



Law Society  
of Scotland

# Law Society of Scotland

## Second Reading Briefing on the Nationality and Borders Bill

January 2022





## Contents

---

<b>INTRODUCTON</b>	<b>3</b>
<b>PART 1 – NATIONALITY</b>	<b>3</b>
<b>PART 2 - ASYLUM</b>	<b>5</b>
<b>PART 3 - IMMIGRATION OFFENCES AND ENFORCEMENT</b>	<b>12</b>
<b>PART 4 – AGE ASSESSMENTS</b>	<b>16</b>
<b>PART 5 - MODERN SLAVERY</b>	<b>16</b>
<b>PART 6 – MISCELLANEOUS</b>	<b>18</b>
<b>PART 7 – GENERAL</b>	<b>20</b>

## Introduction

---

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

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

## General Comments

---

### PART 1

#### NATIONALITY

British Overseas Territories citizenship

1 Historical inability of mothers to transmit citizenship.

#### Our Comment

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

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

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

2 Historical inability of unmarried fathers to transmit citizenship.

**Our Comment**

We agree with the proposal to remove this discriminatory provision.

3 Sections 1 and 2: related British citizenship

**Our Comment**

We have no comment to make.

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

**Our Comment**

We agree with clause 4.

*British citizenship*

5 Disapplication of historical registration requirements

**Our Comment**

We agree with clause 5.

6 Citizenship where mother married to someone other than natural father

**Our Comment**

We agree with clause 6.

**Our Comment**

Powers of the Secretary of State relating to citizenship etc.

7 Citizenship: registration in special cases

**Our Comment**

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

## 8 Requirements for naturalisation etc

### **Our Comment**

We agree with clause 8.

## 9 Notice of decision to deprive a person of citizenship

### **Our Comment**

We are not satisfied that the Government has fully justified the removal of citizenship without notifying the affected person. This clause should be reconsidered.

### *Registration of stateless minors*

## 10 Citizenship: stateless minors

### **Our Comment**

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

## **PART 2**

### **ASYLUM**

#### *Treatment of refugees; support for asylum-seekers* 11 Differential treatment of refugees

### **Our Comment**

Clause 10 provides for “differential treatment of refugees” depending on their mode of arrival. The Home Secretary already has power to treat refugees differently depending on their mode of arrival, but this power should not be used in a discriminatory way. The distinction made in subsection (1) between types of

refugee based on how they arrived in the UK has been criticised by the UNHCR who has stated that this provision threatens “to create a discriminatory two-tier asylum system, undermining the 1951 Refugee Convention and longstanding global cooperation on refugee issues”:

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

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

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

Clause 36 of the bill which deals with the interpretation of Article 34(1) of the Refugee Convention, seems to adopt a restricted meaning:

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

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

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

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

12 Accommodation for asylum-seekers etc

## **Our Comment**

Clause 12 allows for differential provision of accommodation to asylum seekers depending on the stage of their claim and their compliance with various conditions. There does not seem to be any particular need for this to be in an Act of Parliament as the Home Secretary could already do this.

### *Place of claim*

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

### **Our Comment**

The Home Secretary is currently able to designate specific places from which to claim asylum. Clause 13 slightly adjusts the existing Immigration Rules part 11: Rule 327B which defines a “designated place of asylum claim” where refugees may claim asylum. The bill omits “an airport” as a designated place. Clause Page 6 12 (6) redefines “asylum claim” to exclude making a request for international protection which brings the Immigration Rules into conformity with section 113 of the Nationality, Immigration and Asylum Act 2002.

### *Inadmissibility*

14 Asylum claims by EU nationals: inadmissibility.

### **Our Comment**

The New Plan for Immigration Consultation Paper noted that since the UK has left the European Union, “protection claimants who have sought international protection in an EU member state can no longer join family members in the UK using EU law”. The bill provides that the Secretary of State must (subject to an exceptional circumstances provision) declare an asylum claim made by a person who is a national of a member State inadmissible. The mandatory provision which applies to the Secretary of State in clause 14 can be distinguished from the permissive provision in clause 15 where the asylum claimant has a connection to a safe third country. The amendments are contained in clauses 14 and 15 by adding a new Part 4A containing new sections 80A to 80C to the Nationality, Immigration and Asylum Act 2002.

This provision currently exists in the Immigration Rules part 11: asylum 326A procedure which came into effect on 1 January 2021. This means those seeking international protection from a Member State of the EU must apply to join family members in the UK under the Immigration Rules like those from the ‘rest of the world’. Whilst we agree with the principle of equal treatment why is Clause 14 of the bill considered necessary? New Section 80A is in substance a reproduction of Asylum Rules 326E and 326F.

