatened, either to their home country or to a safe third country for consideration of any asylum claims (any such claims would be permanently inadmissible in the UK). The duty in clause 2(1) does not require the Secretary of State to make removal arrangements for unaccompanied children but there is a power to do so in clause 3(2).
  - b) Confer powers to detain persons in scope of the scheme pending their removal with the First-tier Tribunal being able to grant immigration bail once a person has been in detention for 28 days; the Secretary of State will have the power to grant immigration bail at any time, as will the High Court in response to an application for a writ of *habeas corpus*.
  - c) Confer new powers on immigration officers to search for, seize and retain electronic devices (such as mobile phones) from illegal migrants, which appear to contain information relevant to the discharge of their functions, including but not limited to a criminal investigation.
  - d) Provide for the accommodation of and other appropriate support for unaccompanied children by the Secretary of State or local authorities.
  - e) Extend the public order disqualification provided for in the Council of Europe Convention on Action against Trafficking in Human Beings to exclude

persons within the scheme from the protections afforded to potential victims of modern slavery, subject to a limited exception.

- f) Provide for a permanent bar on lawful re-entry to the UK for those removed under the scheme and a permanent bar on those who fall within the scheme from securing settlement in the UK or from securing British citizenship through naturalisation or registration, subject to limited exceptions.
  - g) Make bespoke provision so that persons subject to removal to a safe third country will have a limited time in which to bring a claim based on a real, imminent and foreseeable risk of serious and irreversible harm arising from their removal to a specified third country or based on the Secretary of State having made a mistake of fact when determining that a person was subject to the duty to remove. A decision by the Secretary of State to refuse the claim may be appealed to the Upper Tribunal. There will also be time limits for the consideration of such claims by the Home Office, for the lodging of any appeal and for its consideration by the Upper Tribunal. All other legal challenges to removal, whether on ECHR grounds or otherwise, would be non-suspensive and would therefore be considered by our domestic courts following a person's removal.
  - h) Make further provision in respect of age assessments on people whose age is in doubt.
  - i) Extend Section 80A of the of the Nationality, Immigration and Asylum Act 2002, which provides that asylum claims from EU nationals must generally be declared inadmissible to the UK's asylum system, to cover nationals from Albania, Iceland, Liechtenstein, Norway and Switzerland and other countries to be specified in regulations, and include rights-based claims as well as, as now, asylum claims.
  - j) Introduce a duty on the Secretary of State to determine the maximum number of persons to be admitted to the UK each year via safe and legal routes. The annual number will be determined following consultation with representatives of local authorities and others.
4. The measures at paragraph 3(a) to (e) and (g) to (j) above include new delegated powers. The Bill also contains standard powers to make consequential amendments and in respect of commencement.
5. Clause 63 makes general provision in respect of regulations made under the Bill. Clause 63(2) enables regulations made under the Bill (save for those made under Clause 66 (commencement)) to make transitional, saving, incidental, supplementary or consequential provision and to make different provision for different purposes. Clause 63(4) to (6) provides for the parliamentary procedure (if any) to be applied for each regulation-making power (but see also clause 26 which makes provision for the procedure to be applied to certain regulations made under clause 25).

**Clause 3(3)(d): Power to specify other circumstances in which the secretary of state may make arrangements for the removal of an unaccompanied child**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative procedure</i>

Context and purpose

6. Clause 3(2) provides a power to make arrangements for the removal of unaccompanied children. Clause 3(3) provides that the power in clause 3(2) may only be exercised to remove an unaccompanied child ahead of them reaching adulthood for family reunion purposes (reunion with a parent), removal to their country of origin (if from a safe country listed in section 80AA(1) of the Nationality, Immigration and Asylum Act 2002), where no protection claim is made or in other circumstances specified in regulations made by the Secretary of State.

Justification for the power

7. The Bill provides on its face the circumstances in which it may be appropriate to remove an unaccompanied child. However, the Government considers it necessary to be alert to the people smugglers changing their tactics to circumvent the Bill. As such, it is considered appropriate to have a power to extend the circumstances in which it would be possible to remove an unaccompanied child. Any decisions to use the power to make arrangements for removal will be done on a case by case basis.

Justification of the procedure

8. By virtue of clause 63(4)(a), regulations made under clause 3(3)(d) are subject to the draft affirmative procedure. This level of parliamentary scrutiny is considered appropriate given that the effect of any regulations would be to bring a further cohort of unaccompanied children within scope of the power to make arrangements for removal in clause 3(2).

**Clause 3(7): Power to add other exceptions to the duty to make arrangements for removal**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

Context and purpose

9. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Secretary of State to make arrangements to remove illegal entrants who meet the conditions in clause 2 from the UK as soon as reasonably practical to their home country or a safe third country. Clause 3(1) to (5) provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but may do so in certain circumstances. Clause 3(7) enables the Secretary of State, by regulations, to specify other categories of person who are permanently or temporarily excluded from the duty to remove. By virtue of clause 3(8), regulations made under clause 3(7) may modify the application of any enactment (as defined in clause 3(10)) in relation to a person to whom an exception applies. Clause 3(9) provides that regulations made under clause 3(8)(a) may, in particular, disapply any provision of the Act or any other enactment in relation to a person to whom an exception applies.

#### Justification for the power

10. The duty on the Secretary of State to make arrangements to remove illegal entrants who meet the conditions set out in clause 2 is absolute and stands unless the law provides otherwise. The Bill does not require the Secretary of State to make removal arrangements for unaccompanied children, although she may do so, but there are expected to be other limited exceptions. For example, it would be appropriate, in the interests of justice, to exclude on a temporary basis those persons within the cohort who are being prosecuted in the UK for a criminal offence or are subject to extradition proceedings (in the latter case a person would be extradited to the receiving country rather than removed under the duty in clause 2). It is not possible to anticipate all circumstances in which it may be appropriate to exclude certain categories of persons from the duty to remove; indeed there may be other limited circumstances where exceptions to the duty are appropriate and which only come to light based on operational experience.
11. As a consequence of excluding a category of persons from the duty to remove, it may be necessary to modify the application of the Illegal Migration Act or other enactments. The approach in the Bill for unaccompanied children has necessitated certain changes to or modifications of other enactments (see clauses 15 to 18) and it might, in particular, be necessary to modify immigration legislation to ensure it dovetails with any exceptions.

#### Justification for the procedure

12. By virtue of clause 63(5), regulations made under clause 3(7) are subject to the negative procedure. Notwithstanding that the power may be exercised to modify the Bill itself and other enactments, the negative procedure is considered appropriate given that any regulations made under this power would be beneficial to affected persons as the regulations would exclude them (either temporarily or permanently) from the duty to remove.

