These notes refer to the Immigration Bill
as brought from the House of Commons on 30th January 2014 [HL Bill 84]

IMMIGRATION BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Immigration Bill as brought from the House of Commons on 30th January 2014. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. These explanatory notes do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

3. A glossary of abbreviations and terms used in these explanatory notes is contained in the annex to these notes.

SUMMARY

4. This Bill is in 7 parts.

5. Part 1 of the Bill, and Schedules 1 and 2, contain powers to enable the removal of persons unlawfully in the United Kingdom ("the UK"), enforcement powers, restrictions on bail and additional powers to take biometrics.

6. Part 2 amends rights of appeal, limiting immigration appeals to circumstances where there has been a refusal of a human rights or asylum or humanitarian protection claim, or where refugee status or humanitarian protection has been revoked. It also provides a power for the Secretary of State to certify that to require an appellant who is liable to deportation to leave the UK before their appeal is determined would not cause serious irreversible harm, in which case the person may only appeal from outside the UK. It also provides that a court or tribunal considering a claim that a decision is unlawful on the grounds that it would breach a person's right to respect for private and family life under Article 8 of the European Convention on Human Rights ("the ECHR") must, in particular, have regard to the public interest and sets out what the public interest requires.

7. Part 3, and Schedule 3, covers new powers to regulate migrants' access to services. In general, landlords will be liable to a civil penalty if they rent out premises to migrants who are not lawfully present in the UK. Migrants with time limited

immigration status, such as certain categories of workers and students, can be required

8. to make a contribution to the National Health Service ("the NHS") via a charge payable when applying for entry clearance or an extension of their leave to remain. Banks will be required to undertake an immigration status check before opening a current account and will be prohibited from opening new accounts for those who are known to be unlawfully in the UK and who are disqualified from opening an account, and those unlawfully here will be unable to obtain or retain a driving licence. Provision is also made for the enforcement of civil penalties against employers of persons without a right to work in the UK.

9. Part 4, and Schedules 4, 5 and 6, contain new powers to investigate suspected sham marriages and civil partnerships and extend powers for information to be shared by, and with, registration officials. Notices of marriage or civil partnership involving a non-EEA national (without settled status or an EU law right of permanent residence and not exempt from immigration control or holding a marriage or civil partnership visa) will be referred to the Home Office for a decision whether to investigate whether the proposed marriage or civil partnership is a sham.

10. Part 5, and Schedule 7, strengthen the powers of the Office of the Immigration Services Commissioner ("OISC") and simplify the regulatory scheme for the immigration advice sector. This Part also makes provision for oversight of immigration enforcement functions in Northern Ireland.

11. Part 6 contains three miscellaneous matters. Firstly the power to deprive British citizenship is amended. Secondly, this part together with Schedule 8, provides for the Secretary of State to enable third parties, including carriers and port operator staff, (as 'designated persons'), to undertake embarkation checks on passengers departing from the UK. Schedule 8 also contains powers to direct carriers and port operators to make arrangements for a designated person to conduct embarkation checks. Thirdly, Part 6 makes provision for fees to be charged for immigration applications and other functions.

12. Part 7 contains general provisions, including a power, by order, to make minor and consequential amendments to other enactments, general provisions about commencement and extent and provisions in respect of the parliamentary procedure to be applied to orders and regulations made under the Bill.

BACKGROUND

Part 1: Removal and other powers

13. To enforce the removal of a migrant from the UK it is necessary to identify them, to make a removal decision, to provide a travel document recognised by the State to which they will be removed and to detain them ahead of transfer to a port of

departure. The Bill amends the legislation behind this removal process.

14. Currently, a removal decision can be made under several different powers in the Immigration Acts: paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 ("the 1971 Act"); section 10 of the Immigration and Asylum Act 1999 ("the 1999 Act") and section 47 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"). The relevant power depends on whether the person being removed has been refused leave at the border, is an illegal entrant, an overstayer, has obtained leave to enter or remain by deception or has no further leave to remain following the refusal of an application to extend their leave. The Bill replaces these separate powers with a single power to remove a person who requires leave to enter or remain in the UK but does not have it. This could be because they never had such leave (they entered illegally), they did have such leave but stayed on after it expired or was revoked, or they could be a national of an EEA state who is subject to a deportation or exclusion order.

15. Unique biometric identifiers, such as fingerprints and facial photographs, allow a person's identity to be matched to immigration or other records. There are already powers to take biometrics, such as section 126 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which provides for biometrics for visa applicants, and sections 5 to 15 of the UK Borders Act 2007 ("the 2007 Act") which provide for the issue of biometric immigration documents, more commonly known as Biometric Residence Permits. There are classes of persons from whom it is not currently possible to require biometrics and the Bill seeks to close these gaps, in particular it provides for biometrics to be taken from non-European Economic Area ("non-EEA") family members of EEA nationals, transit visa applicants and persons applying for British citizenship. The Bill also provides the power for an immigration officer to require a person to provide biometric information, usually fingerprints, for the purpose of verifying their identity and thus their immigration status, in cases where there are reasonable grounds to suspect that that person might be liable to removal from the UK.

16. Where a biometric match to immigration records is established it may be possible to link a migrant to a record of a travel document. It may also be necessary to locate the original travel document to facilitate removal. Paragraph 25A of Schedule 2 to the 1971 Act provides immigration officers with a power to enter premises to search for relevant documents. Schedule 1 amends this provision so that it applies also to all persons who are in immigration detention following their arrest for a criminal offence, whether or not it was the police who made that arrest, and extends this search power - with a warrant - to premises belonging to a third party. Schedule 1 also amends powers to search and escort detained persons.

17. A person in immigration detention may apply to the First-tier Tribunal ("the Tribunal") for bail. The Bill limits the ability of individuals awaiting removal from the UK to be released on bail, and also makes provision preventing repeat bail

applications.

Part 2: Appeals etc

18. Currently a right of appeal to the Tribunal exists against any of the 14 different immigration decisions listed in section 82 of the 2002 Act. These include refusals of entry, refusals to vary leave to enter and remain and decisions to remove and deport. There are two further rights of appeal in section 83 and 83A of the 2002 Act against decisions to reject an asylum claim or revoke refugee status in certain circumstances. The Bill restructures rights of appeal to the Tribunal, providing an appeal against refusal of a human rights claim, a protection claim (humanitarian protection and asylum) and revocation of refugee or humanitarian protection status. It will also continue to be possible to bring an appeal, as is currently the case, against a decision to refuse an application based on a right under Community Treaties – provided for by regulations[1] under section 109 of the 2002 Act.

19. Currently a person may not bring an appeal while in the UK when the Secretary of State has certified an asylum or human rights claim as clearly unfounded under section 94 of the 2002 Act. A power also exists in section 97A of the 2002 Act to prevent a person bringing an appeal while in the UK when the Secretary of State certifies that removal would be in the interests of national security. This latter power also allows the Secretary of State to certify in national security cases that the temporary removal of the appellant pending the outcome of an appeal would not breach the UK's human rights obligations (this provision was added by section 54 of the Crime and Courts Act 2013). The Bill makes provision equivalent to the section 97A power to enable certification of a human rights claim where it is considered that the temporary removal of persons liable to deportation pending the outcome of an appeal would not breach the UK's human rights obligations.

20. In July 2011 the Home Office published a consultation paper on *Family Migration*.[2] On 11th June 2012 the government published its response to the consultation setting out that Immigration Rules would be made to reflect the government's and Parliament's view of how the balance should be struck between the right to respect for private and family life under Article 8 of the ECHR and the public interest, including safeguarding the economic well-being of the UK, enforcing immigration controls and protecting the public from foreign criminals.[3] New Immigration Rules came into force on 9th July 2012.[4] The Bill gives the force of primary legislation to the principles reflected in those rules by requiring a court or tribunal, when determining whether a decision is in breach of Article 8 ECHR, to have regard to the public interest considerations as set out in the Bill.

[1] SI 2006/1003 (as amended)
[2] https://www.gov.uk/government/consultations/family-migration-consultation
[3] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/cons-fam-mig.pdf
[4] Statement of Changes in Immigration Rules, HC194, published 13 June 2012

Part 3: Access to Services etc

21. Existing restrictions prevent migrants who do not have the right to enter or remain in the UK from accessing social housing. On 25th March 2013 the Prime Minister committed to creating a new general duty on private landlords to check a tenant's immigration status.[5] In July 2013 the government conducted a public consultation titled *Tackling illegal immigration in privately rented accommodation*.[6] The Bill enables civil penalties to be imposed on those private landlords who rent out premises to illegal migrants without making appropriate checks. This approach is similar to existing obligations on employers to check immigration status in the 2006 Act.

22. Where a landlord can demonstrate that they undertook specified checks regarding the migrant's status before first granting them rights of occupation they will have a statutory excuse to avoid liability for the civil penalty. There will be a code of practice to ensure checks are not carried out on a discriminatory basis, as well as an appeals process against the imposition of a civil penalty. The measures are intended to make it more difficult for illegal migrants to rent property and thus encourage illegal migrants to regularise their stay or leave the UK.

23. Other than visitors, most temporary migrants with time-limited immigration status are currently able to access the NHS for free during their stay in the UK. The Home Office consultation *Controlling Immigration – Regulating Migrant Access to Health Services in the UK*[7] set out proposals to amend this position. The Bill provides for an immigration health charge which will be payable by certain categories of temporary migrant. Migrants would pay the charge at the same time as they applied for entry clearance for a limited period of leave, or limited leave to enter or remain in the UK, including an application to vary leave. The purpose of this provision is to ensure that migrants pay towards the cost of health treatment available in the UK commensurate with their more limited immigration status.

24. The Home Office already works in partnership with the financial services industry to help prevent fraud. CIFAS[8] holds Home Office data on thousands of known immigration offenders. The Bill contains provision intended to ensure that those known to be unlawfully in the UK can be prevented from opening a current account.

25. The 2006 Act sets out a prohibition on the employment of adults who are subject to immigration control and do not have leave to enter or remain in the UK, or who are subject to a condition preventing the acceptance of the employment. The prohibition is supported through both a civil penalty regime and a criminal sanction. Enforcing civil penalties is a complex process and the Home Office consultation

[5] https://www.gov.uk/government/speeches/david-camerons-immigration-speech
[6] https://www.gov.uk/government/consultations/tackling-illegal-immigration-in-privately-rented-accommodation
[7] https://www.gov.uk/government/consultations/migrant-access-to-health-services-in-the-uk
[8] Formerly known as the Credit Industry Fraud Avoidance System: www.cifas.org.uk

paper, *Strengthening and simplifying the civil penalty scheme to prevent illegal working*,[9] published on 9th July 2013, set out proposals for how this could be streamlined. The Bill amends existing legislation to require an employer to exercise their right to object to a civil penalty before they can appeal to the civil court. It also simplifies and accelerates the enforcement of civil penalty debts in the civil courts.

26. The Prime Minister's speech of 25th March 2013 also included a commitment to ensure that illegal immigrants do not hold UK driving licences. Historically, it has been easy for illegal immigrants to secure driving licences and enjoy the privileges of being able to drive and the advantages this brings in securing a settled lifestyle. The published policy in relation to the granting of licences was amended in March 2010 so as to require all applicants to demonstrate that they are in the UK lawfully[10] and 3,000 applications per annum have been refused as a consequence. The clauses in the Bill on driving licences reflect and support this policy. They also provide powers to revoke a licence held by an illegal immigrant; this will be exercised primarily in respect of those who obtained a licence before immigration checks were introduced, and also those individuals who arrived in the UK lawfully but have subsequently remained unlawfully.

Part 4: Marriage and Civil Partnership

27. Sham marriages (or marriages of convenience) and sham civil partnerships – where the marriage or civil partnership is contracted for immigration advantage by a couple who are not in a genuine relationship – pose a significant threat to UK immigration control. The Home Office estimates that roughly 4,000 to 10,000 applications a year to stay in the UK, under the Immigration Rules or the Immigration (EEA) Regulations 2006[11], are made on the basis of a sham marriage or civil partnership. Since 1999, changes to primary legislation and to the Immigration Rules have been introduced in an attempt to prevent abuse by those prepared to enter into a sham marriage or civil partnership as a means to stay in the UK. However, the government considers that further legislative changes are required to tackle this problem.

28. In 2011 the government consulted on proposed reforms to family migration including measures to tackle sham marriages.[12] The Bill extends and amends the marriage and civil partnership notice process to better enable the Home Office to identify and investigate suspected sham marriages and civil partnerships as a basis for taking enforcement and other immigration action under existing powers in cases established as sham.

29. The Bill will change the procedures for giving notice of marriage and civil partnership in England and Wales, in order to provide for a new referral and investigation scheme for proposed marriages and civil partnerships involving a non-

[9] https://www.gov.uk/government/consultations/prevention-of-illegal-working-simplifying-the-civil-penalty-scheme
[10] House of Commons, Official Report, 25 March 2010, Vol 508, Part No 64, col 70WS
[11] SI 2006/1003 (as amended)
[12] Family Migration consultation, *op.cit*

EEA national subject to immigration control. It provides an enabling power to allow the scheme to be extended to Scotland and Northern Ireland by order. It also extends the powers for information to be shared by and with registration officials for the purpose of tackling sham marriages and civil partnerships and related abuse. The government has published additional background information on this measure.[13]

Part 5: Oversight

30. The Office of the Immigration Services Commissioner ("OISC") was established in May 2000 under the 1999 Act to regulate providers of immigration advice. The Commissioner is responsible for ensuring that those who give immigration advice are fit and competent, act in the best interests of their clients, comply with a statutory Code of Conduct and, where relevant, rules made under the 1999 Act. Generally advisers must register with the Commissioner or face prosecution (unless they are covered by an exemption under the 1999 Act). The Bill imposes a duty on the OISC to immediately cancel the registration of unfit or defunct organisations. It provides a power for the OISC to apply to the Tribunal to suspend the activities of an adviser charged with criminal offences until the matter has been resolved. It provides the OISC with a revised power of entry (which requires a warrant) that will apply in respect of the exercise of their audit and inspection duties and to entry to businesses operating from private premises. Finally, it amends the 1999 Act to create a single category of regulated adviser by removing one of the main exemptions which permitted certain advisers to operate without registering with OISC (with the Commissioner's consent). This will simplify the regulatory scheme and changes are being made to the arrangements for fees for registration to enable them to be waived in cases where organisations did not previously have to apply for registration.

31. The Bill will also bring greater oversight of Home Office immigration enforcement. Since February 2008 the Independent Police Complaints Commission has provided oversight of serious complaints, conduct matters and incidents involving immigration officers and officials of the Secretary of State exercising immigration and asylum enforcement powers in England and Wales. This remit was extended to officials exercising general customs and customs revenue functions in 2009. In Scotland, the Crown Office and Procurator Fiscal Service and the Police Investigations & Review Commissioner have the power to provide equivalent independent oversight. However, there is no independent oversight of enforcement activity involving immigration officers and designated customs officials in Northern Ireland. The Bill remedies this, placing the exercise of enforcement powers by such Home Office officials under the oversight of the Police Ombudsman for Northern Ireland.

Part 6: Miscellaneous

32. Currently any person may lose their citizenship if the Secretary of State is satisfied that doing so is conducive to the public good provided that depriving them of

[13] *Sham Marriage and Civil Partnerships: Background information*, published November 2013, https://www.gov.uk/government/publications/immigration-bill-part-4-marriage-and-civil-partnership

their citizenship would not render them stateless. Following the Supreme Court judgment in *Al Jedda*[14], the Bill will amend this power by also allowing naturalised persons to be deprived of their citizenship where they conduct themselves in a manner seriously prejudicial to the vital interests of the UK even where to do so may render them stateless. This returns the law in this area to the position it was in 1966 when the UK ratified and lodged a declaration to the Convention on the Reduction in Statelessness 1961[15].

