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 introduced in the House of Commons on 7 March 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 save lives; and promptly remove those with no legal right to remain in the UK.

3. The Bill includes the measures to:

    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, although they may do so.

    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) Provide for the accommodation of and other appropriate support for unaccompanied children by the Secretary of State or local authorities.

    d) 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.

    e) 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.

f) 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 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.

g) 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.

h) Introduce a duty on the Secretary of State to determine the maximum number of persons to be admitted to the UK for settlement 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), (c), (d), (f), (g) and (h) above include new delegated powers. The Bill also contains standard powers to make consequential amendments and in respect of commencement.

5. Clause 54 makes general provision in respect of regulations made under the Bill. Clause 54(2) enables regulations made under the Bill (save for those made under clause 57 (commencement)) to make different provision for different purposes and to make transitional, saving, incidental, supplementary or consequential provision. Clause 54(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(5): Power to add other exceptions to the duty to make arrangements for removal

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

6. 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 (as defined) from the UK as soon as reasonably practical to their home country or a safe third country. Clause 3(1) and (2) provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but may do so. Clause 3(5) 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(6), regulations made under clause 3(5) may modify the application of any enactment in relation to a person to whom an exception applies.

Justification for the power

7. 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.

8. 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

9. By virtue of clause 54(5), regulations made under clause 3(5) are subject to the negative procedure. This 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

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution where adding to or amending list of*

countries or territories; negative procedure where removing countries or territories

Context and purpose

10. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Home Secretary to make arrangements to remove, as soon as reasonably practicable, illegal entrants who meet the other conditions in clause 2(1) to their home country or a safe third country. Clause 5 amplifies what is meant by a person's home country or a safe third country for these purposes. Specifically, 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.

11. 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)).

12. 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 the Schedule to the Bill.

13. Clause 6(1), (2) and (5) enables the Secretary of State, by regulations, to amend the Schedule to the Bill by –

    (a) adding a country or territory to the Schedule;
    (b) adding a country or territory to the Schedule in respect of a description of person;
    (c) modifying a reference to a country or territory in the Schedule, or
    (d) removing a country or territory from the Schedule.

14. Clause 6(1) provides that the Secretary of State may add a country or territory, or part of a country or territory, to the Schedule if 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 1(1) will not in general contravene the United Kingdom's obligations under the Human Rights Convention.

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).

15. 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.

16. The list of countries in the Schedule (it does not currently contain any territories, although these may be added by regulations) is an amalgamation of the lists of safe counties 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

17. The Schedule 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 counties 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 counties 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

18. By virtue of clause 54(4)(a), regulations made under clause 6(1) are subject to the draft affirmative procedure while, by virtue of clause 54(5), regulations made under clause 6(5) are subject to the negative procedure. The affirmative procedure is considered appropriate for any regulations adding countries or territories to the list or amending an entry relating to a country or territory (including, to remove of a

limitation whereby only men may be removed to certain countries) 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.

19. 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 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

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

20. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Home Secretary 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) and (2) provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but may do so. Clauses 15 to 17 make provision for the care in England of unaccompanied children pending their removal as adults or if it is decided to use the power to remove as a child. These clauses confer powers on the Home Secretary to provide accommodation and other support in England for unaccompanied children; provide for the Home Secretary 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 Home Secretary; place a duty on local authorities in England to provide information to the Home Secretary for the purposes of helping the Home Secretary 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.

21. To enable the Home Secretary to make a decision to transfer an unaccompanied child from the Home Secretary to a local authority or vice versa, clause 17(1) enables the Home Secretary 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 Home Secretary may direct a local authority to

provide is information about the support or accommodation 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

22. It is important that the Home Secretary 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 support or accommodation 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.

23. 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

24. By virtue of Clause 54(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 Home Secretary 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.