**Clause 6(1) and (5): Power to amend list of countries or territories to which a person may be removed**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative procedure where only removing countries or territories, or parts thereof, and draft affirmative in all other cases</i>

**Context and purpose**

13. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Secretary of State to make arrangements to remove, as soon as reasonably practicable, persons who meet the conditions in clause 2 to their home country or a safe third country. Clause 5(3) provides that, subject to the subsequent provisions in clause 4, a person may be removed to:
- (a) a country of which they are a national or citizen,
  - (b) a country or territory in which they have obtained a passport or other document of identity,
  - (c) a country or territory in which they embarked for the United Kingdom, or
  - (d) a country or territory to which there is reason to believe they will be admitted.
14. Under clause 5(4) a person may not be removed to a country or territory falling within clause 5(3)(a) or (b) if they are a national of a country listed in new section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), they have made a protection claim or a human rights claim, and the Secretary of State considers that there are exceptional circumstances (including those specified in clause 5(5)) which prevents the person’s removal to that country. In such a case the person may instead be removed to a country or territory falling within Clause 5(3)(c) or (d) but only if the country or territory is one listed in the Schedule to the Bill (see clause 5(6) and (7)).
15. Under clause 5(8) and (9) a person who is not a national of a country listed in new section 80AA of the 2002 Act may not be removed to a country or territory falling within clause 5(3)(a) or (b) if they have made a protection claim (as defined in section 82(2) of the 2002 Act) or a human rights claim and must instead be removed to a country or territory falling within clause 5(3)(c) or (d) but only if the country or territory is one listed in Schedule 1 to the Bill.
16. Clause 6(1), (2) and (5) enables the Secretary of State, by regulations, to amend Schedule 1 to the Bill by –
- (a) adding a country or territory, or part of a country or territory, to the Schedule;
  - (b) adding a country or territory, or part of a country or territory, to the Schedule in respect of a description of person;

- (c) modifying a reference to a country or territory, or part of a country or territory, in the Schedule, or
- (d) removing a country or territory, or part of a country or territory, from the Schedule.

17. Clause 6(1) provides that the Secretary of State may add a country or territory, or part of a country or territory, to Schedule 1 if the Secretary of State is satisfied that:

- (a) there is in general in that country or territory, or part, no serious risk of persecution, and
- (b) removal of persons to that country or territory, or part, pursuant to the duty in clause 2(1) will not in general contravene the United Kingdom's obligations under the Human Rights Convention as defined in the Bill – see clause 5(13).

In coming to a view on such matters, clause 6(4) requires the Secretary of State to have regard to all the circumstances of the country or territory, or part, including its laws and how they are applied, and to information from any appropriate source (including from member States of the EU and international organisations).

18. In addition to adding a country or territory, or a part of a country or territory, at large, regulations may also add a country or territory or part thereof in relation to a description of person. Clause 6(3) sets out a list of characteristics, such as a person's sex, which may be used for the purpose of such descriptions. The Schedule to the Bill already lists certain countries where only men may be removed to.

19. The list of countries in Schedule 1 (it does not currently contain any territories, although these may be added by regulations) is an amalgamation of the lists of safe countries currently set out in section 94(4) of the 2002 Act and paragraph 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act") with the addition of the Republic of Rwanda and the exclusion of Ukraine.

#### Justification for the power

20. Schedule 1 to the Bill contains a list of safe countries to which illegal entrants may be removed. The list is not intended to be exhaustive in that it does not include all countries where it would be considered safe to remove a person from the UK (for example, the list does not include countries such as Australia, Canada, New Zealand and the United States of America). The list may necessarily change over time as a result of political or other relevant developments either in the countries already listed in the Schedule or in countries not currently listed but where it would in future be safe to remove persons to in the future. In addition, the UK may enter into an agreement (similar to the Migration and Economic Development Partnership with the Republic of Rwanda) with one or more other safe countries or territories for the purposes of processing of asylum claims in that country or territory. In such circumstances, it is considered appropriate for the Government to be able to make amendments to the list through secondary legislation. Similar regulation-making powers are contained in section 94(5) and (6) of the 2002 Act and paragraph 20(1) of Schedule 3 to the 2004 Act.



### Justification for the procedure

21. By virtue of clause 63(4)(b), regulations made under clause 6(1) are subject to the draft affirmative procedure while, by virtue of clause 63(5), regulations made under clause 6(5) are subject to the negative procedure. The affirmative procedure is considered appropriate for any regulations which contain provision adding a country or territory (which would include a situation where a country had been listed only in relation to a description of person, and the regulations omit that entry, and add the country as a whole) given the potential consequences for an individual if they are removed to a country or territory so listed. In such cases, it is right that both Houses should be required to debate and approve such changes to the list before they take effect. The application of the draft affirmative procedure in such circumstances also acknowledges that this is a Henry VIII power. That said, the negative procedure is considered to afford an appropriate level of parliamentary scrutiny in the case of regulations removing a country or territory from the list given that the effect of such a change is that it would no longer be possible to remove a person to such a country or territory where they have made a protection or rights-based claim.
22. The approach taken here mirrors that taken to the similar regulation-making powers in the 2002 Act (see section 112(4) and (5)) and 2004 Act (see paragraph 21 of Schedule 3).

### **Clause 10(2) and (3) – new paragraph 16(2D) and (2E) of Schedule 2 to the immigration Act 1971 and new section 62(2B) and (2C) of the Nationality, Immigration and Asylum Act 2002: Powers of prescribe circumstances in which an unaccompanied child may be detained and time limit on the duration of detention for the purposes of removal**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* Negative procedure

### Context and purpose

23. Clause 10 of the Bill confers new powers to detain persons for the purposes of the scheme in the Bill. New paragraph 16(2D) of Schedule 2 to the immigration Act 1971 and new section 62(2B) of the Nationality, Immigration and Asylum Act 2002 provide that these detention powers may be exercised in respect of an unaccompanied child only in the circumstances specified in regulations made by the Secretary of State. New paragraph 16(2E) of Schedule 2 to the immigration Act 1971 and new section 62(2C) of the Nationality, Immigration and Asylum Act 2002 provide that the Secretary of State may, by regulations, specify time limits that apply in relation to the detention of an unaccompanied child for the purposes of removal.

24. At Report stage of the Bill on 26 April 2023 (Hansard, column 779), the immigration Minister made the following commitment:

“to working ..... to set out the new timescale under which genuine children may be detained for the purposes of removal without the authority of the court and what appropriate support should be provided within detention, recognising the obligations under the Children Act 1989, an important piece of legislation.”

#### Justification for the power

25. Clause 10 of the Bill sets out on the face of the immigration Act 1971 and Nationality, Immigration and Asylum Act 2002 the powers to detain any person, adult or child, for the purposes of the scheme in the Bill. The Government recognises the particular sensitivities around the detention of unaccompanied children and, in these circumstances, brought forward amendments to clause 11 at Commons Report stage to provide for these regulation making powers. Prescribing in regulations the circumstances in which an unaccompanied child may be detained under the powers conferred by the Bill enables the detention powers to be readily modified in the light of operational experience of the scheme, including in the light of any change in tactics by the people smugglers to circumvent the Bill. Similarly, leaving it to regulations to specify a time limit on the detention of unaccompanied children for the purpose of removal, if required, enables the Government to take into account the experience with the operation of the scheme.

#### Justification of the procedure

26. By virtue of new paragraph 16(2J) of Schedule 2 to the immigration Act 1971 and new section 62(H) of the Nationality, Immigration and Asylum Act 2002 the regulation-making powers under new paragraph 16(2D) and (2E) of Schedule 2 to the immigration Act 1971 and new section 62(2B) and (2C) of the Nationality, Immigration and Asylum Act 2002 are subject to the negative procedure. The negative procedure is considered appropriate as the effect of any regulations is to limit the circumstances in which an unaccompanied child may be detained or the duration of detention for the purposes of removal.