33. In May 2010 the government published *The Coalition: our programme for government*[16] which included a commitment to reintroduce exit checks. Routine embarkation controls at UK ports were fully phased out by 1998. The powers to conduct embarkation controls exist in the 1971 Act. Exit checks are already being operated using the electronic capture of data of departing passengers and through targeted, intelligence-led embarkation controls. In delivering the exit checks commitment, the government's approach is to seek to minimise the impact on port operations and on the flow of legitimate passengers through airports, seaports and international rail terminals by integrating embarkation checks with existing processes, wherever possible. The government will continue to discuss with carriers and port operators proposals to enable those who currently have a role in outbound passenger processes, such as carrier and port operator staff, to deliver exit checks. The Bill allows the Secretary of State to enable third parties, including carriers and port operator staff, (as 'designated persons'), to undertake embarkation checks. It also contains powers to enable the Secretary of State to direct carriers and port operators to make arrangements for a designated person to conduct embarkation checks.

34. The Secretary of State's powers to charge fees in connection with immigration and nationality are currently set out in sections 51 and 52 of the 2006 Act, and section 42 of the 2004 Act, which is amended by section 20 of the 2007 Act. The Bill consolidates these powers, to simplify the charging framework, and amends certain elements to ensure that it is more responsive to the needs of the government and people who use immigration and nationality services.

TERRITORIAL EXTENT AND APPLICATION

35. The provisions of the Bill extend to the whole of the UK with the following exceptions. The provisions for disclosure of information in Schedule 6 extend to England and Wales only. There is a power to extend the provisions of the Bill, by Order in Council, to any of the Channel Islands or the Isle of Man.

[14] *Al Jedda v SSHD* [2013] UKSC 62
[15] Convention on the Reduction in Statelessness 1961, United Nations, *Treaty Series*, vol.989, p.175
[16] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf

36. This Bill does not contain any provisions falling within the terms of the Sewel Convention. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

37. In relation to Wales, all of the provisions relate to non-devolved matters. If amendments are made to the Bill that trigger a requirement for a legislative consent motion, the consent of the National Assembly for Wales will be sought for them.

38. In relation to Northern Ireland, all of the provisions of this Bill relate to non-devolved matters. If amendments are made to the Bill that trigger a requirement for a legislative consent motion, the consent of the Northern Ireland Assembly will be sought for them.

COMMENTARY ON CLAUSES

Part 1: Removal and other powers

Clause 1: Removal of persons unlawfully in the United Kingdom

39. This clause replaces section 10 of the 1999 Act and provides a power for the Secretary of State or an immigration officer to authorise the removal of a person who requires leave to enter or remain in the UK but does not have it (*subsection (1)*) or their family members (*subsection (2)*).

40. *Subsection (3)* allows the Secretary of State or an immigration officer to give directions for the removal of those persons described in subsections (1) and (2). Removal directions may be given to the captains or owners or agents of ships or aircraft to remove a person or to make arrangements for removal to the country or territory as specified in paragraphs 8 to 10 of Schedule 2 to the 1971 Act. However under *subsection (4)* persons being deported will continue to be removed under Schedule 3 to the 1971 Act.

41. *Subsection (5)* lists relevant paragraphs of Schedule 2 to the 1971 Act which will also apply to persons subject to removal under this clause. This includes provision for arrest, detention, bail and searches for removal documents.

42. *Subsection (6)* provides a power for the Secretary of State to make regulations regarding the removal of family members, whether that removal is authorised either under this clause or under another provision of the Immigration Acts. These regulations may, in particular, provide for the definition of a family member, any time periods on removal which may apply, and the serving of notices which may affect any

leave to enter or remain that the family member might have in their own right. The government has published draft regulations.[17]

Clause 2: Enforcement Powers

43. This clause gives effect to Schedule 1.

Schedule 1: Enforcement Powers

44. *Paragraph 1* inserts into paragraph 18(3) of Schedule 2 to the 1971 Act a power for an immigration officer to escort a person detained under paragraph 16. Paragraph 18(3) already allows any person acting under the authority of an immigration officer to escort a person so detained.

45. *Paragraph 2 subparagraph (1)* inserts a new paragraph 18A into Schedule 2 to the 1971 Act, giving immigration officers a power to search a person detained under paragraph 16 for anything which the person might use to cause physical injury to themselves or others or which they might use to escape from legal custody. It sets out the grounds which must exist before the power can be exercised, the extent of the search and sets out what may be seized and retained as a result of the search and for how long such items may be retained.

46. *Paragraph 2 subparagraphs (2) to (5)* make corresponding amendments to subsection (1) to other enactments which reference the powers that are available to immigration officers in respect of persons detained under paragraph 16 of Schedule 2 to the 1971 Act to ensure that the new paragraph 18A applies.

47. *Paragraph 3* amends paragraph 25A of Schedule 2 to the 1971 Act by making the power to enter and search premises for relevant documents available in respect of persons who are arrested other than under that Schedule and detained under paragraph 16 of Schedule 2, whether or not the arrest was carried out by a constable. It further inserts new subparagraphs (6A) and (6B) into paragraph 25A so that a warrant may be obtained to enter and search premises belonging to a third party (other than the arrested person) where there are reasonable grounds to believe that relevant documents may be found there. Paragraph 3(4) removes the power to retain relevant documents for so long as necessary in connection with the purpose for which the person was arrested and paragraph 3(5) inserts a new subparagraph (8A) so that the power to retain relevant documents is aligned with the retention powers in section 17 of the 2004 Act and section 46(3) of the 2007 Act.

48. *Paragraph 4* amends sections 28J(11) and 28K(14) of the 1971 Act so that those provisions, which are concerned with the execution and safeguards in respect of warrants, also apply to the new power to obtain a warrant under paragraph 25A(6A) of Schedule 2 to the 1971 Act.

[17] Draft Immigration (Removal of Family Members) Regulations 2014, https://www.gov.uk/government/publications/immigration-bill-part-1-removal

49. *Paragraph 5* amends section 146 of the 1999 Act to provide for immigration officers to use reasonable force when it is necessary in the exercise of a power conferred on them by the Immigration Acts. This clarifies that the power is not limited to the exercise of powers under the 1971 Act and the 1999 Act.

Clause 3: Immigration bail: repeat applications and effect of removal directions

50. *Subsection (2)* inserts new paragraph 22(4) into Schedule 2 to the 1971 Act, which provides that the Secretary of State's consent is required to release a person on bail where removal directions are in force and the removal is due to take place within 14 days of the date of the decision to grant or refuse bail. The government has published a statement of intent setting out how this provision will be used.[18]

51. *Subsection (3)* provides that the Tribunal Procedure Rules[19] must provide that where a person has already made an unsuccessful bail application to the Tribunal under paragraph 25 of Schedule 2 and another application is made within 28 days, the Tribunal must dismiss it without a further hearing unless the applicant demonstrates that there has been a material change in circumstances. The Tribunal Procedure Committee recently consulted[20] on whether to make rules to limit repeat bail applications and published draft procedure rules[21]. The effect of the change in the Bill is to make it mandatory that the procedure rules include this provision rather than at the Committee's discretion.

52. *Subsection (4)* amends paragraph 29 of Schedule 2 to clarify that when a person has an appeal pending under Part 5 they must apply for bail under paragraph 29, and not under paragraph 22.

53. *Subsections (5) and (6)* make equivalent amendments to those made by subsections (2) and (3) in respect of bail applications under paragraph 29 of Schedule 2 (i.e. applications made by a person who has an appeal pending). So subsection (5) amends paragraph 30 to state that where removal directions have been set for a date within 14 days of the decision to release on bail, a person may not be released on immigration bail by the Tribunal without the consent of the Secretary of State.

54. *Subsection (6)* provides that the Tribunal Procedure Rules must state that where a person has already made an unsuccessful bail application to the Tribunal under paragraph 29 and another application is made within 28 days, the Tribunal must dismiss it without a further hearing unless the applicant demonstrates that there has been a material change in circumstances.

---

[18] Immigration Bill Statement of Intent: Bail – effect on removal directions, https://www.gov.uk/government/publications/immigration-bill-part-1-removal.
[19] The Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended), SI 2005/230
[20] Consultation on proposed Tribunal Procedure Rules 2013 http://www.justice.gov.uk/downloads/about/moj/advisory-groups/tpc-iac-rules-2013-consultation.pdf
[21] Draft Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2013 http://www.justice.gov.uk/downloads/about/moj/advisory-groups/draft-tpc-iac-rules2013.pdf

Clause 4: Provision of biometric information with immigration applications

55. This clause amends section 126 of the 2002 Act to make provision for the Secretary of State to make regulations requiring foreign nationals applying for Direct Airside Transit Visas (DATVs), pursuant to section 41 of the 1999 Act, to provide their biometric information as part of their application, and to make regulations requiring non-EEA family members of EEA nationals and other non-EEA nationals who are able to enter or remain in the UK under an enforceable EU right to provide biometric information when they are applying for a document as evidence of their right to enter or remain in the UK, such as an EU residence card.

56. *Subsection (3)* adds a new paragraph to subsection (4) of section 126, which provides for biometric information submitted as part of an application to be recorded on any document issued as a consequence of that application.

57. *Subsection (4)* defines what is meant by a "document" for these purposes.

Clause 5: Identifying persons liable to detention

58. At the moment, if an immigration officer wants to check a person's biometrics, usually fingerprints, to confirm their identity the person must first give their consent, unless they are either still subject to an immigration examination or have been arrested or detained in which case statutory powers exist which allow for their biometrics to be required. This clause amends paragraph 18(2) of Schedule 2 to the 1971 Act to include persons who are liable to be detained, as well as those who have already been detained, as being persons in respect of whom necessary steps can be taken for the purposes of identification, such as fingerprinting and photographing. This power to check biometrics is limited to the purpose of verifying identity as part of an immigration enforcement investigation and any biometrics are to be destroyed as soon as that purpose has been fulfilled.

Clause 6: Provision of biometric information with citizenship applications

59. This clause enables regulations made under section 41 of the British Nationality Act 1981 ("the 1981 Act") to make provision for biometric information to be required when a person applies to become a British citizen.

60. *Subsection (3)* makes amendments to section 41 of the 1981 Act, so that the references to "authorised person" and "biometric information" have the same definitions as those contained in section 126 of the 2002 Act. It provides that the safeguards in relation to taking biometric information from children under the age of 16, which are set out in the 1999 Act, apply equally to regulations made under the 1981 Act. It also provides an exception to the requirement, contained in section 8(5)(b) of the 2007 Act, that biometric information be destroyed as soon as reasonably practicable once a person becomes a British citizen to enable photographs submitted as part of a citizenship application to be retained until that person is issued with their first British passport.

Clause 7: Biometric immigration documents

61. This clause inserts a new subsection (2A) into section 7 of the 2007 Act to enable the Secretary of State to require an application or claim to be disregarded or refused where a person has failed to comply with a requirement of regulations made under section 5 of the 2007 Act, where those regulations have required a biometric immigration document to be used in connection with that application or claim.

Clause 8: Meaning of "biometric information"

62. This clause amends section 15 of the 2007 Act to define biometric information for the purposes of that provision as information about a person's external physical characteristics, such as fingerprints and features of a person's eye. Where the meaning of biometric information is to encompass information beyond external features, the Secretary of State is to specify the physical characteristics in an order. However, it cannot include information about a person's DNA. The order is subject to the affirmative resolution procedure.

63. *Subsection (4)* gives effect to Schedule 2 (Meaning of "biometric information"), which makes corresponding amendments to other enactments providing for powers to require the provision of biometric information.

Clause 9: Safeguards for children

64. This clause amends paragraphs 4 and 18 of Schedule 2 to the 1971 Act to ensure that persons aged under 16 are not required to provide biometric information under that Schedule, unless the requirement is authorised by a chief immigration officer, and the information is provided in the presence of an adult who is a parent or guardian or someone who takes responsibility for the child at the time.

Clause 10: Use and retention of biometric information

65. *Subsection (1)* substitutes a new section 8 of the 2007 Act, which requires the Secretary of State to make provision about the use and retention of biometric information provided pursuant to regulations made under section 5 of the 2007 Act.

66. *New section 8(2)* provides that the regulations must provide that biometric information is retained only if it necessary to retain it for use in connection with the exercise of functions in relation to immigration or nationality.

67. *New section 8(3)* provides that the regulations may include provision permitting the use of retained biometric information for non-immigration purposes, such as the prevention of crime and disorder or the protection of national security.

68. *New sections 8(4), 8(5) and 8(6)* provide that the regulations must include provision about the destruction of biometric information and must require the Secretary of State to take all reasonable steps to ensure that information is destroyed if its retention is no longer necessary for an immigration or nationality purpose and in all cases where the Secretary of State is satisfied that a person is a British citizen or a Commonwealth citizen with the right of

abode. The requirement to destroy biometric information extends to copies, whether held electronically or otherwise.

69. *New section 8(7)* allows biometric information which would otherwise be required to be destroyed to be retained if it is retained in accordance with another power.

70. *New section 8(8)* provides for persons whose biometric information has been destroyed by virtue of the regulations to obtain a certificate confirming this on request from the Secretary of State.

71. *New section 8(9)* provides that section 6(6) of the 2007 Act applies to this section as it does for regulations made under section 5(1) of the 2007 Act, which means the regulations are subject to the affirmative resolution procedure.

72. *Subsections (2) and (3)* make corresponding amendments, so that regulations made under section 8 of the 2007 Act must also include provision for the use and retention of biometric information provided under sections 141 and 144 of the 1999 Act and section 126 of the 2002 Act.

73. The government has published a statement of intent explaining its plans for the use and retention of biometric data taken pursuant to immigration powers.[22]

Part 2: Appeals etc

Clause 11: Right of appeal to First-tier Tribunal

74. Part 5 of the 2002 Act makes provision for statutory appeals to the Immigration and Asylum Chamber of the Tribunal. This clause amends the decisions in respect of which an appeal lies to the Tribunal and the grounds that can be raised on appeal.

75. *Subsection (2)* substitutes a new section 82 of the 2002 Act. The new section 82 provides that a right of appeal to the Tribunal will arise where the Secretary of State has decided to refuse a protection claim, or a human rights claim, or to revoke previously granted protection status. A protection claim is defined as a claim that removal of the person from the UK would breach the UK's obligations under the Refugee Convention or in relation to those who are eligible for a grant of humanitarian protection. Protection status is defined as the grant of leave to an individual as a refugee or a person eligible for humanitarian protection. This right of appeal is subject to the exceptions and limitations set out in Part 5 of the 2002 Act (such as the place from which an appeal must be brought).

76. Section 3C of the 1971 Act provides for the extension of leave until an application is decided and any appeal against the refusal of that application is determined where the

[22] *Immigration Bill Statement of Intent – Use and retention of biometric information*, https://www.gov.uk/government/publications/immigration-bill-part-1-removal.

application in question was made while the individual had leave and that leave expires without the application having been decided. Section 3D of the 1971 Act provides for the extension of leave until any appeal is determined where a person's leave is varied so that no leave remains or is revoked.

77. Where an application is refused and there is not a right of appeal, the applicant may be able to apply for an administrative review. Similarly, an administrative review may be sought when a person's leave is curtailed or is revoked. The Immigration Rules will set out when an applicant may seek an administrative review. In Schedule 9, Part 4 extends the effect of section 3C and 3D where an administrative review can be sought or is pending. The question of whether an administrative review is pending will be determined in accordance with the Immigration Rules. The government has published a statement of intent on how administrative review will operate. [23]

78. *Subsection (3)* repeals sections 83 and 83A of the 2002 Act. Section 83 provides for an appeal right to arise where asylum has been refused but other leave to enter or remain in the UK of at least 12 months' duration has been granted. Section 83A provides for an appeal right to arise following revocation of refugee status where, following that revocation, the individual concerned has limited leave to remain in the UK. Sections 83 and 83A are no longer necessary because the changes to section 82 in subsection (2) provide for a right of appeal against the refusal or revocation of asylum or humanitarian protection.

79. *Subsection (4)* substitutes section 84 of the 2002 Act with a new provision specifying the grounds on which an appeal can be brought under section 82. Where an appeal is brought against the refusal of a protection claim, the appeal must be brought on one or more of the following grounds: that removal would breach the UK's obligations under the Refugee Convention, removal would breach the UK's obligations to those eligible for a grant of humanitarian protection, or removal would be unlawful under section 6 of the Human Rights Act 1998. An appeal against the refusal of a human rights claim may only be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998. An appeal against the revocation of refugee status or humanitarian protection may only be brought on the grounds that removal would breach the UK's obligations under the Refugee Convention or the UK's obligations to those eligible for a grant of humanitarian protection.