25. 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 (17th 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

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*

Parliamentary procedure: *Draft affirmative resolution*

Context and purpose

26. Clause 2 of the Bill (read with clauses 5 and 7) places a duty on the Home Secretary 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) and (2) provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but may do so. Clauses 15 to 18 make provision for the care in England of unaccompanied children pending their removal as adults or if it is decided to use the power to remove as a child These clauses confer powers on the Home Secretary to provide accommodation and other support in England for unaccompanied children; provide for the Home Secretary 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 Home Secretary; place a duty on local authorities in England to provide information to the Home Secretary for the purposes of helping the Home Secretary 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.

27. Clause 19(1) enables the Home Secretary to make regulations enabling Causes 15 to 18 to apply 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

28. 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

29. By virtue of Clause 54(4)(b), 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(5), 23(5) and 24(5): 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:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution*

Context and purpose

30. 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) contain a power for the Secretary of State by regulations to make provision about the circumstances in which it is necessary for a person to be present in the United Kingdom to provide the cooperation referred to above.

Justification for the power

31. This provision is included by way of a marker clause with the expectation that it will be replaced by way of Government amendment during the passage of the Bill.

Justification for the procedure

32. By virtue of clause 54(4)(c), (d) and (f), regulations under clauses 21(5), 23(5) and 24(5) are subject to the draft affirmative procedure. This level of parliamentary scrutiny is considered appropriate given that regulations about the circumstances in which it is necessary for the person to be in the United Kingdom to provide the cooperation go the heart of the exception in clause 21(3), 23(3) and 24(3).

Clause 23(8): Power to amend clause 23 in consequence of regulations made by the Scottish Ministers under the Human Trafficking and Exploitation (Scotland) Act 2015

Power conferred on:	*Secretary of State*

Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution*

Context and purpose

33. 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 Home Secretary 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 person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of their trafficking.

34. 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 of 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.

35. Clause 23(8) 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

36. 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 ms5 remains consistent with the relevant Scots law.

Justification for the procedure

37. By virtue of Clause 40(4)(e), regulations made under clause 23(8) 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

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*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 urgency where made affirmative procedure applies; none where regulations only make transitional or saving provision.*

Context and purpose

38. 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 Home Secretary 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.

39. 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 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;

40. 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.

41. 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

42. 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.

43. 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 Home Secretary 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

44. By virtue of clause 54(4)(g) 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 a relevant provision 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.

45. By virtue of clause 54(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 procure 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 28(3): Power to make provision about the operation of section 63 of the Nationality and Borders Act 2022 in relation to foreign criminals and other persons liable to deportation from the United Kingdom

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution*

Context and purpose

46. Clause 28(1) of the Bill amends 63(3) of the Nationality and Borders Act 2022 (identified potential victims of slavery or human trafficking: disqualification from protection) by adding into section 63(3) categories of person liable to deportation from the United Kingdom. Clause 28(3) provides the Secretary of State with power by regulations to make provision about the operation of section 63 of the Nationality and Borders Act 2022 in relation to foreign criminals (within the meaning given by section 32(1) of the UK Borders Act and other persons liable to deportation from the United Kingdom. Clause 28(4) provides that such regulations may amend section 63 of the Nationality and Borders Act 2022.

Justification for the power

47. This provision is included by way of a marker clause with the expectation that it will be replaced by way of Government amendment during the passage of the Bill.

Justification for the procedure

48. By virtue of Clause 54(4)(h), regulations under clause 28(3) are subject to the draft affirmative procedure. This level of scrutiny is considered appropriate given that this is a Henry VIII power.

Clause 37(11): Power to amend definition of "working day"

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

49. Clauses 37 to 48 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 37(9)), their removal to

a safe third country would result in them facing a real 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.

50. Clause 47 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 six working days for a claimant to submit an appeal or to apply for permission to appeal and a period of 22 working days for the Upper Tribunal to make a decision on an appeal or six working days to determine an application for permission to appeal. Clause 37 provides a definition of working days which includes a day other than a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the UK.

Justification for the power

51. 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. This power will provide flexibility so that we can 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

52. By virtue of Clause 54(5), regulations made under Clause 37 are subject to the negative procedure. Notwithstanding that this is a Henry VIII power, the the negative procedure is considered to provide an adequate level of parliamentary scrutiny given the very narrow scope of the power.