**Schedule 2, paragraphs 8, 10 and 11: Electronic devices etc - powers to make provision: for circumstances in which a relevant article will not need to be returned; about the handling of legally privileged information; authorising other persons to exercise seizure powers**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative procedure (power of retention); Draft affirmative procedure (items subject to legal privilege); Negative procedure</i>



Context and purpose

27. Schedule 2 confer powers to search for, seize and retain things on which relevant information is stored in electronic form, and to access, copy and use that information.
28. Paragraph 8 of Schedule 2 provides that an immigration officer or the Secretary of State may retain an article seized under this Schedule for as long as is considered necessary for a purpose relating to any function of an immigration officer or a function of the Secretary of State in relation to immigration, asylum or nationality. When it is no longer considered necessary to retain it, the article must be returned to the person from whom it was seized. Paragraph 8(2) provides a power for regulations to be made to make provision for law enforcement authorities to be alerted about and passed articles, or information on them, which were obtained through crime or are evidence of it. Such regulations may apply, with or without modifications, section 49 of the Immigration Act 2016 (duty to pass on certain seized items) or make corresponding provision. This is necessary to ensure that, for example, where evidence of non-immigration related criminal offending is found, this can be passed on to the police or other appropriate law enforcement agency.
29. There are no provisions in the Schedule that deal with the handling of legally privileged information but the Home Office will be issuing guidance to immigration officers that, unless relevant provision is made under paragraph 10, items subject to legal professional privilege must not be seized. Paragraph 10 provides that the Secretary of State may by regulations make provision about how articles that contain or may contain legally privileged information are handled. Paragraph 10(2) provides that regulations made under paragraph 10(1) may make:
- (a) provision modifying Schedule 2 as it applies in relation to relevant articles (namely an electronic device);
  - (b) provision applying (with or without modifications) any provision made by or under Part 2 of the Criminal Justice and Police Act 2001 (powers of seizure);
  - (c) provision corresponding, or similar, to any provision made by or under that Part.
30. Paragraph 11 provides that the Secretary of State may by regulations provide that references in Schedule 2 to an immigration officer include a person of a description specified in the regulations, and that a person of a description so specified may, if necessary, use reasonable force in the exercise of any function conferred by virtue of the regulations. Immigration officers are already empowered, if necessary, to use reasonable force by section 146, Immigration and Asylum Act 1999. Paragraph 11(2) provides that the descriptions of person that may be specified in the regulations include persons designated by the Secretary of State, in accordance with the regulations. If they do so, the regulations must contain such safeguards relating to the designation of persons as the Secretary of State considers appropriate

### Justification for the power

31. Schedule 2 provides for a new legal framework for the seizure and retention of electronic devices. Paragraph 8(1) expressly provides that such devices may be retained as long as is necessary for a purpose relating to any function of an immigration officer or a function of the Secretary of State in relation to immigration, asylum or nationality and further expressly provides for the return of devices once it is no longer necessary to retain them for such purposes. Having established these principles on the face of the Bill, it is considered appropriate to leave to secondary legislation the circumstances in which seized articles need not be returned where they may be relevant to the investigation of a non-immigration related crime. Leaving such matters to secondary legislation will enable the rules governing the return of seized articles to readily updated to reflect operational experience.
32. In relation to paragraph 10, again these are new powers and consequently it is not known what level of LPP material will be encountered and therefore whether it will impact the use of the seizure powers. In these circumstances it is considered appropriate to leave such matters to regulations.
33. In relation to paragraph 11, the Home Office wishes to preserve the ability to expand the scope of those who can use the powers. This will enable the Secretary of State in the future to authorise other cohorts of officials, for example police constables, as well as other designated persons such as contractors, to use the powers. There are analogous powers (exercisable administratively rather than via secondary legislation) that enable the Secretary of State to confer certain coercive powers on other specified categories of person, see for example paragraphs 25CA to 25CC of Schedule 2 to the Immigration Act 1971.

### Justification of the procedure

34. By virtue of clause 63(4)(i) and (5), regulations made under paragraph 10(1) of Schedule 2 are subject to the draft affirmative procedure, while those made under paragraph 8(2) or 11(1) are subject to the negative procedure. The affirmative procedure is considered appropriate for regulations made under paragraph 10(1) given the potential for this power to modify the application of the Schedule and the sensitive nature of items subject to legal professional privilege.
35. In relation to the power in paragraph 8, the negative procedure is considered to afford an adequate level of parliamentary scrutiny given that regulations made under this power must apply existing provisions relating to the retention of devices (section 49 of the Immigration Act 2016) with or without modifications or make provision corresponding, or similar, to that section.
36. In relation to the power in paragraph 11, the negative procedure is considered to afford an adequate level of parliamentary scrutiny because this will not create any new powers, but will simply extend the cohort of people who can use them. Additionally, paragraph 11(2) provides that if the regulations include persons designated by the Secretary of State, the regulations must contain such safeguards

relating to the designation of persons as the Secretary of State considers necessary.

**Clause 17(2)(b): Power to specify other kinds of information relating to the care of unaccompanied migrant children to be provided by a local authority to the Secretary of State**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

Context and purpose

37. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Secretary of State to make arrangements to remove, as soon as reasonably practicable, persons who meet the conditions in clause 2 to their home country or a safe third country. Clause 3(1) to (5) provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but has a power to do so in certain circumstances. Clauses 15 to 18 make provision for the accommodation of unaccompanied children in England. These clauses confer powers on the Secretary of State to provide accommodation and other support in England for unaccompanied children; provide for the Secretary of State to transfer responsibility for the care of an unaccompanied child to a local authority in England and provide a power for such responsibility to revert back to the Secretary of State ; place a duty on local authorities in England to provide information to the Secretary of State for the purposes of helping the Secretary of State to make a decision to transfer an unaccompanied migrant child to the local authority or vice versa; and provide for the enforcement of the duties on local authorities imposed by clauses 16 and 17.
38. To enable the Secretary of State to make a decision to transfer an unaccompanied child from Home Office accommodation to a local authority or vice versa, clause 17(1) enables the Secretary of State to direct a local authority to provide information to her for the purposes of helping her to make such a decision. Clause 17(2) provides that the information which the Secretary of State may direct a local authority to provide is information about the accommodation and support provided to children who are looked after by the local authority or such other information as may be specified in regulations.

Justification for the power

39. It is important that the Secretary of State has all relevant information to enable her to take a decision about the transfer of an unaccompanied child to a local authority and vice versa. The core information will relate to the accommodation and support provided to children who are looked after by the local authority, but there may be other information that is relevant to the making of such decisions. Specifying such

other information in regulations affords flexibility to respond to changing circumstances within local authorities.

40. An equivalent power is provided for in section 70 of the Immigration Act 2016 (sections 69 to 73 of that Act make like provision for the transfer of responsibility for caring for particular categories of unaccompanied migrant children, including unaccompanied asylum-seeking children, from one local authority in England, to another).