80. *Subsection (5)* substitutes a new section 85(5) of the 2002 Act which provides that the Tribunal may not consider a new matter unless the Secretary of State has given the Tribunal consent to do so. "New matter" is defined in new section 85(6) as being a ground of appeal within section 84, or any reason the appellant has for wishing to enter or remain in the UK, and a matter that the Secretary of State has not previously considered in the context of a decision in section 82(1) or a statement made under section 120 of the 2002 Act. This is to

[23] *Immigration Bill Statement of Intent – administrative review in lieu of appeals*, https://www.gov.uk/government/publications/immigration-bill-part-2-appeals.

prevent appellants from raising new grounds before the Tribunal before the Secretary of State has had a chance to consider them.

81. Part 4 of Schedule 9 also substitutes a new section 120 of the 2002 Act. The new section 120(2) allows the Secretary of State or an immigration officer to serve a notice on a person who has made a protection or human rights claim, or who has made an application for leave to enter or remain, or who may be removed or deported. Once served with such a notice, the person must provide a statement to the Secretary of State of their reasons and grounds for being permitted to enter or remain in the UK or grounds as to why removal from the UK should not take place. This is the same duty as arose under the previous version of this section. The new version of this section also provides that where an individual requires but does not have leave to enter or remain in the UK or has leave only as a result of it having been extended under section 3C or 3D of the 1971 Act (as amended by Schedule 9 to this Bill), this duty is an ongoing duty to raise any such grounds as soon as reasonably practicable. The scope of the duty to raise grounds is restricted to grounds that will, if refused, result in a right of appeal, e.g. protection or human rights grounds.

Clause 12: Place from which appeal may be brought or continued

82. *Subsection (2)* substitutes section 92 of the 2002 Act. This section governs which appeals can be brought or continued while the appellant remains in the UK. The Secretary of State has various powers of certification in relation to protection claims and human rights claims, and if a claim is certified, then an appeal in relation to it may not be brought or continued from within the UK. So, for example, the Secretary of State may certify a protection or human rights claim under section 94(1) of the 2002 Act if the claim is clearly unfounded, or under s.94(7) if the person is to be removed to a third country where there is no reason to believe that their human rights will be breached. The Bill provides an additional power of certification in new s.94B in relation to human rights claims made by persons liable to deportation (as explained further at paragraph 87 below). Under the existing law, a person is also prevented by Schedule 3 to the 2004 Act from bringing an asylum or human rights appeal from within the UK in certain circumstances where it is proposed to remove him or her to a safe third country. This regime is unchanged by the Bill, but is referenced in new section 92.

83. In the case of a human rights claim made outside the UK, any appeal in relation to it must be brought from outside the UK. As for appeals against the revocation of protection status, these must be brought from outside the UK if the decision was made while the person was outside the UK.

84. *Subsection (6)* of new section 92 provides that where a protection claim appeal is brought or continued from outside the UK, for the purposes of considering whether the grounds of appeal are satisfied, the appeal will be treated as if the person were not outside the UK. This is necessary because the grounds are that the person's *removal* breaches the Refugee Convention or the UK's obligations in relation to persons eligible for a grant of humanitarian protection.

85. *Subsection (7)* of new section 92 provides that where an appellant brings an appeal from within the UK but leaves the UK before that appeal is finally determined, the appeal is treated as abandoned unless the claim to which the appeal relates has been certified (meaning that the appellant has to continue the appeal from outside the UK).

86. Part 4 of Schedule 9 amends the definition of "human rights claim" for the purposes of appeal rights as contained in section 113 of the 2002 Act. The definition is amended to include a claim that refusal of entry to the UK would be a breach of section 6 of the Human Rights Act 1998. This change makes it clear that there is a right of appeal against the refusal of a human rights claim made outside the UK.

87. *Subsection (3)* inserts a new section 94B into Part 5, which creates a new certification power for the Secretary of State in relation to a human rights claim made by a person liable to deportation where the Secretary of State considers that the temporary removal of the appellant pending the outcome of an appeal would not breach the UK's human rights obligations. When considering whether removal of the appellant while an appeal is pending would breach the UK's human rights obligations, the Secretary of State will in particular consider whether the appellant would face a real risk of serious irreversible harm as a consequence. Where a claim is certified under this provision, an appeal may only be brought or continued from outside the UK. Deportation orders are used to remove from the UK foreign criminals and others whose presence in the UK is non-conducive to the public good. This provision will not apply to overstayers and illegal entrants who are subject to administrative removal under clause 1 of this Bill.

Clause 13: Review of certain deportation decisions by Special Immigration Appeals Commission

88. *Clause 13* inserts a new section 2E into the Special Immigration Appeals Commission Act 1997. This allows the Special Immigration Appeals Commission ("SIAC") to review a decision which has been certified under section 97 or 97A(1) of the 2002 Act (certification on grounds of national security etc) in cases where there is no right of appeal in respect of the decision. In cases where there is a right of appeal, the appeal would go to SIAC under s.2 of the SIAC Act 1997. This new provision is necessary because the changes to section 82 of the 2002 Act mean that in future there may be some cases where there is no right of appeal over a decision that has been certified under section 97 or 97A, and judicial review will be the only remedy. It is more appropriate for judicial reviews in national security cases to be conducted by SIAC than in open court.

Clause 14: Article 8 of the ECHR: public interest considerations

89. This clause inserts a new Part 5A into the 2002 Act which makes provision for public interest consideration under Article 8 of the ECHR.

90. In new section 117A, *subsection (1)* provides that Part 5A applies when a court or tribunal is required to determine whether a decision under the Immigration Acts breaches a

person's right to respect for private and family life under Article 8 ECHR and as a result would be unlawful under section 6 of the Human Rights Act 1998.

91. *Subsection (2)* provides that, in considering the public interest question, the court or tribunal must, in particular, have regard to the considerations listed in new section 117B and, in cases concerning the deportation of foreign criminals, must also have regard to the considerations listed in new section 117C.

92. *Subsection (3)* defines the public interest question as meaning the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR.

93. New section 117B lists the public interest considerations which are applicable in all cases.

94. New section 117C lists the additional public interest considerations applicable in cases involving foreign criminals.

95. New section 117D provides for the definition of terms used in Part 5A.

Part 3: Access to Services etc

Chapter 1: Residential tenancies

Clause 15: Residential tenancy agreement

96. This clause identifies the type of arrangements to which the restriction on letting applies.

97. *Subsections (2) (3) and (4)* provide that all arrangements where a person is permitted to occupy a property as their only or main residence in return for the payment of rent are residential tenancy agreements, unless the arrangement falls into one of the exclusions set out in Schedule 3. Accommodation for which no rent is paid, such as convents or monasteries, does not fall within this definition, and so is not subject to the restriction on letting, nor is accommodation which is not used by a person as their only or main home. So, for example, holiday accommodation will not ordinarily be captured, as for most people it will not provide their only or main home, but if somebody chooses to live in a hotel, the arrangements for that person will be captured. Subsections (2) and (3) also identify the range of agreements that will be considered to be a "residential tenancy agreement" for the purposes of the Chapter and who the landlord will be in the various cases. The effect is that where a landlord (L1) grants a tenancy to a tenant (T1) who then grants a licence to a lodger (T2), L1 will be the landlord in respect of T1 and T1 will be the landlord in respect of T2.

98. Certain occupancy agreements are excluded from the scheme and the landlord will be exempt from the requirement to conduct checks. These are listed in Schedule 3.

99. *Subsection (7)* creates a power to amend Schedule 3, in case further categories of agreement need to be excluded from these provisions, or some should be brought within the scope of the restriction. The order is subject to the affirmative resolution procedure (see clause 67(2)).

Schedule 3: Excluded residential tenancy agreements

100. *Paragraphs 1* and *2* excludes agreements which grant a right of occupation in social housing, where the landlord or a local authority is already subject to an obligation to check the immigration status of prospective occupants, or the tenant has an existing tenancy and is seeking to exchange their home for an alternative tenancy.

101. Para*graph 3* excludes agreements which grant a right of occupation in a care home.

102. *Paragraph 4* excludes agreements which grant a right of occupation in a hospital or hospice. In most cases, a hospital or hospice will not provide an individual's only or main residence, nor will the occupant be expected to pay rent. However, in some circumstances it may be that a hospital or hospice does provide the patient's only or main residence and they may be expected to make a contribution towards their board, such that the arrangement would fall within the definition of a residential tenancy agreement as set out in clause 15. This paragraph excludes this type of accommodation.

103. Paragraph 5 excludes agreements which grant a right of occupation in any circumstances where the accommodation is arranged by a relevant National Health Service body which is acting in response to a statutory duty owed to an individual. In some circumstances, continuing health care provision may include the provision of accommodation.

104. *Paragraph 6* excludes agreements which grant a right of occupation in a hostel or refuge. Hostels and refuges which are managed by social landlords, voluntary organisations or charities, or which are not operated on a commercial basis and whose operating costs are provided either wholly or in part by a government department or agency or a local authority are exempt. A hostel is defined as a building, or part of a building which is used to provide residential accommodation otherwise than in separate and self contained premises and board or facilities for food preparation, for persons generally or a class of persons, for example people who are street homeless. A refuge means a building which is used wholly or mainly to provide accommodation for persons who are seeking protection from abuse, such as a refuge for those who have fled domestic abuse or the victims of trafficking.

105. *Paragraph 7* excludes agreements which grant a right of occupation in any circumstances where the accommodation is arranged by a local authority which is acting in response to a statutory duty owed to an individual, or is exercising a specified power with the intention of providing accommodation to a person who is homeless or is threatened with homelessness. This provision ensures that where a local authority is subject to a statutory duty

to provide assistance to an individual, it is not prevented from fulfilling its obligations and that where a local authority considers it appropriate to exercise a power to provide assistance to an individual for the specified purpose, they are able to do so.

106. *Paragraph 8* excludes agreements which grant a right of occupation that is provided to an individual by virtue of any of the specified provisions of the 1999 Act. The specified provisions empower the Secretary of State to provide accommodation for certain asylum seekers, failed asylum seekers and persons who have been granted temporary admission to the UK under paragraph 21 of Schedule 2 to the 1971 Act, or temporary release under that paragraph. The persons who qualify for this support will fall within the definition of a disqualified person in clause 16. The provision ensures that the Secretary of State is not frustrated from exercising the specified statutory powers. It also allows the Secretary of State to secure accommodation to be used for this purpose.

107. *Paragraph 9* excludes agreements to which the Mobile Homes Act 1983 applies.

108. *Paragraph 10* excludes agreements that grant a right of occupation in accommodation that is provided by an employer to an employee, or by a body providing training to an individual in connection with that training. This avoids duplication of the checks the landlord must conduct before offering employment or a place on a course of study.

109. *Paragraph 11* excludes agreements that grant a right of occupation in a hall of residence where the accommodation is provided predominantly for occupation by students, and which is either owned or managed by a specified educational institution, or which has an agreement with one or more such institutions which allows them to nominate the students who will occupy the premises. This avoids duplication of checks which will already be undertaken by the educational institution before offering a student a place on a course of study.

110. *Paragraph 12* provides an exclusion for leases where the lease arrangement is more akin to one of home ownership than a traditional landlord tenant arrangement.

Clause 16: Persons disqualified by immigration status or with limited right to rent

111. This clause sets out those persons who may not occupy privately rented property as their only or main home as a result of their immigration status; these are "disqualified persons." It also sets out those persons who have a "limited right to rent property" because of their immigration status. In general, those who entered the UK unlawfully, or have overstayed their leave to enter or remain in the UK, will be disqualified and those persons who have a limited right to enter or remain in the UK have a limited right to rent.

112. *Subsection (1)* sets out those persons who are disqualified from occupying property. It makes it clear that relevant nationals: British citizens, EEA nationals and Swiss nationals, have the right to rent property,, as they are all relevant nationals as defined in subsection (5).

A person is disqualified from entering a residential tenancy (they do not have a "right to rent") if they are a person who needs leave to enter or remain to be lawfully in the UK but does not have leave (subsection (2)) or their leave is subject to a condition that would prevent them from taking up occupation at the premises. A person whose leave to enter or remain in the UK is invalid, has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise) will not have leave to enter or remain in the UK and so will not have a right to rent. A person who has leave subject to a condition that they reside at a specific address, which is not the address of the premises which are the subject of the agreement, will not have a right to rent that property.

113. *Subsection (3)* gives the Secretary of State the discretion to grant a person the right to rent even though they would otherwise be disqualified as a result of their immigration status.

114. *Subsection (4)* defines the persons who have a "limited right to rent." These are persons who have been granted leave to enter or remain in the UK for a limited period of time, those persons who do not require leave to enter or remain as the qualifying family members of EEA nationals, or persons who enjoy a right to reside in the UK which derives from the EU Treaties.

Clause 17: Persons disqualified by immigration status not to be leased premises

115. This clause provides that a landlord must not allow an adult to occupy property under a residential tenancy agreement if they are a disqualified person.

116. *Subsection (2)* makes it clear that the restriction in subsection (1) will only be contravened where the circumstances set out at subsection (4) or subsection (5) apply.

117. *Subsections (4)* and *(5)* set out the two different circumstances in which a contravention of this restriction may occur. In the first scenario a landlord enters into an agreement which allows a disqualified person to occupy the property. In the second scenario, while at the time the landlord enters into the agreement the person who will occupy the premises has the right to rent, that right comes to an end while they remain in the property.

118. *Subsection (6),* read in conjunction with subsection (4) makes it clear that a person does not have to be named in a tenancy agreement for these provisions to apply. A landlord is expected to make reasonable enquiries regarding the persons who will take up residence under an arrangement before entering into an agreement and even if the individual is not specifically named in any written agreement, the landlord will be responsible for them if they have authorised their occupation or should have been aware of their occupation, from the making of reasonable enquiries.

119. *Subsection (7)* is an anti-avoidance provision. A landlord cannot attempt to avoid liability for a penalty by relying on a provision in a residential tenancy agreement which states that a disqualified person is not permitted to occupy the premises if they subsequently enter

into a side agreement which allows a disqualified person to take up residence without undertaking the required checks or if they otherwise waive a breach of such a provision.

120. *Subsection (9)* confirms that the restriction set out in the clause is not intended to affect the validity or enforceability of any provisions of a residential tenancy agreement. A breach of the restriction will not impact on a landlord or tenant's ability to enforce any provision in the agreement that they have entered into.

Clause 18: Penalty notices: landlords

121. This clause sets out the penalty for landlords who allow disqualified persons to take up residence in a property as their only or main home.

122. *Subsections (1) and (2)* empower the Secretary of State to impose a penalty of up to £3,000 on a landlord for each disqualified adult that they allow to occupy property.

123. *Subsection (3)* determines which landlord is responsible for a penalty. Where liability for a penalty arises because the landlord entered into the agreement which allowed occupation by a disqualified person, then the landlord who entered that agreement will always be responsible. This is to stop landlords who sell property with sitting tenants from passing the burden of a penalty onto the new owner who had no involvement in selecting or checking the occupants.

124. Where liability for a penalty arises because a person was allowed to occupy premises at a time that they had a right to rent, but that person has subsequently become a disqualified person who remains in occupation, the landlord at the time of the contravention will be responsible. This means that where a landlord acquires the freehold of a property with sitting tenants, they will take on responsibility for ensuring that any checks are undertaken in respect of occupants who have a limited right to rent at the required intervals and taking the prescribed steps should those occupants subsequently become disqualified persons.

125. *Subsection (5)* allows a landlord to pass responsibility for a breach to a superior landlord, where the superior landlord is willing to accept that responsibility. To take the example of a landlord (L1) who grants a tenancy to a tenant (T1) who then grants a licence to a lodger (T2), if T2 is a disqualified person, T1 will be the responsible landlord, unless L1 and T1 have agreed between them in writing that L1 will accept responsibility for T2 for the purposes of this scheme. L1 and T1 may determine the extent to which L1 will accept responsibility; for instance, L1 could agree to undertake responsibility only for specifically named occupants, or only for pre-grant, and not post-grant, contraventions.