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

### **Our Comment**

The bill provides that the Secretary of State may declare an asylum claim made by a person who has a connection to a safe third country. This permissive provision which applies to the Secretary of State in clause 15 can be distinguished from the obligation on the Secretary of State in clause 14.

16 Clarification of basis for support where asylum claim inadmissible.

#### **Our Comment**

Clause 16 removes the right to normal asylum support where an asylum claim is declared inadmissible.

#### *Supporting evidence*

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

#### **Our Comment**

Clause 17 reflects the terms of Regulation 339L which places a duty on an asylum claimant to substantiate the claim for asylum. Accordingly why is Clause 17 of the bill considered necessary?

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

#### **Our Comment**

Clause 18 seeks to amend Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (claimant's credibility) by inserting new subsections 3A and 3B which provide that behaviour not in good faith can affect the assessment of credibility including behaviour in connection with an asylum or human rights claim, towards an immigration officer or in connection with judicial review proceedings. The Claimant's credibility is already comprehensively covered by section 8 of the 2004 Act and these provisions may not enhance the existing law.

#### *Priority removal notices*

19 Priority removal notices

#### **Our Comment**

We have no comment to make at this time.

20 Priority removal notices: supplementary

#### **Our Comment**

We have no comment to make at this time.

21 Late compliance with priority removal notice: damage to credibility

#### **Our Comment**

We have no comment to make at this time.

22 Priority removal notices: expedited appeals



### **Our Comment**

We have no comment to make at this time.

23 Expedited appeals: joining of related appeals

### **Our Comment**

We have no comment to make at this time although on first examination this appears to be a sensible provision.

24 Civil legal services for recipients of priority removal notices

### **Our Comment**

Clause 24 does not apply to Scotland. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply in Scotland and therefore these provisions will have no effect to applicants whose legal aid provision is under the Legal Aid (Scotland) Act 1986.

*Late evidence*

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

### **Our Comment**

We have no comment to make at this time.

Appeals 26 Accelerated detained appeals

### **Our Comment**

We have no comment to make at this time.

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

### **Our Comment**

We have no comment to make at this time.

*Removal to safe third country*

28 Removal of asylum seeker to safe country

### **Our Comment**

We have no comment to make at this time.

*Interpretation of Refugee Convention*

29 Refugee Convention: general

### **Our Comment**

We have no comment to make at this time.

30 Article 1(A)(2): persecution

### **Our Comment**

We have no comment to make at this time.

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

### **Our Comment**

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

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

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

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

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

In summary, we take the view that the change in clause 31 appears to go against the intention of the New Plan for Immigration, and flies in the face of 25 years judicial scrutiny.

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

**Our Comment**

We have no comment to make at this time.

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

**Our Comment**

We have no comment to make at this time.

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

**Our Comment**

We have no comment to make at this time.

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

**Our Comment**

36 Article 31(1): immunity from penalties

**Our Comment**

We have no comment to make at this time.

37 Article 33(2): particularly serious crime

**Our Comment**

We have no comment to make at this time.

*Interpretation*

38 Interpretation of Part 2

**Our Comment**

We have no comment to make at this time.

## PART 3

### IMMIGRATION CONTROL

#### *Immigration offences and penalties*

#### 39 Illegal entry and similar offences

##### **Our Comment**

Clause 39 of the Bill adds a new component to the existing offence of illegal entry. Subsection (2) adds new subsections to section 24 of the Immigration Act 1971. New Subsection (C1) makes it an offence for someone who requires entry clearance to arrive in the UK without *valid entry clearance*.

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

*The concept of ‘entering the UK without leave’ has caused difficulties about precisely what ‘entering’ means in the context of the current section 24(1)(a) of the 1971 Act’* paragraph 390.

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

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

*This will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don’t technically “enter” the UK”* paragraph 394.