#### Justification for the procedure

41. By virtue of clause 63(5), the regulation-making power in clause 17(2)(b) is subject to the negative procedure. The negative procedure is considered appropriate for this power because any additional information that may be set out in regulations could be provided by a local authority only for purposes specified in the clause. As both the principle of a direction by the Secretary of State and the purposes for which that information may be used will have been subject to full parliamentary scrutiny during the passage of the Bill, it is not considered necessary for regulations under this power to then be debated and approved before they are made.
42. The analogous regulation-making power in section 70 of the Immigration Act 2016 was originally subject to the negative procedure and the Delegated Powers and Regulatory Reform Committee did not comment on the power (then in clause 40 of the Immigration Bill) in their report on the Bill (17<sup>th</sup> [Report](#) of Session 2015/16). Subsequently, section 93 of the Immigration Act 2016 was amended (see what is now section 93(2)(fb)) to make regulations made under section 70 subject to the affirmative procedure, but the rationale for doing so does not carry across to the regulations made under clause 17 (see the [explanatory note](#) to the Transfer of Responsibility for Relevant Children (Extension to Wales, Scotland and Northern Ireland) Regulations 2018).

#### **Clause 19: Power to make provision for Wales, Scotland and Northern Ireland to similar effect to clauses 15 to 18**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Draft affirmative resolution</i>

#### Context and purpose

43. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Secretary of State to make arrangements to remove, as soon as reasonably practicable, illegal entrants (who meet the other conditions in clause 2) to their home country or a safe third country. Clause 3(1) to (5) provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but has a power to do so in certain circumstances. Clauses 15 to 18 make provision for the care of unaccompanied children in England. These clauses confer powers on the

Secretary of State to provide accommodation and other support in England for unaccompanied children; provide for the Secretary of State to transfer responsibility for the care of an unaccompanied child to a local authority in England; and provide a power for such responsibility to revert back to the Secretary of State; place a duty on local authorities in England to provide information to the Secretary of State for the purposes of helping the Secretary of State to make a decision to transfer an unaccompanied migrant child to the local authority or vice versa; and provide for the enforcement of the duties on local authorities imposed by clauses 16 and 17.

44. Clause 19(1) enables the Secretary of State to make regulations enabling clauses 15 to 18 to apply in relation to Wales, Scotland and Northern Ireland. Clause 19(2) enables such regulations to amend, repeal or revoke any enactment, including the Illegal Migration Act. In effect, this power would enable regulations to make textual amendments to clauses 15 to 18 so that they apply across the UK and to make any necessary consequential amendments to legislation in Scotland, Wales and Northern Ireland relating to looked after children.

#### Justification for the power

45. While the provisions in the Bill as a whole are for a reserved or excepted purpose in each of Scotland, Wales and Northern Ireland (that is, immigration and nationality) and therefore not within the legislative competence of the Scottish Parliament, Senedd Cymru and Northern Ireland Assembly, the functions of local authorities in respect of looked after children is a devolved matter and this is reflected in different legislative regimes in each of Scotland, Wales and Northern Ireland. Consequently, in order to make the provisions in clauses 15 to 18 effective in Scotland, Wales and Northern Ireland it may be necessary to make some detailed modifications of Scottish, Welsh and Northern Ireland legislation. This will require detailed input from the devolved administrations. It is considered appropriate for this to be done in secondary legislation once the clauses in respect of England have been approved by Parliament. A similar approach was adopted in sections 69 to 73 of the Immigration Act 2016 which make like provision for the transfer of responsibility for caring for particular categories of unaccompanied migrant children, including unaccompanied asylum-seeking children, from one local authority in England, to another. Section 73 of the 2016 Act contains an analogous regulation-making power to that in clause 19.

#### Justification for the procedure

46. By virtue of clause 63(4)(c), regulations under clause 19(1) are subject to the draft affirmative procedure. This level of parliamentary scrutiny is considered appropriate given the Henry VIII nature of the power and is consistent with the level of scrutiny for the analogous power in section 73 of the 2016 Act.

**Clause 21(6), 23(6) and 24(6): Power to make provision about the circumstances in which it is necessary for a person to remain in the UK for purposes of cooperating with a law enforcement agency**

*Power conferred on:* Secretary of State

*Power exercisable by:* Statutory guidance

*Parliamentary procedure:* None

Context and purpose

47. Clause 21(3) provides that the disqualifications in clause 21(2) do not apply in relation to a person if: (a) the Secretary of State is satisfied that the person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation, (b) the Secretary of State considers that it is necessary for the person to be present in the United Kingdom to provide that cooperation, and (c) the Secretary of State does not consider that the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person. Equivalent provision is made in clauses 23(3) and 24(3). Clauses 21(5), 23(5) and 24(5) provide that the Secretary of State must assume for the purposes of subsection (3)(b) that it is not necessary for the person to be present in the United Kingdom to provide the cooperation unless the Secretary of State considers that there are compelling circumstances which require the person to be present in the United Kingdom for that purpose. Clauses 23(6), 24(6) and 25(6) provides that in determining whether there are compelling circumstances, the Secretary of State must have regard to guidance issued by the Secretary of State.

Justification for the power

48. The Bill itself sets out the framework for the disqualification of specified modern slavery provisions to persons who meet the conditions in clause 2 of the Bill. The purpose of any guidance under clauses 21, 23 and 24 is to support Home Office decision-makers, acting on behalf of the Secretary of State, in determining whether there are compelling circumstances for a person to be present in the United Kingdom for the purpose of the cooperation referred to above. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with good practice and the changing nature of the response to slavery and human trafficking.

Justification for the procedure

49. Guidance issued under clauses 21, 23 and 24 will not be subject to any parliamentary procedure on the grounds that it would provide practical advice to Home Office decision-makers when making a determination that there are compelling circumstances for a person to be present in the United Kingdom for the purpose of the cooperation referred to above. The guidance would be drafted in consultation with relevant law enforcement agencies and will be published. The guidance will not conflict with, or alter the scope of, the statutory framework for the



application of the public order disqualification to those who meet the conditions in clause 2. Moreover, whilst a Home Office decision-maker will be required to have regard to the guidance when making a determination, the guidance will not be binding. The approach taken here is in line with, for example, the guidance under section 49 of the Modern Slavery Act 2015 which is also not subject to any parliamentary procedure.

**Clause 23(9): Power to amend clause 23 in consequence of regulations made by the Scottish Ministers under the Human Trafficking and Exploitation (Scotland) Act 2015**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Draft affirmative resolution</i>

Context and purpose

50. Clauses 21 to 24 make provision for the disapplication of specified modern slavery provisions relating to removal from the UK, the grant of limited leave to remain in the UK and the provision of support to potential victims. Clause 4(1)(c) of the Bill provides that the duty on the Secretary of State to make arrangements to remove from the UK illegal entrants who meet the four conditions in clause 2 applies irrespective of whether a person claims to be a victim of slavery or human trafficking. Clauses 21 to 24 deal with the consequences of that provision. In particular, they disapply provisions in Part 5 of the Nationality and Borders Act 2022 which prevent the removal of a potential victim of modern slavery during a minimum 30-day recovery period and provide for the grant of limited leave to remain to confirmed victims of modern slavery in specified circumstances. These clauses also disapply provision in the Modern Slavery Act 2015 (and equivalent provision in legislation applicable to Scotland and Northern Ireland) in respect of the provision of support to victims of modern slavery. The disapplication of these provisions is set aside in cases where (a) the Secretary of State is satisfied that the person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation, (b) the Secretary of State considers that it is necessary for the person to be present in the United Kingdom to provide that cooperation, and (c) the Secretary of State does not consider that the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person.