126. *Subsection (6)* enables the Secretary of State to amend by order the amount of the penalty referred to in subsection (2). This order is subject to the affirmative resolution procedure (see clause 67(2)).

Clause 19: Excuses available to landlords

127. This clause sets out the statutory excuses available to landlords to avoid a penalty for renting to someone who is disqualified. A landlord can establish an excuse if he carries out checks according to the prescribed requirements and the carrying out of those requirements did not show that the prospective occupant was disqualified. A landlord also has an excuse if he arranges for an agent to do the checks for him (subsection (2)).

128. *Subsections (3) and (4)* set out the duration before a tenancy commences within which the checks must be carried out. In the case of those with permanent status in the UK, the checks may be carried out at any time before the tenancy is entered into. For those subject to immigration control and who have a limited right to rent the checks must be carried out within a set period prior to the commencement of the tenancy. This period will be specified by order. This is to prevent a perverse scenario whereby checks reveal a person's leave will expire prior to the commencement of the tenancy but a landlord is nevertheless able to rent to them because they had valid leave at the time the check was carried out.

129. *Subsection (6)* sets out that if an occupant's leave expires during a tenancy the landlord can establish an excuse by carrying out repeat checks at the specified intervals, (or arranging for an agent to do so), and by then telling the Secretary of State that a disqualified person is in their property if the repeat check identifies that the person's limited right to rent is no longer valid. They must make this report as soon as possible after making the repeat check.

130. *Subsection (7)* sets out how a landlord can be said to have notified the Secretary of State "as soon as reasonably practicable."

131. *Subsection (8)* requires notification to the Secretary of State to be made in the prescribed form and manner.

132. *Subsection (9)* defines "limited right occupier" to mean an occupier who had a limited right to rent when first granted a right to occupy a premises.

Clause 20: Penalty notices: agents

133. This clause sets out the circumstances where an agent contracted by a landlord to carry out checks on an occupant's right to rent can be held liable for any breach of the restriction on renting to disqualified persons. An agent may be liable where they act in the course of a business, so for instance letting agents who make status checks on tenants (subsection (2)); the landlord cannot simply pass the checking burden on by asking a friend or illegitimate company to carry out the checks for them. The agreement with the agent must be made in writing.

134. *Subsections (3) and (4)* empower the Secretary of State to impose a penalty of up to £3,000 on an agent for each disqualified adult that is allowed to occupy property.

135. *Subsection (5)* provides for the maximum amount of the penalty specified in subsection (4*)* to be varied by order. This order is subject to the affirmative resolution procedure (see clause 67(2)).

Clause 21: Excuses available to agents

136. This clause sets out the excuses available to agents where they are engaged to check a tenant's right to rent, but a disqualified person is allowed to occupy a property. The agent has an excuse either where they can demonstrate that they carried out relevant checks, but they did not reveal that a person was disqualified (subsection (2)), or where they informed the landlord that the occupant was disqualified before the tenancy began (subsection (5)).

137. *Subsections (3) and (4)* set out the duration before a tenancy commences within which the checks must be carried out, applying the same rules as in clause 19.

138. Under *subsection (6)*, in the case of an occupant who became disqualified during the tenancy, the agent has an excuse if they have carried out repeat checks in respect of the individual at the specified intervals, and informed the Secretary of State that a disqualified person is in the property if the repeat check identifies that the person's limited right to rent is no longer valid. They must make this report as soon as possible after making the repeat check.

139. *Subsection (7)* sets out how an agent can be said to have notified the Secretary of State "as soon as reasonably practicable."

140. *Subsection (8)* requires notification to the Secretary of State to be made in the prescribed form and manner.

Clause 22: Eligibility period

141. This clause sets out the times at which a landlord or agent must undertake repeat checks of those persons with a limited right to rent if they are to rely on the excuses provided for in clause 19 or 21. A landlord letting to someone who has limited leave in the UK should check that they have not become disqualified from renting either before their leave is due to expire, or one year after the tenancy begins, whichever is the longer period. To take some practical examples, if a landlord grants an agreement allowing use of a room to a visitor who has six months' leave to remain in July 2015, the landlord will not need to undertake a repeat status check until July 2016 to maintain a statutory excuse against a penalty. If, at the same time, the landlord rents a property to a student with four years' leave, he need not undertake a repeat status check until July 2019. Where the occupant has indefinite leave to remain, the landlord will not need to undertake a repeat check; while their biometric residence permit may need to be renewed within a period of 10 years, the landlord can rely on the fact that the leave they have been granted is indefinite and no further check is required.

Clause 23: Penalty notices: general

142. This clause provides for the issuing of a penalty notice by the Secretary of State to a landlord or agent. Subsection (1) provides that as a matter of law, the Secretary of State does not have to establish whether the landlord or agent can establish an excuse before serving a penalty notice. Subsection (3) provides that a separate penalty notice can be given for each disqualified adult occupying the premises.

Subsection (2) sets out what a notice should contain. The notice must say why the Secretary of State thinks the landlord or agent is liable and give details of how large the penalty is, how it should be paid and give a deadline for payment that is more than four weeks away. The notice must also say how the landlord or agent can go about lodging an objection to the penalty. A notice cannot be given if a year or more has passed since a disqualified person occupied a property, unless a new notice is being issued under clause 24(6) following consideration of an objection made by a landlord or agent and the original notice was given within that 1 year period (subsection (5)).

143. *Subsection (4)* provides that where a penalty notice is given to two or more persons who jointly constitute the landlord or agent, then those persons are liable for the penalty on a joint and several basis.

Clause 24: Objection

144. This clause establishes the process by which a landlord or agent may object to the penalty they have been given by the Secretary of State for renting to a disqualified person and for the Secretary of State to consider objections.

145. *Subsections (1) and (2)* provide that a landlord or agent may object to his liability to the imposition of a penalty and to the amount. He may also object on the basis that he is not the liable party, is excused payment because he has complied with the requirements set out in clause 19 for landlords, or clause 21 for agents, or that the penalty given is too high in the circumstances.

146. *Subsection (3)* sets out that an objection must be made in writing to the Secretary of State within a timeframe that will be set out in an order and must give the reasons, which should be either that the landlord or agent does not believe they are liable, or that they have an excuse as set out in clause 19 or 21, or that the penalty given is too high in the circumstances.

147. The Secretary of State must consider the objection, with regard to the Code of Practice issued under Section 27; and may decide to cancel the penalty or change the amount which must be paid as a result of the objection, or take no action and leave the penalty notice as it stands. The Secretary of State must notify the agent or landlord of the decision within a set period that will be set out by order (subsections (4), (5) and (6)).

Clause 25: Appeals

148. This clause sets out the right of appeal where the landlord or agent is unhappy with the Secretary of State's decision on their objection to a penalty, and ensures a right of appeal should the Secretary of State fail to respond to an objection within the required timeframe.

149. *Subsection (1)* provides that a landlord or agent on whom a penalty is served may appeal to the court on the grounds that he is not liable to the penalty, the amount is too high, or he is excused payment having complied with the specified requirements.

150. *Subsection (2)* covers the actions that may be taken by the court.

151. *Subsection (3)* sets out the nature of the appeal and the matters to which the court must have regard in determining the case.

152. *Subsection (5)* requires that a landlord or agent must have made an objection under clause 24 before he may appeal.

153. *Subsections (6) to (9)* provide for when an appeal must be brought and define what the "relevant date" is for the recipient of penalty notices where the recipient is bringing an appeal under subsection (5).

Clause 26: Enforcement

154. This clause provides that a penalty due to the Secretary of State may be recovered as though it were due under an order of a court. This means that the Secretary of State may take action to recover money owed under a penalty notice without first issuing a substantive claim with a court. Instead the debt may be registered with the court, and enforcement action pursued without further order.

Clause 27: General matters

155. This clause imposes a requirement on the Secretary of State to issue a code of practice in relation to these provisions. The code of practice must set out:

- the criteria to be applied in deciding whether to impose a penalty and the amount;
- guidance regarding when a person will be considered to be using premises as their 'only or main residence' for the purposes of these provisions, with particular emphasis on tourist lets and lets made in connection with business travel;
- details of the steps landlords and agents will be expected to take to determine who will be occupying the premises under the terms of a residential tenancy agreement.

156. *Subsection (5)* requires that the code of practice is reviewed from time to time.

157. *Subsection (6)* requires that the code of practice, and any revisions that are made to it, must be laid before Parliament.

158. The government has published a draft code of practice.[24]

Clause 28: Discrimination

159. This clause requires the Secretary of State to issue a code of practice to landlords and agents specifying how to avoid contravening the Equality Act 2010 or the Race Relations (Northern Ireland) Order 1997 while avoiding liability for a civil penalty. The Secretary of State must review that code of practice from time to time and any revisions that are made to it must be laid before Parliament.

160. *Subsections (3)* and *(4)* provide that before issuing the code of practice, the Secretary of State must consult with the Commission for Equality and Human Rights, the Equality Commission for Northern Ireland and persons representing the interests of landlords and tenants as considered appropriate before issuing or reissuing the code. A draft code must be published following consultation and representations on it must be considered before a final version is published. A breach of this code will not make a person liable to civil or criminal proceedings, but may be taken into account by a court or tribunal (subsection (5)).

161. The government has published a prototype code of practice on discrimination.[25]

Clause 29: Orders

162. This clause elaborates on the Secretary of State's order-making powers under this Chapter and in particular sets out the types of action which the Secretary of State may prescribe that must be carried out by landlords and agents to enable them to establish a statutory excuse against a penalty.

163. *Subsection (2)* makes provision if any draft statutory instrument under or in connection with this Chapter subject to the affirmative procedure under clause 67(2) would be a hybrid instrument subject to the special procedure for such instruments in the House of Lords. This could arise, for example, if an instrument were laid under clause 15(7) that made provision which would apply in respect of one geographical area alone. In that situation, the instrument would be treated as though it were not a hybrid instrument for the purposes of the standing orders of either House of Parliament and so would not be subject to any special procedure for hybrid instruments.

Clause 30: Transitional provision

164. *Subsections (1) and (2)* provide that landlords who allowed people to occupy their premises before these provisions come into force do not need to make checks regarding the immigration status of those occupants. Any new arrangements made between landlords and

[24] *Code of Practice: Civil Penalties for landlords and their agents*, published 31 October 2013, https://www.gov.uk/government/publications/immigration-bill-part-3-access-to-services.
[25] *Prototype Anti-Discrimination Code*, published 31 October 2013, https://www.gov.uk/government/publications/immigration-bill-part-3-access-to-services.

tenants where they were previously parties to another agreement and the tenant has enjoyed a continuing right of occupation of the premises will also not be subject to the restrictions.

165. *Subsection (3)* enables the Secretary of State to appoint the commencement day for the purposes of this clause by order, and allows different days to be appointed for different purposes or areas. The clause is subject to the general commencement powers set out in clause 68(3) and so will be brought into force by an order made under the procedure specified for that provision. But as the new regime under the Chapter may be commenced at different times in relation to different areas, it follows that different commencement days may also be required for different areas for the purposes of the transitional provisions under this clause. This provision provides the flexibility to appoint those different commencement days.

166. Implementation of the provisions in Chapter 1 of Part 3 relating to residential tenancies will be rolled out on a phased geographical basis across the United Kingdom. Commencement of the initial implementation will be by order which is not subject to any parliamentary procedure. Clause 67(7) provides that any subsequent order made under clause 68(3) bringing into force those provisions is subject to the negative parliamentary procedure.

Clause 31: Crown Application

167. This clause provides that the restrictions on letting apply to residential tenancy agreements made in respect of premises which are on Crown lands, except where the Crown is itself the responsible landlord. If property on Crown land is let out to a tenant who is not a Crown body, the tenant will be bound by the scheme should they sub-let the property.

Clause 32: Interpretation

168. This clause sets out the definitions given to terms within these provisions.

169. *Subsection (6)* enables the Secretary of State to prescribe situations which will or will not be treated as entering into a residential tenancy agreement and circumstances where a person will or will not be considered to be occupying premises as their only or main residence for the purposes of these provisions. This will allow the Secretary of State to make provision in relation to a range of different circumstances that may occur in relation to a residential tenancy agreement – for example, the variation and renewal of agreements. The power will enable the Secretary of State to specify how such matters are to be dealt with for the purposes of the scheme. The power will also allow the Secretary of State to put in place anti-avoidance measures should this prove necessary in relation to the premises which should be considered to be a person's only or main residence, for instance by ensuring that illegal migrants are not able to escape the provisions by claiming that their only or main residence is overseas. The order is subject to the negative resolution procedure (see clause 67).

Chapter 2: Other Services etc

National Health Service

Clause 33: Immigration health charge

170. This clause provides the Secretary of State with a power, by order, to require certain migrants to pay an immigration health charge. Affected migrants would be required to pay the charge when applying for leave to enter or remain in the UK or when applying for entry clearance. The order may include provision about the amount, method of payment and consequences of non-payment of the charge and for exemptions from the charge. The order may also provide for a reduction, waiver or refund of all or part of the charge. In specifying the amount of the charge, the Secretary of State must have regard to the range of health services likely to be available free of charge for persons who have paid the charge.

171. *Subsection (5)* provides that any funds collected under this power must be paid to either the Consolidated Fund or applied as specified in the order. The order is subject to the affirmative resolution procedure (see clause 67(2)).

Clause 34: Related provision: charges for health services

172. Persons who are ordinarily resident in the UK are not chargeable for health services under the legislation specified in clause 34(2). Clause 34 states that for the purpose of the charging provisions those who require leave to enter or remain and do not have it and those who have limited leave to enter or remain are not to be treated as ordinarily resident, so ensuring they can potentially be charged for health services throughout the UK.

173. *Subsection (2)* sets out the specific health service charging provisions in each of the constituent parts of the UK in respect of which the definition of not ordinarily resident in subsection (1) applies.

Bank accounts

Clause 35: Prohibition on opening current accounts for disqualified persons

174. *Subsection (1)* provides that a bank or building society must not open a current account for a person who falls within subsection (2) unless one of two conditions has been satisfied.

175. The first condition is that the bank or building society has carried out a "status check" in respect of the applicant, that is a check in relation to their immigration status, and this has indicated the person is not a "disqualified person" for whom an account should not be opened. The second condition is that the bank or building society has been unable to carry out a status check because of circumstances that cannot reasonably be regarded as within its control. This might occur, for example, if it were unable to perform a check because of operational difficulties being encountered by the checking service for an extended period.

176. *Subsection (2)* sets out the persons who may be disqualified from opening a bank account. A person may be disqualified from opening a current account if they are physically present in the UK and require leave to enter or remain in the UK but do not have it.

177. *Subsection (3)* defines what constitutes a "status check" and a "disqualified person" for the purposes of these provisions. A status check means a check with a specified anti-fraud organisation or a specified data-matching authority. A disqualified person is a person who falls within subsection (2) and in respect of whom the Secretary of State considers a current account should not be opened. The Secretary of State therefore has discretion as to who should be barred from opening current accounts. This is because there will be some individuals who face legitimate barriers which prevent them from leaving the UK, even though they do not have leave. The Secretary of State may enable these persons to open a current account. Subsection (3) provides that the prohibition on opening an account for a disqualified person extends to instances where the disqualified person is applying for a joint account, an account to which that person is to be a signatory or a named beneficiary, and also to instances where the disqualified person is to be added to an existing account as an account holder, signatory or named beneficiary.

178. *Subsection (4)* provides that an anti-fraud organisation specified for the purposes of subsection (3)(a) must be an organisation specified under section 68 of the Serious Crime Act 2007 and that a data-matching authority specified must be a person or body conducting data matching exercises within the meaning of Schedule 9 to the Local Audit and Accountability Act 2013, under or by virtue of that or any other Act.

179. *Subsection (5)* has the effect that where a bank or building society is unable to carry out a status check because it has not paid a reasonable fee for the status check to be carried out when required to do so, and it opens an account for a disqualified person, it will breach the prohibition on opening current accounts for disqualified persons.