Clause 38(1): Power to amend clause 37 to make provision about the meaning of "serious and irreversible harm"

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution*

Context and purpose

53. Clauses 37 to 48 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 37(9)), their removal to a safe third country would result in them facing a real 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.

54. Clause 38 enables the Secretary of State, by regulations, to make provision about the meaning of "serious and irreversible harm".

Justification for the power

55. Clause 38 is designed as a placeholder for a substantive clause which will define serious and irreversible harm. A person subject to the duty to remove will have a limited time in which to bring a claim based on a real risk of serious and irreversible harm arising from their removal to a specified third country. The real risk of serious and irreversible harm test mirrors that applied by the European Court of Human Rights when considering whether to grant interim measures under Rule 39 of its Rules of Court. The substantive clause will take account of the UK's domestic courts interpretation of serious and irreversible harm and will provide a framework for decisions on serious harm suspensive claims.

Justification for the procedure

56. By virtue of clause 54(4)(h), the regulation-making power in clause 38 is subject to the draft affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power. However, the Government does not intend to use the power as drafted but intends to replace it will a substantive provision once further work has been completed.

Clause 40(5) and 41(5): Power to prescribe the information, and the form and manner it is to be submitted, to support a serious harm suspensive claim or factual suspensive claim

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

57. Clauses 37 to 47 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 37(9)), their removal to a safe third country would result in them facing a real 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.

58. 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 48 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 40(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 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 40(5) further provides that "prescribed" means prescribed in regulations made by the Secretary of State. Clause 41(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

59. 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 modified 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

60. By virtue of clause 54(5), regulations made under clauses 40 and 41 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 49: Power to make provision about interim measures indicated by the European Court of Human Rights

Power conferred on: *Secretary of State*

Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution*

Context and purpose

61. Clause 49 is designed as a placeholder for a substantive clause which will make provision about interim measures indicated by the European Court of Human Rights. The European Court of Human Rights may, under Rule 39 of its Rules of Court, indicate interim measures to any State party to the European Convention on Human Rights. Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.

Justification for the power

62. This provision is included by way of a marker clause with the expectation that it will be replaced by way of Government amendment during the passage of the Bill.

Justification of the procedure

63. By virtue of clause 54(4)(j), regulations made under clause 49 are subject to the draft affirmative procedure so that Parliament will be assured of an opportunity to scrutinise any proposals that could, in principle, be brought forward using this power.

Clause 50(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

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

Context and purpose

64. 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.

65. 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.

66. 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) (the Policy).

67. Clause 50(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

68. 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.

69. 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

70. 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.

71. 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 51(1) and (6): Power to specify annual cap on the number of persons to be admitted for settlement to the UK via safe and legal routes

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Draft affirmative resolution*

Context and purpose

72. 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."

73. Clause 51(1) places a duty on the Secretary of State, by regulations to determine the maximum number of persons who may enter the United Kingdom each year for settlement using safe and legal routes. Clause 51(6) 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.

74. In preparing the regulations under Clause 51(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.

Justification for the power

75. 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.

76. 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.

77. 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 for current safe and legal routes do not mean that these specific routes will be part of the cap, 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

78. By virtue of Clause 54(4)(k), regulations made under clause 51(1) and (6) 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 53(1): Power to make consequential amendments

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

Context and purpose

79. Clause 53(1) confers a power on the Secretary of State to make consequential provision for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation.

Justification for the power

80. 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 genuinely consequential on provisions made by or under the Bill. But 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 regulation 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

81. 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 54(4)(l)) 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 57(1): Commencement power

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *None*

Context and purpose

82. Clause 57(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

83. 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

84. 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 57(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

85. Clause 57(5) confers on the Secretary of State power to make such transitional, transitory or saving provisions as they consider appropriate in connection with the coming into force of the provisions in the Bill.

Justification for the power

86. 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

87. 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 54(6)(b)).

Home Office
7 March 2023