51. Clause 23 disapplies provisions relating to the provision of support to potential victims of modern slavery in Scotland. The relevant provisions are: any duty of the Scottish Ministers under section 9(1) of the Human Trafficking and Exploitation (Scotland) Act 2015 to secure the provision of support and assistance to potential victims of modern slavery; any power of the Scottish Ministers under section 9(3) of that Act to secure the provision of support and assistance to potential victims of modern slavery; and duty or power of the Scottish Ministers under regulations

under section 10(1) of that Act relating to the provision of support or assistance to potential victims of modern slavery.

52. Clause 23(9) enables the Secretary of State to make regulations amending clause 23 in consequence of regulations made by the Scottish Ministers under section 9(8) or 10(1) of the Human Trafficking and Exploitation (Scotland) Act 2015.

#### Justification for the power

53. The drafting of clause 23 draws, in part, on section 9(6) and (7) of the Human Trafficking and Exploitation (Scotland) Act 2015 which, amongst other things, describes when there are reasonable grounds to believe that an adult is a victim of a trafficking offence for the purposes of securing support and assistance. However, subsection (8) of Section 9 of that Act confers a power on the Scottish Ministers to modify subsections (6) and (7). Clause 23 is also, in part, based on regulation 3 of the Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018, made under section 10(1) of the Human Trafficking and Exploitation (Scotland) Act 2015. The 2018 Regulations could also be modified or replaced in the future. It may therefore be necessary to amend clause 22 in consequence of regulations made by the Scottish Ministers under the powers conferred by sections 9(8) and 10(1) of the Human Trafficking and Exploitation (Scotland) Act 2015 to ensure that the text of clause 23 remains consistent with the relevant Scots law.

#### Justification for the procedure

54. By virtue of Clause 63(4)(d), regulations made under clause 23(9) are subject to the draft affirmative procedure. This level of scrutiny is considered appropriate given that this is a Henry VIII power and in view of the impact on potential victims of modern slavery. It is also noted that the regulation-making powers in Sections 9(8) and 10(1) of the Human Trafficking and Exploitation (Scotland) Act 2015 are themselves subject to the affirmative procedure in the Scottish Parliament (see section 41(2) of that Act).

### **Clause 25(3) and (8): Power to suspend and revive operation of a relevant provision in clauses 21 to 24**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative procedure where regulations suspend a relevant provision; draft affirmative procedure where regulations continue operation of a relevant provision; draft affirmative procedure where regulations revive operation of a relevant provision, save in cases of</i>

*urgency where made affirmative procedure applies; none where regulations only make transitional or saving provision.*

### Context and purpose

55. Clauses 21 to 24 make provision for the disapplication of certain modern slavery provisions relating to removal from the UK, the grant of limited leave to remain in the UK and the provision of support to potential victims. Clause 4(1)(c) of the Bill provides that the duty on the Secretary of State to make arrangements to remove from the UK illegal entrants who meet the four conditions in clause 1 applies irrespective of whether a person claims to be a victim of slavery or human trafficking. Clauses 21 to 24 deal with the consequences of that provision. In particular, they disapply provisions in Part 5 of the Nationality and Borders Act 2022 which prevent the removal of a potential victim of modern slavery during a minimum 30-day recovery period and provide for the grant of limited leave to remain to confirmed victims of modern slavery in specified circumstances. These clauses also disapply provision in the Modern Slavery Act 2015 (and equivalent provision in legislation applicable to Scotland and Northern Ireland) in respect of the provision of support to victims of modern slavery. The disapplication of these provisions is set aside in cases where a person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of their trafficking.
56. Clause 25(1) and (2) provide for the operation of a “relevant provision” in clauses 21 to 24 (save for the regulation-making power in clause 23(8)) to be suspended two years after the commencement of those clauses. Clause 25(3) to (5) then enable the Secretary of State, by regulations, to:
- a) provide for the operation of a relevant provision to be suspended before the time at which its operation would otherwise be suspended (for example, before the end of the initial two-year period provided for in clause 25(1));
  - b) provide for a relevant provision to continue in force for a further period not exceeding 12 months;
  - c) provide for the previously suspended operation of a relevant provision to be revived for a specified period not exceeding 12 months.
57. Clause 25(6) provides that the power to make regulations under clause 25(3)(b) or (c) may be exercised on multiple occasions, thereby enabling the operation of a relevant provision to continue for two or more periods of up to 12 months at a time.
58. Clause 25(8) confers a free-standing power to make regulations making transitional or saving provision in connection with the suspension of the operation of a relevant provision.

### Justification for the power

59. The provisions in clauses 21 to 24 reflect provision in Article 13(3) of the Council of Europe Convention on Action against Trafficking in Human Beings which

provides that State parties to the Convention are not bound to observe the minimum 30-day recovery and reflection period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. The Government considers that it is appropriate to apply the public order disqualification to illegal entrants who meet the four conditions in clause 2 on the basis that it is in the interests of the protection of public order in the UK including to prevent persons from evading immigration controls in this country, to reduce or remove incentives for unsafe practices or irregular entry, and to reduce the pressure on public services caused in particular by small boat crossings in the UK.

60. The Government recognises, however, that the application of the public order disqualification to this cohort of illegal entrants (subject to the limited exception where a person is cooperating with law enforcement agencies in the investigation or prosecution of an offence relating to the circumstances of their modern slavery or human trafficking) is a significant step and only justified during such time as the exceptional circumstances relating to the illegal entry into the UK, including such resulting from persons crossing the Channel in small boats, continues to apply. Accordingly, it is considered appropriate for the continued necessity for these provisions to be kept under review and for them to be automatically suspended after two years unless the Secretary of State is satisfied that the exceptional circumstances continue to apply, and Parliament has approved the extension (for no more than a year at a time) of the application of these provisions. Similarly, if the exceptional circumstances no longer apply for a period but then recur, it is appropriate that a similar process should apply to the reactivation of these provisions.