180. *Subsection (6)* provides that where a bank or building society refuses to open a current account in accordance with the requirements of this clause, the bank or building society must tell the person of the reason for refusal, if it can do so lawfully. The duty to inform the person of the reason for refusal is to enable the person, if relevant, to obtain evidence of his lawful immigration status so that he can then reapply for an account. However, the duty to inform is subject to any other provision that would prevent a bank or building society from communicating information to the person. For instance, if informing the person would amount to an offence under section 333A of the Proceeds of Crime Act 2002 (Tipping Off: regulated sector), the bank or building society could not tell them.

Clause 36: Regulation by Financial Conduct Authority

181. *Subsection (1)* provides that the Treasury may make regulations to enable the Financial Conduct Authority (FCA) to make arrangements for monitoring and enforcing compliance with the prohibition imposed on banks and building societies by clause 35. The regulations are subject to the affirmative resolution procedure (see clause 67(2)).

182. The regulations may make provisions for the FCA to be given free access to the information held by the anti-fraud organisation or data-matching authority specified for the purposes of clause 35 which is accessed by banks and building societies (subsection (2)(a)). Such access may be necessary to ensure effective regulation and enforcement by the FCA. Subsection (2)(b) provides any regulations may correspond to any provisions of the Financial Services and Markets Act 2000, in particular those listed in subsection (3), with or without modification.

183. *Subsection (3)* sets out specific matters that the regulations may cover in order to ensure the FCA can take such steps as necessary to put in place appropriate arrangements to combat and deter breaches of the obligations under clause 35 by banks and building societies. The reference to "criminal offences" at subsection (3)(a) will, for example, enable the regulations to make it an offence for banks and building societies to mislead the FCA.

Clause 37: "Bank" and "building society"

184. This clause defines what is meant in these provisions by the terms "bank" and "building society".

185. *Subsection (1)* provides that for the purposes of these provisions, a "bank" is an "authorised deposit-taker" that has its head office or a branch in the UK. This is subject to the exclusions set out at subsection (4).

186. *Subsection (2)* defines an "authorised deposit-taker," consistent with the relevant provisions of the Financial Services and Markets Act 2000, while subsection (3) provides that this definition does not include bodies that have permission to accept deposits only for the purposes of or in the course of another form of activity (for example insurance companies).

187. *Subsection (5)* defines a building society for the purposes of these provisions.

Clause 38: Power to amend

188. *Subsection (1)(a)* provides that the Treasury may, by order, amend clauses 35 to 37 to alter the categories of financial institutions to which those clauses apply. This is an anti-avoidance measure, in case in future it becomes necessary to extend the prohibition set out in clause 35 to institutions such as credit unions.

189. *Subsections (1)(b), (1)(c) and (1)(d)* allow the Treasury, by order, to amend clause 35 to make the prohibition apply to different kinds of accounts (including other financial products by means of which a payment can be made), beyond or instead of current accounts, to define such categories of accounts and to further define accounts operated or to be operated by or for a person or body of a description that will be specified in the order. This is largely an anti-avoidance measure, in case in future it becomes necessary to alter the ambit of the prohibition to cover financial products other than current accounts (for example savings accounts, or to clarify the types of accounts that are covered).

190. *Subsection (2)* provides that such an order may amend clauses 35 to 37 to confer order making powers upon the Treasury itself so that details of the types of account which will fall within the prohibition can be specified in secondary legislation.

191. Orders under this clause are subject to the affirmative resolution procedure (see clause 67(2)).

Work

Clause 39: Appeals against penalty notices

192. This clause amends section 17 of the 2006 Act. It substitutes for subsections (4) and (5) new subsections (4A) to (4E). The effect is to require an employer to exercise their right to object to a penalty notice for a breach of the illegal working provisions in that Act to the Secretary of State before they appeal to the civil court against the penalty.

Clause 40: Recovery of sums payable under penalty notices

193. This clause amends section 18 of the 2006 Act. It substitutes subsections (1) and (2) with new subsections (1) to (1D). The effect is to allow the Secretary of State to enforce a penalty as if it were a debt due under a court order. The amendment will allow an outstanding penalty to be registered with the civil court, after which enforcement action may be commenced immediately. It will eliminate the need for the Secretary of State to first make an application to the court for a substantive order for payment.

194. Currently the penalty 'may be recovered by the Secretary of State as a debt due to him.' This requires the issue of a substantive claim which gives the employer the opportunity to raise a defence before the matter is determined and judgment is given. At this point in proceedings, the Secretary of State can seek to rely on subsection (2) of section 18 which states that in proceedings for the enforcement of a penalty, no question may be raised regarding liability to the penalty, application of an excuse in section 15(3) or the amount of the penalty. The amendment will remove the need for these proceedings entirely and allow the Secretary of State to register the penalty with the court and then move to enforcement proceedings.

195. Subsection (1D) provides that where action is taken under this section for the recovery of a sum payable as a penalty, the penalty is to be treated as if it were a judgment entered in the county court in England and Wales for the purposes of section 98 of the Courts Act 2003, and as a judgment in Northern Ireland in respect of which an application for enforcement has been entered for the purposes of Article 116 of the Judgments Enforcement (Northern Ireland) Order 1981. This will allow penalty notices where enforcement action is taken to be entered on the registers of judgments in England and Wales and in Northern Ireland as though a substantive order for the sum payable had been made by a court in those jurisdictions.

Driving licences

Clause 41: Grant of driving licences: residence requirement

196. Section 97 of the Road Traffic Act 1988 ("the 1988 Act") and Article 13 of the Road Traffic (Northern Ireland) Order 1981[26] ("the 1981 Order") set out the circumstances in which the Secretary of State and Department of the Environment must grant Great Britain and Northern Ireland driving licences respectively.

197. *Subsection (1)* amends section 97(1) of the 1988 Act to provide that one of the conditions for the grant of a driving licence is that the person must meet the relevant residence requirement.

198. *Subsection (2)* inserts new section 97A after section 97 of the 1988 Act to define the residence requirement and provides, in particular, that a person will not meet this requirement where they require leave to enter or remain in the UK but do not have it.

199. *Subsections (3) and (4)* make corresponding provision to the 1981 Order in respect of the grant of driving licences in Northern Ireland.

Clause 42: Revocation of driving licences on grounds of immigration status

200. *Subsection (1)* inserts into section 99 of the 1988 Act a power to revoke a driving licence where it appears to the Secretary of State that a licence holder is not lawfully resident in the UK (defined as where a person requires leave to enter or remain in the UK but does not have it). Provision is also made for persons who fail to surrender a driving licence that has been revoked on grounds of immigration status, without reasonable excuse, to be guilty of a criminal offence.

201. *Subsection (2)* makes provision for a person who is aggrieved by the Secretary of State's decision to revoke their driving licence on the grounds that they were not lawfully resident in the UK to appeal to a magistrates' court or, in Scotland, to the sheriff within whose jurisdiction he resides. In any appeal against the revocation of a driving licence, the court or sheriff is not entitled to entertain any questions as to whether the appellant should be, or should have been, granted leave to enter or remain in the UK or whether the appellant has been granted leave to enter or remain after the date that the Secretary of State served a revocation notice.

202. *Subsections (3) and (4)* make corresponding provision to the 1981 Order in relation to the revocation of driving licences in Northern Ireland.

[26] S.I. 1981/154 (N.I. 1)

Part 4: Marriage and Civil Partnership

Chapter 1: Referral and Investigation of Proposed Marriages and Civil Partnerships

Clause 43: Decision whether to investigate

203. *Subsection (1)* provides that the clause applies if a superintendent registrar refers a proposed marriage to the Secretary of State under section 28H of the Marriage Act 1949 ("the 1949 Act"), or a registration authority refers a proposed civil partnership to the Secretary of State under section 12A of the Civil Partnership Act 2004. Sections 28H and 12A are inserted by Schedule 4 to the Bill.

204. *Subsection (2)* requires the Secretary of State to decide whether to investigate whether a proposed marriage or civil partnership referred to the Secretary of State is a sham, as defined by clause 57(3). (That definition refers to sections 24 and 24A of the Immigration and Asylum Act 1999, which are amended by clause 51.).

205. *Subsection (3)* prevents the Secretary of State from conducting an investigation unless the conditions set out in subsection (4) (Condition A) and subsection (5) (Condition B) are met.

206. *Subsection (4)* provides that Condition A is met if the Secretary of State is satisfied that one or both parties to the proposed marriage or civil partnership is not an exempt person, as defined by clause 44.

207. *Subsection (5)* provides that Condition B is met if the Secretary of State has reasonable grounds for suspecting the proposed marriage or civil partnership is a sham.

208. *Subsection (6)* requires that, in deciding whether to conduct an investigation, the Secretary of State has regard to any guidance published by the Secretary of State for that purpose.

209. *Subsection (7)* requires the Secretary of State to give notice of the decision whether to conduct an investigation to both parties to the proposed marriage and to the superintendent registrar who referred it.

210. *Subsection (8)* requires the Secretary of State to give notice of the decision whether to conduct an investigation to both parties to the proposed civil partnership and to the registration authority who referred it and, if different, the registration authority responsible for issuing the civil partnership schedule.

211. *Subsection (9)* requires the Secretary of State to make and give notice of the decision whether to conduct an investigation within the 28-day period for giving notice of marriage following civil preliminaries for which section 31 of the 1949 Act (as amended by paragraph 10 of Schedule 4) will provide, or within the 28-day period for giving notice of civil

partnership for which section 11 of the Civil Partnership Act 2004 (as amended by paragraph 22 of Schedule 4) will provide.

Clause 44: Exempt persons

212. *Subsection (1)* provides for three categories of persons who are exempt from the referral and investigation scheme: subsection (1)(a) a relevant national as defined in section 57 (British citizen, EEA national or Swiss national); subsection (1)(b) on the basis of having the appropriate immigration status, as defined in subsection (2); and subsection (1)(c) on the basis that the person holds a relevant visa, as defined in regulations made under subsection (4).

213. *Subsection (2)* provides that a person has the appropriate immigration status if they fall into one of three categories: a non-EEA national with an EU law right of permanent residence in the UK; a person exempt from immigration control as defined in regulations made under subsection (3); or a person who has settled status in the UK, as defined in section 33(2A) of the 1971 Act.

214. *Subsection (3)* provides for the question whether a person is exempt from immigration control (and therefore an exempt person under subsections (1)(b) and (2)(b)) to be determined in accordance with regulations made by the Secretary of State.

215. *Subsection (4)* provides for regulations to be made by the Secretary of State specifying what kinds of visa or other authorisation constitute a relevant visa for the purpose of being an exempt person under subsection (1)(c).

216. *Subsection (5)* limits the types of visa or other authorisation which may be specified in the regulations in subsection (4) to those which are granted for the purpose of enabling a person to enter or remain in the UK to marry or form a civil partnership.

Clause 45: Conduct of investigation

217. *Subsection (1)* requires that any investigation of whether a proposed marriage or civil partnership is a sham must be conducted in accordance with any regulations made by the Secretary of State for that purpose.

218. *Subsection (2)* requires that in any investigation of whether a proposed marriage or civil partnership is a sham, regard must be had to any guidance published by the Secretary of State for that purpose.

219. Subsection (3) provides that, where the Secretary of State decides to investigate whether a proposed marriage or civil partnership is a sham, the relevant parties are required to comply with any requirements specified in regulations if notified by the Secretary of State that they must do so.

220. *Subsection (4)* provides that the Secretary of State must decide as part of the investigation whether both of the parties to the proposed marriage or civil partnership have complied with the investigation, the "compliance question."

221. *Subsection (5)* provides that the compliance question is to be decided in accordance with any regulations made by the Secretary of State for that purpose.

222. *Subsection (6)* provides that the compliance question is to be decided with regard to any guidance published by the Secretary of State for that purpose.

223. *Subsection (7)* requires the Secretary of State to decide the compliance question and give notice of the decision to both parties to the proposed marriage or civil partnership, and to the superintendent registrar or the registration authority who referred it to the Secretary of State, and if different, the registration authority responsible for issuing the civil partnership schedule, within a 70 day period.

224. *Subsection (8)* requires the Secretary of State to give reasons for reaching a decision that one or both of the relevant parties to the proposed marriage or civil partnership have not complied with the investigation.

225. *Subsection (9)* provides that regulations made under this clause may in particular deal with: (a) the circumstances in which a relevant party, as defined in subsection (11), is to be taken to have failed to comply with a relevant requirement, as also defined in subsection (11); and (b) the consequences of a relevant party's failure to comply with a relevant requirement.

226. *Subsection (10)* allows the compliance question to be decided by reference to a relevant party's compliance with one or more relevant requirements.

227. *Subsection (11)* defines particular terms used in this clause.

Clause 46: Investigations: supplementary

228. *Subsection (1)* provides that a notice given by the Secretary of State under clause 43 that the Secretary of State has decided to investigate whether a proposed marriage or civil partnership is a sham must include notice that the compliance question must be decided within a period of 70 days from the date on which the couple gave notice; notice of the date on which that period will end; notice that the couple may be required to comply with requirements imposed as part of the investigation; and information prescribed under subsection (3) about the investigation.

229. *Subsection (2)* allows a notice given under clause 43 to include such other information as the Secretary of State considers appropriate.

230. *Subsection (3)* contains an enabling power for the Secretary of State to prescribe in regulations what information must be included in the clause 43 notice and provides that this may include information about the conduct of an investigation; the requirements with which the parties to the proposed marriage or civil partnership must comply; the consequences of failing to comply with those or any other requirements; the possible outcomes of the investigation; and the consequences of those outcomes.

231. *Subsection (4)* allows the Secretary of State, by regulations, to specify requirements relating to the investigation which may be imposed on the parties to a proposed marriage or civil partnership in accordance with clause 45(3).

232. *Subsection (5)* enables regulations made by the Secretary of State under subsection (4) to specify in particular, a requirement on an individual(s) to make contact in a particular way within a particular time period (including by telephone); a requirement for the couple to be present at a particular place at a particular time; to be visited at home; to be interviewed; and to provide information, photographs and evidence.

233. *Subsection (6)* provides that the Secretary of State's powers in relation to marriages or civil partnership suspected to be a sham (including any powers of investigation) remain unaffected by the referral and investigation scheme.

234. *Subsection (7)* defines particular terms used in clauses 43 to 45 and in this clause.

Clause 47: Referral of proposed marriages and civil partnerships in England and Wales
235. This clause gives effect to Schedule 4, which makes further provision for the referral to the Secretary of State of proposed marriages and civil partnerships in England and Wales.

Schedule 4: Referral of proposed marriages and civil partnerships in England and Wales

Part 1: Marriage

Introduction
236. *Paragraph 1* provides that the 1949 Act is amended in accordance with Part 1 of this Schedule.

Supply of additional information and evidence
237. *Paragraph 2* amends section 27 of the 1949 Act to require a person giving notice of marriage to give their date of birth.

238. *Paragraph 3* inserts a new section 27ZA (entry of particulars in notice book: compliance with requirements) to instruct a superintendent registrar not to enter particulars relating to a marriage where various requirements imposed under the 1949 Act or the 2004

Act (including, in particular, requirements inserted into those Acts by the Bill) have not been complied with.

239. *Paragraph 4* inserts a new section 27E (additional information if party not relevant national) into the 1949 Act. Section 27E does not apply to a proposed marriage under section 39A of the 1949 Act (marriage of former civil partners one of whom has changed sex). Where applicable, section 27E requires that, if either or both parties giving notice are not relevant nationals (British citizens, EEA nationals or Swiss nationals) they must declare that (i) they have the appropriate immigration status under clause 44(2) (and, if so, what that is); (ii) they have a relevant visa under clause 44(4) (and, if so, what that is); or (iii) they have neither the appropriate immigration status nor a relevant visa. Where either or both parties do not have the appropriate immigration status or a relevant visa, it also provides that the notice may be accompanied by a statement of their immigration position in the UK.

240. The new section 27E also requires that, where one or both parties has a relevant visa, both parties must provide specified photographs of themselves.

241. The new section 27E also requires that where one or both parties declare that they have neither the appropriate immigration status nor a relevant visa, both parties must provide specified photographs of themselves; their usual address; if their usual address is outside the UK, an address in the UK at which they can be contacted by post; and, information about any other names previously used, and any aliases previously or currently used.