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

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

#### 40 Assisting unlawful immigration or asylum seeker.

##### **Our Comment**

Clause 40 increases the minimum sentence from 14 years to life imprisonment and criminalises helping an asylum seeker to arrive in the UK, even if not for gain. At the moment it is only a criminal offence to help an

asylum seeker to arrive in the UK if this is done for gain (i.e., if done by a people smuggler). The “for gain” element is being removed. As a result, almost anyone who helps an asylum seeker to arrive in the UK will potentially be guilty of an offence, subject to whatever defences may be available under criminal law. How will this affect organisations such as the Royal National Lifeboat Institution? We are also concerned about the effect on Ships’ Masters who save asylum seekers from drowning as they are obliged to do by the Duty to Render Assistance under Article 98 of the UN Convention on the Law of the Sea: [UNCLOS and Agreement on Part XI - Preamble and frame index](#)

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

The original proposals in the bill might be thought to have been mitigated by the inclusion of further subclauses which insert new subsections 25BA and 25BB into the Immigration Act 1971 seeking to make new provision of the “facilitation offences” to rescuers, and provide defences in connection with stowaways. Unfortunately, the new provisions are not sufficient to deal with the variety of circumstances which can emerge when rescuing people in danger or distress at sea.

New Section 25BA provides:

- (1) A person does not commit a facilitation offence if the act of facilitation was an act done by or on behalf of, or co-ordinated by—
  - (a) Her Majesty’s Coastguard, or
  - (b) an overseas maritime search and rescue authority exercising similar functions to those of Her Majesty’s Coastguard.

How will such authority be evidenced? Will all radio communications relating to the coordination need to be recorded? What if a facilitation requires urgent intervention and the authority cannot be granted quickly enough? Will a retrospective grant of authority be permitted?

New Section 25BA (2) and (3) provide for statutory defences and exclusions from the defences. These provisions underscore the problems created by such provisions when compared with the existing regime.

41 Penalty for failure to secure goods vehicle

## **Our Comment**

We have no comment to make at this time.

### *Working in United Kingdom waters: arrival and entry*

#### 42 Working in United Kingdom waters: arrival and entry

##### **Our Comment**

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

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

To regulate work which takes place inside territorial waters, clause 42 will create a system of "authorisation".

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

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

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

##### *Enforcement*

#### 43 Power to search container unloaded from ship or aircraft.

##### **Our Comment**

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

## 44 Maritime enforcement

### Our Comment

Clause 44 and Schedule 6 of the Bill introduce amended maritime enforcement powers, with the explicit intention of stopping small boats crossing the Channel (Explanatory Notes, paragraph 437). Existing powers to divert migrant vessels will, in future, apply to ships that are in foreign or international waters (rather than just those in UK waters, as is currently the case). “Ship” is redefined to include:

*... any ‘other structure... constructed or used to carry persons, goods, plant or machinery by water’, which is intended to include anything which may be used to cross the English Channel [Explanatory Notes, paragraph 825].*

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

### *Removals*

## 45 Removals: notice requirements

### Our Comment

Clause 45 amends the power to remove people from the UK when they do not have a visa.

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

Clause 45 changes this and provides that a person can only be removed after:

1. They have been given a written removal notice which specifies the date they will be removed and the country they will be removed to.
2. At least five working days have elapsed since the notice was given.

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

## 46 Prisoners liable to removal from the United Kingdom

### Our Comment

We have no comments at this time.

### *Immigration bail*

## 47 Matters relevant to decisions relating to immigration bail.

## **Our Comment**

Clause 47 sets out new criteria for those deciding whether to release a person from detention on immigration bail. The decision-maker will have to factor in whether the person has “failed without reasonable excuse to cooperate” in various ways. These factors seem reasonable when deciding whether or not to grant immigration bail.

## **PART 4**

### *Age Assessments*

48 Interpretation of Part etc

## **Our Comment**

We have no comment to make.

49 Persons subject to immigration control: referral or assessment by local authority etc

## **Our Comment**

We note that age assessments will be carried out by Immigration Officers, the Secretary of State and Local Authorities. However, we consider that any regulations should be consulted upon. Where this provision is deployed to place duties on Scottish Local Authorities the regulations should be made with the consent of Scottish Ministers.

We have no comments to make to clauses 50 to 56 at this time.

## **PART 5**

### **MODERN SLAVERY**

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

## **Our Comment**

We have no comment to make at this time.

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

## **Our Comment**

We have no comment to make at this time.

59 Identification of potential victims of slavery or human trafficking

## **Our Comment**



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

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

#### **Our Comment**

We have no comment to make at this time.

61 No entitlement to additional recovery period etc

#### **Our Comment**

We have no comment to make at this time.

62 Identified potential victims etc: disqualification from protection.

#### **Our Comment**

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

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

#### **Our Comment**

Clause 63 does not apply to Scotland but extends only to England and Wales.

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

#### **Our Comment**

We have no comment to make.

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

#### **Our Comment**

Clause 65 does not apply to Scotland. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply in Scotland and therefore these provisions will have no effect to applicants whose legal aid provision is under the Legal Aid (Scotland) Act 1986.