#### Justification for the procedure

61. By virtue of clause 63(4)(e) and (5), regulations made under clause 25(3)(a) are subject to the negative procedure while those made under clause 25(3)(b) are subject to the draft affirmative procedure. Clause 26 makes separate provision for the parliamentary procedure for regulations made under clause 25(3)(c). In such a case, the draft affirmative procedure applies save in cases of urgency where the made affirmative procedure applies. Given the impact of these provisions on potential victims of modern slavery it is considered appropriate that regulations that either continue the relevant provisions in force or reactivate them after a period in which they have lapsed should be debated and approved by each House. Generally, this should happen before the regulations take effect, but it may be necessary to make regulations speedily under clause 25(3)(c), for example in response to a new wave of small boat arrivals over the summer recess, in which case it is considered appropriate that the made affirmative procedure applies. Regulations suspending the operation of the relevant provisions would result in illegal entrants falling within the duty to remove in Clause 1 and who are potential victims of modern slavery being availed of the protections provided for in the relevant modern slavery legislation. In such circumstances, it is considered that the negative procedure affords an appropriate level of parliamentary scrutiny.
62. By virtue of clause 63(6)(a), regulations only made under clause 25(8) are not subject to any parliamentary procedure. If such regulations are combined with regulations under clause 25(3)(a), (b) or (c) the procedure appropriate to those

regulations will apply. The power in clause 25(8) is intended to ensure a smooth transition in the operation of modern slavery legislation in the event that the operation of the provisions in clauses 21 to 24 is suspended. This power is akin to standard powers to make transitional or saving provision in connection with the commencement of provisions in a Bill (see, for example, clause 57(5) of this Bill); such powers are not usually subject to any parliamentary procedure on the basis that Parliament will have already approved the substantive provisions to which any transitional or saving provision relates. Here, provision for the suspension of the provisions in clauses 21 to 24 is included on the face of the Bill (clause 25(1)) or will be included in regulations (made under clause 25(3)(a)) subject to the negative procedure; the former provision will therefore have been subject to parliamentary scrutiny during the passage of the Bill and there will be an opportunity for either House to scrutinise any regulations made under the latter provision. Given this, it is not considered necessary for free-standing regulations made under clause 24(8) to be subject to separate scrutiny arrangements.

### **Clause 37(9): Power to amend definition of “working day”**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

### **Context and purpose**

63. Clauses 37 to 54 make provision in respect of legal proceedings connected with the duty to make arrangements for removal in clause 2 of the Bill. Under these clauses the only legal challenges which would suspend removal pending the outcome of the challenge are those where a person liable to removal claims that, before the end of the relevant period (as defined in clause 38(9)), their removal to a safe third country would result in them facing a real, imminent and foreseeable risk of serious and irreversible harm (a serious harm suspensive claim) or where a person served with a notice of removal claims that they do not in fact meet the four conditions in clause 2 (a factual suspensive claim). All other legal challenges would be non-suspensive.

64. Clause 48 imposes a duty on the Tribunal Procedure Rules Committee to introduce procedural rules which set out the timing for determining an appeal against a decision to refuse a suspensive claim and, for determining an application for permission to appeal following the certification of a claim or refusal to accept there were good reasons for a late claim. The Bill provides for a period of seven working days for a claimant to submit an appeal or to apply for permission to appeal and a period of 23 working days for the Upper Tribunal to make a decision on an appeal or seven working days to determine an application for permission to appeal. Clause 37 defines a working day as a day other than a Saturday, a Sunday, Christmas Day, 35 Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

### Justification for the power

65. The Bill itself sets out the timings for each stage of the process in respect of the submission of suspensive claims, their consideration by the Home Office and for the appeal process so that removals are not significantly delayed. It is envisaged that this power would be exercised to amend the definition of working days in the event that it is possible for appeals to be processed and hearings to take place seven days a week.

### Justification for the procedure

66. By virtue of Clause 63(5), regulations made under clause 37 are subject to the negative procedure. Notwithstanding that this is a Henry VIII power, the negative procedure is considered to provide an adequate level of parliamentary scrutiny given the very narrow scope of the power.

### **Clause 39(1): Power to amend clause 38 to make provision about the meaning of “serious and irreversible harm”**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Draft affirmative resolution</i>

### Context and purpose

67. Clauses 37 to 54 make provision in respect of legal proceedings connected with the duty to make arrangements for removal in clause 2 of the Bill. Under these clauses the only legal challenges which would suspend removal pending the outcome of the challenge are those where a person liable to removal claims that, before the end of the relevant period (as defined in clause 38(9)), their removal to a safe third country would result in them facing a real, imminent and foreseeable risk of serious and irreversible harm (a serious harm suspensive claim) or where a person served with a notice of removal claims that they do not in fact meet the four conditions in clause 2 (a factual suspensive claim). All other legal challenges would not suspend the person’s removal.

68. Clause 38 defines “serious and irrevocable harm” for the purposes of the Act. Clause 39 enables the Secretary of State, by regulations, to amend clause 38 to make further provision about the meaning of “serious and irreversible harm”.

### Justification for the power

69. A person subject to the duty to remove will have a limited time in which to bring a claim based on a real, imminent and foreseeable risk of serious and irreversible harm arising from their removal to a specified third country. The real risk of serious and irreversible harm test reflects that applied by the European Court of Human Rights when considering whether to grant interim measures under Rule 39 of its



Rules of Court. Clause 38 sets out the basis for a domestic interpretation of serious and irreversible harm and provides a framework for decisions on serious harm suspensive claims. As the jurisprudence develops it may be necessary or desirable to amend clause 38, in particular the examples of what does and does not constitute serious and irreversible harm. This regulation-making power will enable such changes to be made promptly, providing timely and up to date guidance to the courts.

#### Justification for the procedure

70. By virtue of clause 63(4)(f), the regulation-making power in clause 38 is subject to the draft affirmative procedure. The affirmative procedure is considered appropriate as any amendments to clause 38 will impact on the Secretary of State's and the Upper Tribunal's consideration of serious harm suspensive claims made by persons issued with a removal notice. The affirmative procedure also recognises that this is a Henry VIII power.

**Clause 41(5) and 42(5): Power to prescribe the information to be contained in a claim, and the form and manner in which the claim is to be submitted, to support a serious harm suspensive claim or factual suspensive claim**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

#### Context and purpose

71. Clauses 37 to 54 make provision in respect of legal proceedings connected with the duty to make arrangements for removal in clause 2 of the Bill. Under these clauses the only legal challenges which would suspend removal pending the outcome of the challenge are those where a person liable to removal claims that, before the end of the relevant period (as defined in clause 38(9)), their removal to a safe third country would result in them facing a real, imminent and foreseeable risk of serious and irreversible harm (a serious harm suspensive claim) or where a person served with a notice of removal claims that they do not in fact meet the four conditions in clause 2 (a factual suspensive claim). All other legal challenges would not suspend the person's removal.

72. The intention of the Bill is that illegal entrants who meet the four conditions in clause 2 are promptly removed from the UK. To achieve this, clauses 37 to 54 provide for an expedited process for the consideration of any suspensive claims by the Secretary of State (in practice, the Home Office) and any appeal resulting from a decision to refuse a claim. Clause 41(5) provides that a serious harm suspensive claim must (a) contain compelling evidence that the person would, before the end of the relevant period, face a real, imminent and foreseeable risk of serious irreversible harm if removed under clause 2 from the United Kingdom to the particular country or territory specified in the removal notice; (b) contain the

prescribed information; and (c) be made in the prescribed form and manner. Clause 41(5) further provides that “prescribed” means prescribed in regulations made by the Secretary of State. Clause 42(5) makes like provision in respect of a factual suspensive claim. In such a case, a claim must again contain the prescribed information and be made in the prescribed form and manner. These provisions will facilitate the expeditious consideration of claims by providing for them to be submitted in a standard format and with the appropriate information to enable the claim to be assessed and a decision promptly taken.