242. *Paragraph 5* amends section 28 of the 1949 Act to require the parties to declare that the information and evidence provided with the notice is true.

243. *Paragraph 6* amends section 28A (power to require evidence) of the 1949 Act and *paragraph 7* inserts new section 28B (provision of evidence), section 28C (additional evidence if party not relevant national), section 28D (change of usual address or UK contact address), section 28E (rejection of false information or evidence), section 28F (amendment of notice and evidence provisions) and section 28G (specified evidence).

244. The new section 28B (provision of evidence) requires that a notice of marriage under section 27 of the 1949 Act must be accompanied by evidence, specified in regulations made under the new section 28G, of the person's name and surname, date of birth, place of residence and nationality. Section 28B(2) requires a person giving notice of marriage to provide evidence of whether he or she has previously been married or formed a civil partnership and, if so, as to the ending of the marriage or civil partnership.

245. The new section 28C (additional evidence if party not relevant national) requires that, where either party is not a relevant national (British citizen, EEA national or Swiss national) a notice of marriage under section 27 of the 1949 Act must be accompanied by evidence, specified in regulations made under the new section 28G, that they have the appropriate immigration status under clause 44(2) or a relevant visa under clause 44(4), if either is the

case. Where the notice is not accompanied by this evidence, it requires that the notice be accompanied by specified photographs of both parties; their usual address and specified evidence of this; if their usual address is outside the UK, an address in the UK at which they can be contacted by post; and information about any other names previously used, and any aliases previously or currently used.

246. The new section 28D (change of usual address or UK contact address) requires that, once notice has been given, any change of usual address or UK contact address (where such an address has been provided), must be notified by the couple to the Secretary of State, according to regulations subject to the negative resolution procedure.

247. The new section 28E (rejection of false information or evidence) provides that a superintendent registrar may reject any information, photograph or evidence provided in giving notice under section 27 of the 1949 Act, in particular where they have reasonable grounds for suspecting that the information, photograph or evidence is false. If any information, photograph or evidence is rejected, the superintendent registrar may proceed as if it had not been provided.

248. The new section 28F (amendment of notice and evidence provisions) provides that, subject to consultation with the Registrar General, the Secretary of State may, by order subject to the affirmative procedure, amend the information or evidence required to give notice of marriage under section 27 of the 1949 Act and make consequential amendments, including to primary legislation.

249. The new section 28G (specified evidence) provides for the Registrar General to make regulations, with the approval of the Secretary of State, about specified evidence for the purposes of section 8, 16 or 28B. Section 28G also provides that, subject to consultation with the Registrar General, the Secretary of State may make regulations, subject to the negative resolution procedure, about specified evidence for the purposes of new section 28C. The regulations under this section may make provision for example for the kind of evidence to be supplied, the form in which it is to be supplied, and the manner in which it is to be supplied.

Referral to the Secretary of State

250. *Paragraph 8* inserts a new section 28H (referral of proposed marriage to Secretary of State) in the 1949 Act. This requires the superintendent registrar, when notice of marriage is given under section 27 of the 1949 Act, to decide whether both parties to the proposed marriage are exempt persons under clause 44(1) (unless the marriage is one to which section 39A of the 1949 Act applies because it is a marriage between former civil partners, one of whom has changed sex). Where the superintendent registrar decides that one or both of the parties is not an exempt person, the registrar must refer the proposed marriage to the Secretary of State. The registrar must also refer the marriage if one or both of the parties is not a British citizen, EEA national or Swiss national and evidence required under new section 28C(2) or (3) has not been provided. They must do so in accordance with regulations about the form, manner and timing of the referral (and the information to be included with it) made by the

Secretary of State (after consulting the Registrar General), subject to the negative resolution procedure. The superintendent registrar must also notify the parties that the proposed marriage must be referred to the Secretary of State, what this means and of any requirements in regulations under new section 28D about notifying the Secretary of State of any change in usual or UK contact address.

251. *Paragraph 9* inserts Schedule 3A (modifications if proposed marriage referred under section 28H) before Schedule 4. This provides that the duty placed on the superintendent registrar under section 31(2) of the 1949 Act to issue a certificate for marriage does not apply unless and until one of five events occurs. Event 1 occurs where the Secretary of State has given the superintendent registrar notice under clause 43(7) of a decision not to investigate; event 2 occurs where the statutory 28 day period has ended and the Secretary of State has not given the superintendent registrar notice under clause 43(7); event 3 occurs where the Secretary of State has given the superintendent registrar notice under clause 45(7) that the parties to the referred marriage have complied with the investigation; event 4 occurs where the 70 day period has ended and the Secretary of State has not given the superintendent registrar notice under clause 45(7); and event 5 occurs if the Secretary of State gives the superintendent registrar notice that the duty under section 31(2) of the 1949 Act applies.

252. *Paragraph 9* also extends the notice period to 70 days if the Secretary of State gives the superintendent registrar notice under clause 43(7) of a decision to investigate whether a referred marriage is a sham. Where a proposed marriage is referred to the Secretary of State, the statutory notice period (whether 28 or 70 days) can be shortened by the Secretary of State in exceptional circumstances, in which case the Secretary of State must notify the applicant and the superintendent registrar of the reduced period, enabling the issue by the superintendent registrar to issue a certificate in respect of the referred marriage under section 31(2) of the 1949 Act.

Notice period

253. *Paragraph 10* amends the notice period in section 31 of the 1949 Act (marriage under certificate without licence) from 15 days to 28 days. Paragraph 10 also requires, for a proposed marriage referred to the Secretary of State under new section 28H, any application for a reduction in the notice period to be submitted to the Secretary of State and for the decision to be made by the Secretary of State and notified to the applicant and the superintendent registrar, in accordance with regulations made by the Secretary of State after consultation with the Registrar General.

Marriage referred to Secretary of State: issue of certificates

254. *Paragraph 11* inserts a new section 31ZA (notice of marriage: false information or evidence) in the 1949 Act.

255. The new section 31ZA provides that, where notice of marriage has been given under section 27 of the 1949 Act, the superintendent registrar may refuse to issue the certificate

where they have reasonable grounds for suspecting that an incorrect decision was made because false information or evidence was provided.

Certificates
256. Paragraph 12 amends section 35 (marriage in registration district in which neither party resides) of the 1949 Act, to allow non-EEA nationals to marry in any Anglican place of worship that Church preliminaries would have allowed, notwithstanding that such couples must now complete civil rather than Church preliminaries.

One party resident in Scotland
257. Paragraph 13 provides that where one party is resident in England and the other party is resident in Scotland notice may be given in accordance with section 27 and the other provisions of the 1949 Act.

Proof of certain matters not necessary to validity of marriages
258. *Paragraph 14* amends section 48 (proof of certain matters not necessary to validity of marriages) of the 1949 Act to include any of the five events listed in paragraph 2(2) to (6) of Schedule 3A (modification if proposed marriage referred under section 28H) of the 1949 Act.

Regulations etc
259. *Paragraph 15* provides that regulations or orders made under the 1949 Act may make provision for different cases.

Offences
260. *Paragraph 16* amends the relevant period in section 75 of the 1949 Act (offences relating to solemnization of marriages) from 15 days to 28 days.

Relevant nationals
261. *Paragraph 17* amends section 78 (interpretation of the 1949 Act) to add relevant definitions.

Part 2: Civil Partnership

Introduction
262. *Paragraph 18* provides that the Civil Partnership Act 2004 is amended as follows.

Supply of additional information and evidence
263. *Paragraph 19* amends section 8 of the Civil Partnership Act 2004 to include in the declaration to be included with the notice of proposed civil partnership a statement that the proposed civil partner believes that all the information in the notice and the information and evidence supplied with it are true.

264. *Paragraph 20* inserts a new section 8A (additional information if party not relevant national) into the Civil Partnership Act 2004. Section 8A does not apply to a proposed civil

partnership under Schedule 3 of the Civil Partnership Act 2004 (civil partnership between former spouses one of whom has changed sex). Where applicable, section 8A requires that, if either or both parties giving notice of a proposed civil partnership are not relevant nationals (British citizens, EEA nationals or Swiss nationals), they must declare that (i) they have the appropriate immigration status under clause 44(2) (and, if so, what that is); (ii) they have a relevant visa under clause 44(4) (and, if so, what that is); or (iii) they have neither the appropriate immigration status nor a relevant visa. Where either or both parties do not have the appropriate immigration status or a relevant visa, it also provides for the notice to be accompanied by a statement of their immigration position in the UK.

265. The new section 8A also requires that, where one or both parties has a relevant visa, both parties must provide specified photographs of themselves.

266. The new section 8A also requires, that where one or both parties declare that they have neither the appropriate immigration status nor a relevant visa, both parties must provide specified photographs of themselves; their usual address; if their usual address is outside the UK, an address in the UK at which they can be contacted by post; and information about any other names previously used, and any aliases previously or currently used.

267. *Paragraph 21* substitutes for section 9 (evidence) of the Civil Partnership Act 2004 a new section 9, new section 9A (additional evidence if party not relevant national), new section 9B (change of usual address or UK contact address), new section 9C (rejection of false information or evidence), new section 9D (amendment of notice and evidence provisions), new section 9E (specified evidence) and new section 9F (recording of information in the register: compliance with requirements).

268. The new section 9 (evidence) requires that a notice of proposed civil partnership under section 8 must be accompanied by evidence, specified in regulations made under the new section 9E, of the person's name and surname, date of birth, place of residence, nationality and whether the person has previously formed a civil partnership or been married and, if so, as to the ending of the civil partnership or marriage.

269. The new section 9A (additional evidence if party not relevant national) requires that, where either or both parties are not relevant nationals (British citizens, EEA nationals or Swiss nationals), a notice of proposed civil partnership under section 8 must be accompanied by evidence, specified in regulations made under the new section 9E, that they have the appropriate immigration status under clause 44(2) or a relevant visa under clause 44(4), if either is the case. Where the notice is not accompanied by this evidence, it requires the notice to be accompanied by specified photographs of both parties; their usual address and specified evidence of this; if their usual address is outside the UK, an address in the UK at which they can be contacted by post; and information about any other names previously used, and any aliases previously or currently used.

270. The new section 9B (change of usual address or UK contact address) requires that, once notice has been given, any change of usual address or UK contact address (where such an address has been provided), must be notified by the couple to the Secretary of State, according to regulations.

271. The new section 9C (rejection of false information or evidence) provides that a registration authority may reject any information, photograph or evidence provided in giving notice under section 8 where they have reasonable grounds for suspecting that the information, photograph or evidence is false. If any information, photograph or evidence is rejected, the registration authority may proceed as if it had not been provided.

272. The new section 9D (amendment of notice and evidence provisions) provides that, subject to consultation with the Registrar General, the Secretary of State may by order amend the information or evidence required to give notice of civil partnership under section 8.

273. The new section 9E (specified evidence) provides for the Registrar General to make regulations, with the approval of the Secretary of State, about specified evidence for the purpose of section 9. It also provides that, subject to consultation with the Registrar General, the Secretary of State may make regulations about specified evidence for the purposes of new section 9A. The regulations under this clause may make provision for example for the kind of evidence to be supplied, the form in which it is to be supplied, and the manner in which it is to be supplied.

274. The new section 9F (recording of information in the register: compliance with requirements) instructs a registration authority not to enter information relating to a proposed civil partnership where various requirements imposed under the Civil Partnership Act 2004 (including, in particular, requirements inserted into that Act by the Bill) have not been complied with.

Notice period

275. *Paragraph 22* increases the notice period in section 11 of the Civil Partnership Act 2004 (meaning of the "waiting period") from 15 days to 28 days.

276. *Paragraph 23* requires, for a proposed civil partnership referred to the Secretary of State under section 12A, any application for a reduction in the notice period to be submitted to the Secretary of State and for the decision to be made by the Secretary of State and notified to the applicant and the registration authority, in accordance with regulations made by the Secretary of State after consultation with the Registrar General.

Referral to the Secretary of State

277. *Paragraph 24* inserts a new section 12A (referral of proposed civil partnership to Secretary of State) into the Civil Partnership Act 2004. This requires the registration authority, when notice of proposed civil partnership is given under section 8, to decide whether both parties to the proposed civil partnership are exempt persons under clause 44(1)

(unless the civil partnership is one to which Schedule 3 of the Civil Partnership Act 2004 applies because it is between former spouses, one of whom has changed sex). Where the registration authority decides that one or both of the parties is not an exempt person, they must refer the proposed civil partnership to the Secretary of State. The registration authority must also refer the proposed civil partnership if one or both of the parties is not a British citizen, EEA national or Swiss national and evidence required under new section 9A(2) or (3) has not been provided. They must do so in accordance with regulations about the form, manner and timing of the referral (and the information to be included with it) made by the Secretary of State (after consulting the Registrar General). The registration authority must also notify the parties that the proposed civil partnership must be referred to the Secretary of State, what this means and how they must notify the Secretary of State of any change in usual or UK contact address.

278. *Paragraph 25* inserts Schedule 3A (modifications if proposed civil partnership referred under section 12A) after Schedule 3. This provides that the duty under section 14(1) on a registration authority to issue a civil partnership schedule does not apply unless and until one of five events occurs. Event 1 occurs where the Secretary of State has given the registration authority notice under clause 43(8) of a decision not to investigate; event 2 occurs where the statutory 28 day period has ended and the Secretary of State has not given the registration authority notice under clause 43(8); event 3 occurs where the Secretary of State has given the registration authority notice under clause 45(7) that the parties to the referred civil partnership have complied with the investigation; event 4 occurs where the 70 day period has ended and the Secretary of State has not given the registration authority notice under clause 45(7); and event 5 occurs if the Secretary of State gives the registration authority notice that the duty under section 14(1) of the Civil Partnership Act 2004 applies.

279. Paragraph 25 also extends the notice period to 70 days if the Secretary of State gives the registration authority notice under clause 43(8) of a decision to investigate a referred civil partnership as a sham. Where a proposed civil partnership is referred to the Secretary of State, the statutory notice period (whether 28 or 70 days) can be shortened by the Secretary of State in exceptional circumstances, in which case the Secretary of State must notify the applicant and the registration authority of the reduced period, enabling the registration authority to issue a certificate in respect of the referred civil partnership under section 14(1) of the Civil Partnership Act 2004.

Civil partnership referred to Secretary of State: issue of civil partnership schedule

280. *Paragraph 26* inserts a new section 14A (notice of proposed civil partnership: false information or evidence) in the Civil Partnership Act 2004.

281. The new section 14A provides that, where notice of a proposed civil partnership has been given under section 8, the registration authority may refuse to issue the civil partnership schedule where there are reasonable grounds for suspecting that an incorrect decision was made because false information or evidence was provided.

The nationality requirement
282. *Paragraph 27* amends section 30 of the Civil Partnership Act 2004 to insert a new section 30A (relevant nationals) which defines relevant national.

Regulations and orders
283. *Paragraph 28* amends section 36 of the Civil Partnership Act 2004 to provide for regulations and orders concerning civil partnerships made under the new provisions inserted by the Bill to be made by the Secretary of State in consultation with the Registrar General and subject to the affirmative or negative resolution procedure.

Proof of certain matters not necessary to validity of civil partnership
284. *Paragraph 29* amends section 52 (proof of certain matters not necessary to validity of civil partnership) of the Civil Partnership Act 2004 to include any of the five events listed in paragraph 2(2) to (6) of Schedule 3A (modification if proposed civil partnership referred under section 12A) of the Civil Partnership Act 2004.

Clause 48: Extension of scheme to Scotland and Northern Ireland
285. *Subsection (1)* provides an order-making power to make such provision as the Secretary of State considers appropriate to extend the referral and investigation scheme to proposed marriages and civil partnerships in Scotland and Northern Ireland. The order is subject to the affirmative resolution procedure (see clause 67(2)).

286. *Subsection (2)* provides that an order under this clause can make provision having a similar effect to that made by clause 53 (requirement as to giving notice of marriage or civil partnership); Schedule 4 (which contains amendments to the 1949 Act and Civil Partnership Act 2004 relating to referrals under the scheme); or Parts 1, 2 and 4 of Schedule 6 (disclosure of information for immigration purposes); can confer functions on any person; and can amend, repeal or revoke any enactment.