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

#### **Our Comment**

Clause 66 does not apply to Scotland. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply in Scotland and therefore these provisions will have no effect to applicants whose legal aid provision is under the Legal Aid (Scotland) Act 1986.

67 Disapplication of retained EU law deriving from Trafficking Directive.

#### **Our Comment**

We have no comment to make at this time.

68 Part 4: interpretation

#### **Our Comment**

We have no comment to make at this time.

## **PART 6**

### **MISCELLANEOUS**

69 Removals from the UK: visa penalties for uncooperative countries

#### **Our Comment**

We have no comment to make.

70 Visa penalties: review and revocation

#### **Our Comment**

We have no comment to make.

71 Electronic travel authorisations

### **Our Comment**

Clause 71 (originally clause 60) was a 'placeholder' clause. We agree with the general proposition for electronic travel authorisations.

72 Liability of carriers

### **Our Comment**

We have no comment to make.

73 Special Immigration Appeals Commission

### **Our Comment**

Clause 73 was originally represented by a 'placeholder' clause. This allowed the Government to table amendments to those clauses to set out its intentions in more detail. It is regrettable that the Government did not consult on the new clauses in advance of the Committee Stage in the House of Commons.

74 Counter-terrorism questioning of detained entrants away from place of arrival

### **Our Comment**

We have no comment to make at this time.

75 References to justices of the peace in relation to Northern Ireland

### **Our Comment**

We have no comment to make.

76 Tribunal charging power in respect of wasted resources.

### **Our Comment**

We consider that clause 76 is problematic, unnecessary and unacceptable. The First-tier or Upper Tribunal is to be given powers to charge a person exercising rights of audience or rights to conduct litigation if that person is found to have acted improperly, unreasonably or negligently. Under current statutory and common law powers professional regulators have sufficient powers to deal with matters of professional discipline such as improper or unreasonable conduct and it is in the public interest that such powers rest with the regulators. It is inappropriate that the determination of negligence should be included in the clause when that is properly the province of the civil courts. Furthermore, we note that any amounts charged under this clause are to be paid to the Consolidated Fund rather than to the client who may have suffered as a result of any alleged negligence or improper or unreasonable conduct. This appears to be more in the nature of a tax rather than compensation for an affected party.

This clause needs to be reconsidered.

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

### **Our Comment**

We refer to our comments in respect of clause 76. We agree that if clause 76 proceeds unamended there will be a need for due process provisions to be put in place.

78 Pre-consolidation amendments of immigration legislation

### **Our Comment**

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

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

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

## **PART 7**

### **GENERAL**

79 Financial provision

### **Our Comment**

We have no comment to make at this time.

80 Transitional and consequential provision

### **Our Comment**

Clause 80 provides that the Secretary of State may by regulations make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act and make such provision as the Secretary of State considers appropriate in consequence of this Act. Regulations under subsection (2) can include amending, repealing or revoking any enactment.

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

The same argument cannot be made for giving the Secretary of State powers to amend, repeal or revoke *any* enactment as per clause 80(3). In this context “any enactment” includes (a) an Act of Parliament, (b) retained direct principal EU legislation, (c) an Act of the Scottish Parliament, (d) a Measure or Act of Senedd Cymru, or (e) Northern Ireland legislation. Although such regulations will be subject to affirmative resolution procedure they should be consulted upon within a super-affirmative procedure and, where appropriate require the consent of the devolved legislatures and administrations.

## 81 Regulations

### **Our Comment**

Our comments in respect of clause 80 apply. We firmly believe that the Secretary of State should be under an obligation to consult such persons as the Secretary considers appropriate before making any regulation under the bill. Furthermore, where appropriate the Secretary of State should also require to consult with such persons as are appropriate and seek the consent of devolved legislatures and administrations.

## 82 Extent

### **Our Comment**

We have no comment to make.

## 83 Commencement

### **Our Comment**

We have no comment to make.

## 84 Short title

### **Our Comment**

We have no comment to make.

Schedule 1 — Waiver of requirement of presence in UK etc

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

Schedule 3 — Removal of asylum seeker to safe country

Schedule 4 — Penalty for failure to secure goods vehicle etc

Schedule 5 — Working in United Kingdom waters: consequential and related amendments

Schedule 6 --- Maritime Enforcement

Schedule 7 --- Prisoners returning to the United Kingdom: Modifications of Criminal Justice Act 2003

We have no comment to make on the Schedules at this time.



**For further information, please contact:**

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 07785 578333

[michaelclancy@lawscot.org.uk](mailto:michaelclancy@lawscot.org.uk)