#### Justification for the power

73. The Bill itself provides that any suspensive claim must set out evidence in support of the claim. It is considered appropriate to then provide for relevant information and the form and manner it is presented (including on a claim form designed for this purpose) to be left to secondary legislation. The prescribed information may relate to the evidence in support of a claim, for example, if the claim is based on the medical condition of the claimant, the regulations may provide that the claim needs to be supported by medical evidence from a doctor, or relate to information about the claimant (name, date of birth, nationality etc) and his or her representative (for example, name and contact details). Setting out such matters in regulations would enable them to be amended promptly as necessary, for example, in the light of judgments by the Upper Tribunal in determining appeals against decisions made by the Secretary of State; such judgments may include observations on the decision-making processes which could be strengthened by amending the prescribed information and/or the prescribed form.

#### Justification for the procedure

74. By virtue of clause 63(5), regulations made under clauses 41 and 42 are subject to the negative procedure. The regulations deal with secondary matters in support of a suspensive claim and augment express provision on the face of the Bill to the effect that a claim must be supported by compelling evidence. In these circumstances, it is considered that the negative procedure affords an adequate level of parliamentary scrutiny.

### **Clause 56(1): Power to make provision about refusal to consent to scientific methods**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

#### Context and purpose

75. Clause 56 provides a power to make regulations about the effect of a refusal, by a person to whom the Bill applies, to consent to the use of a scientific method in an

age assessment without good reason. The regulations may provide that, in certain circumstances, the person may be assumed to be an adult. Making such a provision will help disincentivise individuals deliberately misrepresenting their ages in order to cheat the system and who are putting genuine children at risk.

#### Justification for the power

76. Regulations to be made under this power are intended to disincentivise individuals from deliberately misrepresenting their ages to undermine the objectives of the Bill. Taking this power future-proofs the legislation by allowing the Secretary of State to set out the circumstances in which refusal of consent without good reason may result in an assumption that the individual is an adult when the scientific methods in question further develop.
77. Making such provision in regulations enables account to be taken of scientific advances in the field of scientific age assessments. The Secretary of State will not exercise the power until satisfied that the scientific methods in question are sufficiently accurate to mean that applying the automatic assumption in cases of refusal to consent will be compatible with the European Convention on Human Rights (in particular Article 8 (right to private and family life)).

#### Justification of the procedure

78. By virtue of clause 63(5), regulations under clause 56 are subject to the negative procedure. It is considered that this procedure is appropriate since the power will not be exercised until the Secretary of State is satisfied that the scientific methods in question are sufficiently accurate to mean that applying the automatic assumption in cases of refusal of consent will be compatible with the European Convention on Human Rights.

#### **Clause 57(3) – new section 80AA(2) of the Nationality, Immigration and Asylum Act 2002: Power to amend list of safe countries for purpose of Section 80A of the 2002 Act**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Draft affirmative resolution where adding to or amending list of States; negative procedure only where removing States</i>

#### Context and purpose

79. Section 80A of the 2002 Act, as inserted by section 15 of the Nationality and Borders Act 2022, provides that asylum claims from EU nationals must be declared inadmissible to the UK's asylum system, unless there are exceptional circumstances as a result of which the Secretary of State considers the claim ought

to be considered, as European Union member states are deemed as inherently safe. This means that the State does not have to substantively consider the claim, except in exceptional circumstances as set out above, and individuals can be returned to their country of nationality.

80. While the UK was a member of the EU, inadmissibility processes were explicitly allowed under EU law, including through the Dublin Regulation and the Protocol on Asylum for Nationals of Member States (“the Spanish Protocol”). The Spanish Protocol provides, in effect, that an application for asylum made in an EU member state by a national of another EU member state should be considered inadmissible save in certain defined circumstances and sets out how an admissible claim should be dealt with in one of those circumstances. The basis of the Spanish Protocol is founded in the fact that EU member states are required by Article 2 of the Treaty on European Union to respect human dignity, freedom, democracy, equality, the rule of law and human rights. It is therefore considered that the level of protection afforded to individuals’ fundamental rights and freedoms in EU member states means that they are deemed to be safe countries. As such, there is, except in exceptional circumstances, no risk of persecution of EU nationals in EU countries that would give rise to a need for international protection.
81. Section 80A(1) and (3) impose a duty on the Secretary of State to declare asylum claims and humanitarian protection claims inadmissible unless exceptional circumstances apply. The current guidance appears here [EEA and EU asylum claims \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/guidance/eea-and-eu-asylum-claims) (the Policy).
82. Clause 57(3) inserts new section 80AA into the 2002 Act which creates a list of safe countries of origin for the purposes of section 80A of the 2002 Act. That list comprises EU member states, non-EU EEA countries (namely, Iceland, Liechtenstein and Norway), Switzerland and Albania. New section 80AA(2) confers a power on the Secretary of State, by regulations, to add or remove a State the Secretary of State considers safe subject to certain criteria being fulfilled. The power to add a State would apply where the Secretary of State is satisfied that there is in general in that state no serious risk of persecution of nationals of that State, and removal to that State of nationals of that State will not in general contravene the UK’s obligations under the European Convention on Human Rights (new section 80AA (3)). In coming to a view on such matters, new section 80AA(4) requires the Secretary of State to have regard to all the circumstances of the State, including its laws and how they are applied, and to information from any appropriate source (including from member States of the EU and international organisations).

#### Justification for the power

83. There are other demonstrably safe countries, in addition to the EU member states, to which the Government considers it is appropriate to extend the inadmissibility procedure provided for in section 80A of the 2002 Act. The Bill itself adds Albania, Iceland, Liechtenstein, Norway and Switzerland to the list. Before adding further countries to the list, the government considers it appropriate to conduct, on a case-by-case basis, an assessment so that the Secretary of State can be satisfied that it is safe to return nationals of the relevant State to that country. To enable such

prior assessments to be undertaken, it is considered appropriate to be able to add States to the list by regulations. Conversely, should the circumstances in a listed country radically change such that the Secretary of State was no longer satisfied that the State met the test in new section 80AA(3), it is appropriate that a country should be removed from the list through secondary legislation.

84. Similar regulation-making powers are contained in section 94(5) and (6) of the 2002 Act and paragraph 20(1) of Schedule 3 to the 2004 Act.

#### Justification for the procedure

85. By virtue of new section 80AA(6) and (7), regulations containing provision adding a State to the list in new section 80AA(1), or which both add a State and remove a State from the list are subject to the draft affirmative procedure, while regulations containing provision which just removes a State are subject to the negative procedure. The draft affirmative procedure is considered appropriate for any regulations adding a State to the list given the potential consequences for an individual if they are removed to a State so listed. In such cases, it is right that both Houses should be required to debate and approve such changes to the list before they take effect. The application of the draft affirmative procedure in such circumstances also acknowledges that this is a Henry VIII power. That said, the negative procedure is considered to afford an appropriate level of parliamentary scrutiny in the case of regulations removing a State from the list given that the effect of such a change is that the inadmissibility procedure in section 80A would no longer apply to nationals of that country or territory.

86. The approach taken here mirrors that taken to the similar regulation-making powers in the 2002 Act (see section 112(4) and (5)) and 2004 Act (see paragraph 21 of Schedule 3).