287. *Subsection (3)* provides that an order under this clause can impose on registration officials and registration authorities in Scotland and Northern Ireland a duty of referral to the Secretary of State under the scheme.

288. *Subsection (4)* provides that an order under this clause may not impose a duty or confer a function on Scottish Ministers or the Northern Ireland Executive.

289. *Subsection (5)* defines particular terms used in this clause.

Clause 49: Supplementary provision

290. *Subsection (1)* provides that the clause applies if the referral and investigation scheme is extended by an order under clause 48.

291. *Subsection (2)* provides for administrative regulations to be made by the Secretary of State in relation to the application of the scheme for a) proposed marriages and civil partnerships in Scotland and b) proposed marriages and civil partnerships in Northern Ireland, in so far as the scheme is extended to Scotland and Northern Ireland.

292. *Subsection (3)* defines administrative regulations as those made under Schedule 5 (Sham marriages and civil partnership: administrative regulations).

293. *Subsection (4)* provides an order-making power for the Secretary of State to make provision about a) the information or b) the evidence that must or may be given in relation to proposed marriages or civil partnerships under the law of Scotland or Northern Ireland, in cases where one or both of the parties is not a relevant national. The order is subject to the affirmative resolution procedure (see clause 67(2)).

294. *Subsection (5)* provides that an order under subsection (4) may amend, repeal or revoke any enactment.

295. *Subsection (6)* provides an order-making power for the Secretary of State to specify 'other immigration purposes' for which information may be disclosed in the event that an extension order makes provision for the disclosure of information for immigration purposes.

296. *Subsection (7)* requires the Secretary of State to consult the Registrar General for Scotland and Registrar General for Northern Ireland before making any regulations or an order under this clause.

297. *Subsection (8)* applies the definitions in clause 48 to expressions used in this clause and in Schedule 5 (Sham marriage and civil partnership: administrative regulations).

Schedule 5: Sham Marriage and Civil Partnership: Administrative Regulations

Introduction
298. *Paragraph 1* provides that the Schedule sets out the kinds of regulations which can be made by the Secretary of State under clause 49. It also includes definitions used in this Schedule.

Notices
299. *Paragraph 2* provides for the Secretary of State to make regulations about the giving of relevant notices and when a relevant notice is presumed to have been received.

Evidence
300. *Paragraph 3* provides for the Secretary of State to make regulations about the supply of evidence in accordance with a relevant evidence provision. The regulations under this section may make provision for example for the kind of evidence to be supplied, the form in which it is to be supplied, and the manner in which it is to be supplied.

Change of address
301. *Paragraph 4* provides for the Secretary of State to make regulations about any change of usual address; UK contact address and any change of UK contact address (where such an address has been provided); and evidence of any address notified. Regulations under this section may also impose a requirement on a person and make provision for the rejection of information or evidence if there are reasonable grounds to suspect it is false.

Referral
302. *Paragraph 5* provides for the Secretary of State to make regulations requiring a person who has a duty to refer a marriage or civil partnership notice to comply with certain requirements, in particular relating to the form, manner or timing of the referral and information, photographs or evidence to be included with the referral. Paragraph 5 also provides for regulations to be made about the information to be provided to the parties about the effects of the referral and of any requirements under regulations made under paragraph 4.

Applications for shortening of waiting period
303. *Paragraph 6* provides for the Secretary of State to make regulations about the making and granting of applications for the shortening of a waiting period in cases where a proposed Scottish or Northern Ireland marriage or civil partnership is referred to the Secretary of State.

Chapter 2: Sham Marriage and Civil Partnership

Clause 50: Meaning of "sham marriage" and "sham civil partnership"
304. This clause amends the 1999 Act.

305. *Subsection (2)* substitutes a new section 24(5) in the 1999 Act, which contains a new definition of "sham marriage." This is a marriage in which either or both of the parties is not a relevant national (British citizen, EEA national or Swiss national); there is no genuine relationship between the parties; and either or both of the parties is entering into the marriage to avoid the effect of UK immigration law (which is defined to include the regulations concerning the free movement rights of EEA nationals) or the Immigration Rules.

306. *Subsection (3)* substitutes a new section 24A(5) in the 1999 Act, which contains a new definition of "sham civil partnership" in similar terms to that of "sham marriage" contained in the new section 24(5).

Clause 51: Duty to report suspicious marriages and civil partnerships
307. This clause amends the 1999 Act.

308. *Subsection (2)* amends section 24 of the 1999 Act so that the duty conferred on registration officials to report suspected sham marriages to the Secretary of State applies in respect of information received in advance of a person giving notice of marriage.

309. *Subsection (3)* amends section 24A of the 1999 Act so that the duty conferred on an authorised person within the meaning of the Civil Partnership Act 2004 to report suspected sham civil partnerships to the Secretary of State applies in respect of information received in advance of a person giving notice of civil partnership.

Chapter 3: Other Provisions

Persons not relevant nationals etc: marriage on superintendent registrar's certificates

Clause 52: Solemnization of marriage according to rites of Church of England

310. This clause amends the 1949 Act.

311. *Subsection (2)* amends section 5 of the 1949 Act so that, where a couple wish to get married in the Anglican Church and one or both of them is not a relevant national (British citizen, EEA national or Swiss national), the banns process and the common licence process will not be available. In order to get married in the Anglican Church, they will have to obtain superintendent registrar's certificates (subject to the referral and investigation scheme where applicable), unless the provisions for the Archbishop of Canterbury's Special Licence or for Anglican preliminaries on board one of HM ships at sea apply.

312. *Subsections (3) and (4)* amend sections 8 and 16 of the 1949 Act so that, where a couple wish to get married in the Anglican Church following the publication of banns, or following the issue of a common licence, they will have to provide the minister (in the case of banns), or the person granting the common licence, with specified evidence that they are British citizens, EEA nationals or Swiss nationals.

Clause 53: Requirement as to giving notice of marriage or civil partnership

313. *Subsection (1)* provides that section 19 of the 2004 Act (procedure for marriage in England and Wales) is amended in accordance with subsection (2) and subsection (3).

314. *Subsection (2)* substitutes for section 19(1) of the 2004 Act new subsections 19(1), (1A) and (1B). These provide that the requirement in section 19 to give notice of marriage at a designated register office applies to both parties to a proposed marriage where either of them is not a British citizen, EEA national or Swiss national, unless that non-EEA national is exempt from immigration control (and the notice of marriage is accompanied by specified evidence of this).

315. *Subsection (3)* defines particular terms used in the amended section 19.

316. *Subsection (4)* provides that Schedule 23 to the Civil Partnerships Act 2004 (immigration control and formation of civil partnerships) is amended in accordance with subsections (5) to (9).

317. *Subsection (5) and (6)*, together with the consequential amendments in subsections (7), (8) and (9), provide that the requirement in Part 1 of Schedule 23 to give notice of civil partnership at a designated register office applies to both parties to a proposed civil partnership where either of them is not a British citizen, EEA national or Swiss national or exempt from immigration control (and the notice of civil partnership is accompanied by specified evidence of this).

Clause 54: Information

318. This clause gives effect to Schedule 6 (information).

Schedule 6: Information

Part 1: Disclosure of Information etc where proposed marriage or civil partnership referred to Secretary of State

319. In *paragraph 1, subparagraph (1)* provides that the paragraph applies if a superintendent registrar refers a proposed marriage to the Secretary of State under section 28H of the 1949 Act, or a registration authority refers a proposed civil partnership to the Secretary of State under section 12A of the Civil Partnership Act 2004.

320. *Subparagraph (2)* allows the Secretary of State to disclose relevant information, including supplying a document containing relevant information, to a registration official.

321. *Subparagraph (3)* defines the meaning of "relevant information" to include the fact that a proposed marriage or civil partnership has been referred; the names of the parties to the proposed marriage or civil partnership; any information included with the referral in accordance with regulations under section 28H of the 1949 Act or section 12A of the Civil Partnership Act 2004; the address of any party notified to the Secretary of State in accordance with the regulations; details of any immigration enforcement action taken by the Secretary of State in respect of a party to the proposed marriage or civil partnership; and details of any immigration decision taken by reference to the marriage or civil partnership.

Part 2: Disclosure of Information etc for immigration purposes etc

Disclosures by registration officials

322. In *paragraph 2, subparagraph (1)* allows a registration official to disclose any information or supply any document held to the Secretary of State or to another registration official for a purpose defined in subparagraph (2).

323. *Subparagraph (2)* provides for information to be disclosed for (a) immigration purposes and (b) purposes connected to the referral of proposed marriage and civil partnership notices.

324. *Subparagraph (3)* defines "immigration purposes" for the purpose of this paragraph.

325. *Paragraph 3* allows a registration official to disclose to another registration official that a suspicion about a marriage or civil partnership has been reported to the Secretary of State under section 24 or 24A of the 1999 Act and the content of that report.

Disclosures by the Secretary of State

326. In *paragraph 4, subparagraph (1)* allows the Secretary of State to disclose any information or supply any document to a registration official for a specified verification purpose defined in subparagraph (2).

327. *Subparagraph (2)* defines specified "verification purposes" used in this paragraph, including the verification of information provided by a person giving notice of marriage or civil partnership; and the verification of the immigration status, and any suspected or actual involvement in immigration offences, of people who contact the registration service in connection with the exercise of a registration function.

328. *Subparagraph (3)* defines "relevant official" in this paragraph.

Part 3: Disclosure of Information etc for prevention of crime etc

329. In *paragraph 5, subparagraph (1)* allows a registration official to disclose any information or supply any information to an eligible person or another registration official in England and Wales for the purpose of crime-fighting.

330. *Subparagraph (2)* provides for information to be disclosed for crime-fighting purposes if the conditions set out in subparagraphs (3) (Condition A) and (4) (Condition B) are met.

331. *Subparagraph (3)* provides that Condition A is met if the registration official has reasonable grounds for suspecting that a criminal offence has been, is being, or will be committed.

332. *Subparagraph (4)* provides that Condition B is met if the registration official discloses the information or supplies the document for the purpose of verification of information supplied to another registration official or assisting in the prosecution, investigation, detection or prevention of a criminal offence.

333. *Subparagraph (5)* defines "eligible person" in this paragraph.

Part 4: General Provisions

Limitations on powers

334. *Paragraph 6* limits powers under this Schedule and provides that this Schedule does not authorise (a) a disclosure in contravention of the Data Protection Act 1998 of personal data not exempt from those provisions or (b) a disclosure prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000.

No breach of confidentiality etc
335. *Paragraph 7* provides for disclosure of information authorised by this Schedule not to breach obligations of confidence or restrictions on the disclosure of information.

Retention, copying and disposal of documents
336. *Paragraph 8* permits a person who is supplied with a document under this Schedule to retain it, copy it or dispose of it in an appropriate manner.

Saving for existing powers
337. *Paragraph 9* provides for no limit to be made on any other power to disclose information or supply documents.

Meaning of "registration official"
338. *Paragraph 10* defines "registration official."

Clause 55: Regulations about evidence
339. *Subsection (1)* provides a power for the Secretary of State to make regulations about evidence relevant to the determination, for the purposes of this Part, of whether a person is a relevant national under clause 44(1), whether a person has the appropriate immigration status under clause 44(2), and whether a person has a relevant visa under clause 44(4).

340. *Subsection (2)* contains a non-exhaustive list of the types of provision that may be included in the regulations. This includes for example provision about the kind of evidence which is to be supplied, the form in which evidence is to be supplied, and the manner in which evidence is to be supplied.

341. *Subsection (3)* requires the Secretary of State to consult the Registrar General before making any regulations under this clause.

342. *Subsection (4)* provides that in this clause evidence includes a photograph or other image.

Clause 56: Notices
343. *Subsection (1)* provides a power for the Secretary of State to make regulations about the giving of notices under Part 4 and under the amendments made to the 1949 Act and the Civil Partnership Act 2004.

344. *Subsection (2)* provides that such regulations may in particular make provision about the circumstances in which notice is to be presumed to have been received by the person to whom it is given.

345. *Subsection (3)* requires the Secretary of State to consult the Registrar General before making any regulations under this clause.

Clause 57: Interpretation of this Part
346. *Subsection (1)* defines particular expressions used in this Part.

347. *Subsections (2) to (5)* make provision on the interpretation of terms in this Part.

Part 5: Oversight

Office of the Immigration Services Commissioner

Clause 58: Immigration advisers and immigration service providers
348. This clause provides that Schedule 7 has effect.

Schedule 7: Immigration advisers and immigration service providers
349. *Paragraph 1* explains that this Schedule makes amendments to Part 5 of the 1999 Act, which provides for the regulation of immigration advisers and immigration services providers, including, in particular, the establishment of the Immigration Services Commissioner ("the Commissioner").

350. *Paragraph 2* concerns the Commissioner's power to exempt immigration advisers from registration.

351. *Paragraphs 2(1) and 2(2)* have the effect of removing the Commissioner's general power to exempt immigration advisers and service providers from the requirement to be registered and the consequential requirement to pay a fee to the Commissioner. The Commissioner currently uses this power to exempt advisers that do not charge for their services.

352. *Paragraph 3* concerns the waiver of fees for registration. It amends paragraph 5 of Schedule 6 to the 1999 Act to provide a new power for the Secretary of State to require or authorise the Commissioner to waive all or part of a registration fee in particular cases. The Government plans to use this power to require the Commissioner to waive the registration fee in relation to advisers who do not charge for their services.

353. *Paragraph 4* introduces a new duty on the Commissioner to cancel registration in certain circumstances (see paragraph 4(4)).

354. *Paragraph 4(1)* provides that where such cancellation is on the grounds that an adviser is no longer competent or is otherwise unfit, such a decision is appealable to the Tribunal under section 87(3) of the 1999 Act.

355. *Paragraph 4(2)* provides that the Commissioner's powers to determine complaints under paragraph 9(1)(a) of Schedule 5 to the 1999 Act are subject to the new duty to cancel

the registration of a person the Commissioner considers to be no longer competent or otherwise unfit.

356. *Paragraph 4(3)* makes some changes to the Commissioner's power under paragraph 3 of Schedule 6 to the 1999 Act (to require registered advisers to apply for their registration to be continued) that are consequential on the new cancellation power.

357. *Paragraph 4(4)* inserts a new paragraph 4A into Schedule 6 to the 1999 Act. This requires the Commissioner to cancel a person's registration in the following circumstances: where the person asks for their registration to be cancelled; where the person concerned dies; where the organisation concerned is dissolved or wound up; where the person is convicted of certain immigration offences where the First-tier Tribunal directs the Commissioner to cancel a person's registration; and where the Commissioner considers that the person is no longer competent or is otherwise unfit to provide immigration advice and services.

358. *Paragraph 5* concerns the suspension of registration in certain circumstances.

359. *Paragraph 5(1) and (2)* make some changes to sections 84(3) and 87(4) of the 1999 Act that are consequential on paragraph 5(3) below.

360. *Paragraph 5(3)* inserts a new paragraph 4B into Schedule 6 to the 1999 Act. This provides that the Tribunal may, on an application made to it by the Commissioner, suspend a person's registration where the person is charged with the following: an offence involving dishonesty or deception; an indictable offence; or certain immigration offences. Under the new paragraph, the suspension will have effect until one of the following has occurred: the person is acquitted, the charge is withdrawn, the proceedings are discontinued or an order is made for the charge to lie on the file. Where the person is convicted, the suspension will continue to have effect until the Commissioner has cancelled the person's registration (in the cases where she is required so to do so) or decided whether or not to cancel it (where she needs to exercise judgement about whether they competent or fit). Persons suspended will, for the period of their suspension, not be treated as registered persons for the purposes of section 84 of the 1999 Act. The new paragraph also requires the Commissioner to record the suspension in the Commissioner's register of advisers and organisations and remove such records where applicable.

361. *Paragraph 6* inserts a new paragraph 4A after paragraph 4 of Schedule 5 of the 1999 Act. The purpose of this is to put beyond doubt that the Commissioner's powers include inspection of the activities of and business of registered persons.