#### **Clause 58(1) and (7): Power to specify annual cap on the number of persons to be admitted to the UK via safe and legal routes**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Draft affirmative resolution</i>

#### Context and purpose

87. In an [oral statement](#) to Parliament on illegal migration on 13 December 2023, the Prime Minister announced that:

“The only way to come to the UK for asylum will be through safe and legal routes and, as we get a grip on illegal migration, we will create more of those routes. We will work with the United Nations High Commissioner for Refugees to identify those who are most in need so that the UK remains a safe haven for the most vulnerable. We will also introduce an annual quota on numbers, set

by Parliament in consultation with local authorities to determine our capacity, and amendable in the face of humanitarian emergencies.”

The Prime Minister's statement sets out the government's commitment to continue to provide safe and legal routes for protection, with the intention that this commitment is achieved through resettlement routes.

88. Clause 58(1) places a duty on the Secretary of State, by regulations to specify the maximum number of persons who may enter the United Kingdom each year using safe and legal routes. Clause 58(7) confers a power to define safe and legal routes for these purposes. While this is expressed as a power to make regulations, there is an implicit duty to do so. This is a duty to make regulations under subsection (1), and this could not be complied with if there were no regulations setting out what were safe and legal routes.
89. In preparing the regulations under clause 58(1) the Secretary of State is required to consult representatives of local authorities and such other persons as the Secretary of State considers appropriate; this requirement is disapplied in cases of urgency. The duty to consult does not apply where the Secretary of State considers that the number needs to be changed as a matter of urgency (clause 58(3)). The first such consultation must take place within three months of Royal Assent (clause 58(4)).

#### Justification for the power

90. The United Kingdom has a long and proud history of offering sanctuary to refugees. between 2015 and December 2022, just under half a million (481,804) people were offered safe and legal routes into the UK, including those from Hong Kong, Syria, Afghanistan and Ukraine, as well as family members of refugees. But the country's capacity to take in those fleeing conflict, persecution or humanitarian disasters is not infinite. Supporting the settlement of refugees into communities draws on resources at national and local level, including housing, educational, health and welfare services. It is appropriate therefore that decisions around the numbers to be admitted for settlement each year through safe and legal routes reflect the capacity of local authorities, and other front-line service providers, to support new arrivals. Such judgements need to be made periodically, whether on an annual or multi-year basis, in consultation with representatives of local authorities and others. Until such consultation has taken place, it is not feasible to specify an annual figure on the face of the Bill. Moreover, the figure will be subject to change over time as capacity varies. It is therefore considered appropriate to specify the annual figure in secondary legislation.
91. There are currently existing resettlement routes in the UK including:
- (a) the Afghan Citizens Resettlement Scheme;
  - (b) the UK Resettlement Scheme;
  - (c) the Mandate Resettlement Scheme;
  - (d) the Community Sponsorship Scheme.

See [here](#) for more information about these schemes.



92. These schemes are established on an administrative basis and not provided for in the Immigration Rules. Moreover, the schemes are subject to periodic change and maybe withdrawn and replaced from time to time. The examples given in paragraph 91 may not be included in the safe and legal routes specified in the regulations - defining the routes and cap figure depends on a number of factors including local authority capacity and the resettlement routes offered at the time of the regulations. As such, it is not considered appropriate to specify these schemes on the face of the Bill but instead specify the relevant schemes in regulations.

#### Justification for the procedure

93. By virtue of clause 63(4)(g), regulations made under clause 58(1) and (7) are subject to the draft affirmative procedure. The maximum number set in the regulations will impact on communities across the UK and the definition of safe and legal routes is central to the determination of the annual number to be admitted for settlement, it is therefore considered appropriate that the regulations are debated and approved by both Houses before they take effect.

#### **Clause 62(1): Power to make consequential amendments**

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution (if it does not amend primary legislation), otherwise draft affirmative resolution</i>

#### Context and purpose

94. Clause 62(1) confers a power on the Secretary of State to make consequential provision for the purposes of the Bill. Such provision may, in particular, amend, repeal or revoke any enactment passed or made before, or in the same Session as, this Bill.

#### Justification for the power

95. The powers conferred by this clause are wide, but they are limited by the fact that any amendments made under the regulation-making power must be consequential on provisions made by or under the Bill. There are various precedents for such provisions, including Section 84(2) of the Nationality and Borders Act 2022. The Bill already includes some changes to other enactments as a consequence of the substantive provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers it appropriate to enable true consequential amendments to be made by regulations in order to ensure that the changes effected by this Bill can be effectively delivered, mitigating the risk of undermining the operation of the immigration and asylum system if a provision were missed.

### Justification for the procedure

96. If regulations made under this power do not amend or repeal primary legislation, they will be subject to the negative resolution procedure (by virtue of clause 54(5)). The affirmative procedure is not considered necessary or suitable for any applicable amendments which might be made to secondary legislation by virtue of this clause as any applicable orders and regulations will have no impact or very little impact on rights and will be administrative or procedural in nature. If regulations made under this power do amend or repeal provision in primary legislation, they will be subject to the affirmative resolution procedure (by virtue of clause 63(4)(h)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause and is consistent with the approach taken in the Nationality and Borders Act 2022 and elsewhere.

### **Clause 65(7) and (10): Channel Islands and Isle of Man**

*Power conferred on:* *His Majesty*

*Power exercisable by:* *Order in Council*

*Parliamentary procedure:* *None*

### Context and purpose

97. Clause 65(7) contains a standard power (known as a “permissive extent clause”) to allow some or all of the provisions of the Bill to be extended to one or more of the Channel Islands and the Isle of Man. Clause 65(10) provides that the existing permissive extent clauses in the enactments specified in Clause 65(11) may also be exercised in relation to any amendments to those enactments made by the Bill.

### Justification for the power

98. It is appropriate that primary legislation is not required to extend the provisions of the Bill or the amendments made by this Bill to the specified enactments to the Crown Dependencies. The extension of the provisions to the Crown Dependencies would occur only with the agreement of those jurisdictions’ authorities, and would be the means by which the Bill could be extended without those jurisdictions being required to legislate for themselves. A similar free-standing permissive extent clause and extensions to existing permissive extent clauses were included in section 86(4) and (5) of the Nationality and Borders Act 2022.

### Justification for the procedure

99. The new and modified permissive extent clauses are not subject to any parliamentary procedure. This reflects the customary position for Orders in Council extending provisions of an Act to the Crown Dependencies or British overseas territories.

### **Clause 66(1): Commencement power**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* None

#### Context and purpose

100. Clause 66(1) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.

#### Justification for the power

101. Leaving provisions in the Bill 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

102. As is usual with commencement powers, regulations made under clause 57(1) are not subject to any parliamentary procedure (see clause 54(6)(b)). Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

### **Clause 66(5): Power to make transitional, transitory or saving provision**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* None

#### Context and purpose

103. Clause 66(5) confers on the Secretary of State power to make transitional or saving provision in connection with the coming into force of any provision of the Bill.

#### Justification for the power

104. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, Section 208(6) of the Police, Crime, Sentencing and Courts Act 2022.

### Justification for the procedure

105. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure (by virtue of clause 63(6)(b)).

**Home Office**  
**27 April 2023**