362. *Paragraph 7(1)* amends section 89(2) of the 1999 Act to provide that the Tribunal may uphold a charge laid against an adviser who was registered at the time of an alleged breach of the code of practice or rules, but whose registration has since been cancelled.

363. *Paragraph 7(2) to (5)* make amendments to paragraphs 5(3) and 9 of Schedule 5 of the 1999 Act to provide that the Commissioner may investigate and determine complaints against an organisation that was registered at the time of an alleged breach of the code of practice or rules, but whose registration has since been cancelled.

364. *Paragraph 8* concerns the Commissioner's powers of entry.

365. *Paragraph 8(1)* omits the current paragraph 7 of Schedule 5 to the 1999 Act which sets out the existing power of entry in relation to complaints.

366. *Paragraph 8(2)* inserts a new paragraph 10A into that Schedule. This paragraph provides a modified framework for the Commissioner's power of entry in relation to non-criminal matters. The modifications are as follows: firstly, the power may only be given effect if the Commissioner obtains a warrant from a magistrate or, in Scotland, a sheriff. Secondly, the magistrate or sheriff may grant the warrant in relation to the exercise of any of the Commissioner's functions, not just the investigation of complaints. This means that it can be used for inspection purposes. Thirdly, a warrant may be granted in relation to private residences where they are being used or have been used to provide immigration advice or services. Fourthly, the power may be used to investigate complaints against an organisation that has had its registration cancelled. Fifthly, the sanction available to the Commissioner in relation to a person who fails without reasonable excuse to allow access to the premises is the cancellation of the person's registration. In other respects, the Commissioner's power of entry will remain substantially the same.

Clause 59: Police Ombudsman for Northern Ireland

367. The Police Ombudsman for Northern Ireland ("PONI") was established under Part VII of the Police (Northern Ireland) Act 1998. This clause inserts new clauses 60ZB and 60ZC into that Act enabling the remit of PONI to be expanded to provide for the oversight of certain persons exercising specified enforcement functions in relation to immigration, asylum and customs matters in the Home Office.

368. *Subsection (1)* of new section 60ZB provides that the Secretary of State and PONI may enter into an agreement for the establishment of oversight and complaints procedures similar to those that apply in respect of the Police Service of Northern Ireland.

369. *Subsection (2)* provides a reserve power for the Secretary of State to establish oversight and complaints procedures by statutory instrument in the event that the Secretary of State and PONI are unable to reach an agreement.

370. *Subsection (3)* lists the persons who could be subject to PONI's oversight.

371. *Subsection (4)* provides a non-exhaustive list of the functions, which might be specified as "enforcement functions" in an agreement or order under subsection (1) and (2) of

section 60ZB, including powers of entry, powers to search persons or property, powers to seize or detain property, powers of arrest and detention and powers of examination.

372. *Subsection (5)* defines the meaning of "specified".

373. *Subsection (1)* of new section 60ZC provides that the Secretary of State must approve any variation or termination to the agreement.

374. *Subsection (2)* provides that the Secretary of State must consult with PONI and must consult with such other persons as he thinks appropriate before making any order under subsection (2) of section 60ZB.

375. *Subsection (3)* provides that an agreement or order under section 60ZB(1) or (2) may include provision for the Secretary of State to make payments to or in respect of the Ombudsman.

376. *Subsection (4)* provides that any agreement or order under section 60Z(1) or (2) relates only to the exercise of enforcement functions wholly or partly in Northern Ireland.

377. *Subsection (5)* provides that any agreement or order under section 60ZB(1) or (2) only relates to matters arising on or after the day on which the agreement or order is made.

378. *Subsection (6)* provides that the agreement or order made under section 60ZB(1) or (2) may not confer functions on PONI in relation to the exercise by any person of a function conferred on him by or under Part 8 of the Immigration and Asylum Act 1999, which relates to arrangements made in relation to detainee custody officers responsible for the exercise of escort and custodial functions over persons detained under paragraph 16 of Schedule 2 to the 1971 Act.

Part 6: Miscellaneous

Clause 60: Deprivation of citizenship: conduct seriously prejudicial to the interests of the UK

379. At present, the Secretary of State for the Home Department can deprive a person of their citizenship under section 40 of the 1981 Act. This can be done where either the individual has acquired it using fraud, false representation or concealment of a material fact (s40(3)); or where she is satisfied that doing so is 'conducive to the public good' (s40(2)) and the person would not be left stateless as a result (s40(4)).

380. *Subsection (1)* amends the 1981 Act to create a sub-category of cases which enables the Secretary of State to deprive, by order, a person of their British citizenship status - regardless of whether or not it will render them stateless - where the individual has (i) acquired citizenship as a result of naturalisation and (ii) conducted themselves in a manner

seriously prejudicial to the vital interests of the UK (and so for this reason it is conducive to the public good to deprive that person).

381. The purpose of this provision is to qualify the existing provisions on deprivation so that in the most serious cases - such as those involving national security, terrorism, espionage or taking up arms against British or allied forces – individuals can still be deprived of their citizenship, where this has been acquired by means of naturalisation, without regard to whether or not it will render them stateless.

382. This provision is intended to be consistent with the 1961 UN Convention on the Reduction of Statelessness, which allowed states to declare on ratifying the Convention that they retain the right to deprive a person and render them stateless in specific circumstances. The UK ratified the Convention on 29th March 1966 and explicitly retained the right to deprive where the person had either " i) has, in regard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty."

Clause 61: Embarkation checks
383. This clause provides that Schedule 8 (embarkation checks) has effect.

Schedule 8: Embarkation checks

Part 1: Functions Exercisable by Designated Persons

Examinations by designated person
384. *Paragraph 2* of this Schedule allows for powers of examination exercisable by an immigration officer to be exercised by a designated person.

385. *Subparagraphs (1) and (2)* amend paragraph 3 of Schedule 2 to the 1971 Act to allow a "designated person" to exercise the power of examination in relation to any person who is embarking or seeking to embark in the UK.

386. *Subparagraph (3)* replaces subparagraph (1A) of paragraph 3 of Schedule 2 so that, whether the initial examination is undertaken by an immigration officer or designated person, a person so examined may be required by notice in writing given by an immigration officer, to submit to further examination.

Information and Documents
387. *Paragraph 3* of this Schedule amends paragraph 4 of Schedule 2 to the 1971 Act to enable a designated person to require information and documents relevant to an examination.

388. *Subparagraph (2)* amends paragraph 4(1) of Schedule 2 so that a passenger examined under paragraph 3(1) is under a duty to provide the immigration officer or the designated person with all such information in his possession as that person may require for the purpose of either his, or any other person's, functions under that paragraph. So, a designated person can require such information as may be necessary to allow an immigration officer to locate the passenger in order to give him written notice that he is required to submit to further examination.

389. *Subparagraph (3)* amends paragraph 4(2) of Schedule 2 to require a person examined under paragraph 3, if so required by an immigration officer or a designated person, to produce a specified document or to declare whether they are carrying or have carried a document of a type which the immigration officer or designated person consider relevant for the purposes of the examination.

390. *Subparagraph (4)* amends paragraph 4(3) of Schedule 2 to confirm that an immigration officer can exercise the power of search set out in that paragraph, even if they did not commence the examination or require the person to produce documents under paragraph 4(2)(b).

391. *Subparagraph (5)* amends paragraph 4(4) of Schedule 2 to confirm that any immigration officer may exercise the power to examine and detain a passport or other document, even if they did not commence the examination. Where a passport or other document is produced or found in accordance with this paragraph, an immigration officer may examine it and detain it.

392. *Subparagraph (6)* inserts new paragraphs (4A) and (4B) into Schedule 2. New paragraph (4A) provides the power for a "designated person" to be able to examine and detain a passport or other document produced during the examination. Where this power is exercised, the designated person must deliver the said passport or document to an immigration officer as soon as reasonably practicable. The new paragraph (4B) provides for an immigration officer to treat a document delivered to him under this paragraph as though he had found the document himself under subparagraph 4(a), (b) or (c).

393. *Subparagraph (7)* amends paragraph 4(5) of Schedule 2 so that a passenger examined under paragraph 3 may be required to provide biometric information (in particular, fingerprints or features of the iris or any other part of the eye) to either an immigration officer or a designated person, where this is necessary to determine whether a passport or other document relates to that person.

Embarkation cards

394. *Paragraph 4* of this Schedule amends paragraph 5 of Schedule 2 to the 1971 Act to enable the Secretary of State to make provision by order to require passengers embarking in the UK to produce embarkation cards to a designated person.

Designations

395. *Paragraph 5* of this Schedule inserts new paragraph 5A in Schedule 2 to the 1971 Act to make provision in relation to designated persons.

396. New paragraph 5A(2) of Schedule 2 to the 1971 Act provides that a designation will be subject to such limitations as may be specified in the designation.

397. New paragraph 5A(3) sets out that a limitation under subparagraph (5A)(2) may in particular relate to the functions that are exercised by that designated person.

398. New paragraph 5A(4) provides that a designation may be permanent or for a specified period and may in either case be withdrawn or varied.

399. New paragraph 5A(5) provides that the power to designate, or to withdraw or vary a designation, is exercised by the Secretary of State giving notice to the person in question.

400. New paragraph 5A(6) provides that the Secretary of State may designate a person under this paragraph only if satisfied that the person is capable of effectively carrying out the functions that are exercisable by virtue of the designation, has received adequate training in respect of the exercise of those functions, and is otherwise a suitable person to exercise those functions.

Directions to carriers and operators of ports

401. *Paragraph 6* inserts new paragraph 5B in Schedule 2 to the 1971 Act to enable the Secretary of State to direct carriers and port operators to make specified arrangements for the exercise of functions by designated persons.

402. New paragraph 5B(1) makes provision for the Secretary of State to direct carriers or port operators to make arrangements for "designated persons" to exercise a specified function in relation to persons of a specified description. So a carrier or port operator may be required to make arrangements for designated persons to exercise the power of examination in respect of embarking passengers travelling on a specified route, or from a specified port.

403. New paragraph 5B(2) provides that such a direction must specify the port where, and the date (or dates) and time (or times) when a function is to be exercised under the arrangements.

404. New paragraph 5B(3) requires a direction under this paragraph to be given in writing.

405. New paragraph 5B(4) provides that a direction given under this paragraph may specify a description of persons by reference to destination, route, date and time of travel to which it applies.

406. New paragraph 5B(5) defines "function" and "specified" in directions under this paragraph.

Part 2: Other Provision

Offences

407. *Paragraph 7* amends section 27 of the 1971 Act to provide that a failure by a carrier or port operator to comply with a direction issued under new paragraph (5B) of Schedule 2 without reasonable excuse will be an offence under that section.

Clause 62: Fees

408. *Subsection (1)* provides for the Secretary of State to charge fees for the exercise of functions in connection with immigration and nationality. The term "functions" includes, but is not limited to, the specified functions listed in section 51 of the 2006 Act (applications, claims, services and processes). Use of the term simplifies the legislation, ensuring that there is no longer a need to decide which category a particular activity falls into. Functions can be delivered overseas, at the border or within the UK. They can be delivered by the Secretary of State, her officers, agents, commercial partners or any person acting on her behalf.

409. *Subsections (2) to (7)* provide that the existing legislative structure consisting of a power contained in primary legislation and exercised by way of a fees order and fees regulations is maintained. Chargeable functions will be set out in a fees order; and fee amounts set out in fees regulations (subsections (7) and (8)) which will be subject to the negative resolution procedure. A fees order made under clause 62 is subject to the affirmative resolution procedure (see clause 67).

410. *Subsection (4)* provides that the fees order must also specify the way that fees will be set. Fees must be charged either as a fixed amount; or calculated using as an hourly rate; or a combination of these. *Subsection (5*) provides that the order must also specify the maximum amount that may be charged in respect of the fixed element of the fee. A minimum level of fixed fee may also be specified for particular functions.

411. *Subsection (6)* provides that where fees are set by reference to an hourly rate or other factor (subsection (4) (b)) the fees order must specify how the fee or fee part is to be calculated. Consistent with subsection (5), a maximum rate or other factor must be specified and a minimum rate or other factor may be specified for particular fees.

412. *Subsection (7)* confirms that fees for all functions will be set out in fees regulations. Where the fee is set as a fixed amount, this amount will be set out in regulations (most immigration and visa fees are set in this way). Where the fee is to be calculated by reference to an hourly rate or other factor, or where it comprises more than one element, the amounts and rates will be set out in regulations.

413. *Subsection (8)* provides that the fee amounts and rates set out in fees regulations must not exceed the maxima or be less than any minima set out in a fees order. Consistent with existing powers in the 2004 and 2006 Acts, it also provides that the fee for the exercise of a function may exceed the cost of exercising that function.

414. *Subsection (9)* consolidates the matters that may already be taken into account when setting certain fees – administrative costs, benefits and the costs of other functions – and extends these to include international comparisons (fees set by other countries for similar functions), the promotion of economic growth and mutual or reciprocal arrangements with other countries. It also ensures that these matters may be considered in relation to fees for all relevant functions. Costs may include the costs of the Secretary of State or any other person performing a function (for example a commercial provider exercising functions pursuant to a contract with the department). Subsection (9) ensures that those who use the immigration and nationality system continue to pay their fair share towards its continued running and that fees and any future fee changes can be targeted to promote economic growth, including reducing fees in some categories or offering fast-track services for visitors and economically valuable migrants.

415. *Subsection (9)(c)* confirms that fees can be set to take account of the cost of exercising any function in connection with immigration or nationality. This ensures that individual fees may be set at a level that reflects the cost of operating the immigration system, by applying cross-subsidy powers to the full range of functions rather than, as at present, being limited to specific chargeable functions.

416. *Subsections (9)(d)* to *(f)* provide that fees can be set with regard to economic and international considerations. For example, application fees may be set at a level to attract tourists or economically valuable migrants to the UK. Premium service fees may be set at a level to ensure that premium services may be made available to commercially important people, and those the UK considers will support international trade and economic growth.

417. *Subsection (10)* ensures that powers in relation to exceptions, discretion etc. are carried forward from section 51 of the 2006 Act.

418. *Subsection (12)* confirms the definition of 'costs', including those of commercial providers exercising immigration functions, and states that it applies to this clause as well as clauses 63 and 64.

419. *Subsection (13))* ensures that it is possible to charge a different amount for the same function in different circumstances, for example where the government wants to offer a concession to encourage applications in a particular route or for a particular group to promote economic growth. This applies to any function specified in clause 62 and 64.

Clause 63: Fees orders and fees regulations: supplemental
420. This clause sets out supplemental provisions which clarify the way that the powers in clause 62 may be exercised and how fees paid may be applied.

Clause 64: Power to charge fees for attendance services in particular cases
421. *Subsection (1)* confirms that clause 64 only applies when a person carries out a function in connection with immigration or nationality at a location outside of the United Kingdom, at an agreed time and place at the request of a customer. Attendance services are optional and bespoke services, which are provided in addition to other chargeable services.

422. *Subsection (2)* states that the 'attendance service' defined in subsection (1) does not include the exercise of other chargeable functions, for which fees must be set out in the fees order and fees regulations.

423. *Subsection (4)* provides that the customer may be charges a fee for the 'attendance service' in order to ensure that the costs of providing the service are recovered.

Part 7: Final Provisions

424. This Part makes financial provision and a power by order to make transitional and consequential provision. It also gives effect to Schedule 9 (transitional and consequential provision). It also makes provision for commencement by order and about the extent of the Bill.

Clause 67: Orders and regulations
425. This clause sets out the parliamentary procedure in respect of various order- and regulation-making powers provided for in the Bill.

FINANCIAL EFFECTS

426. The main financial implications of the Bill for the public sector are detailed in the overarching Impact Assessment produced for the Bill. Further details of the costs and benefits of individual provisions are set out in the individual impact assessments available on the Bill website, see Summary of Impact Assessments below.

PUBLIC SECTOR MANPOWER

427. The provisions of the Bill impact mainly on the public sector, primarily the Home Office and HM Courts and Tribunals Service. The main impacts on the Home Office come from collecting the immigration health charge, setting up an immigration status checking service for landlords, additional fingerprint collection from applicants, setting up an administrative review process in lieu of appeal rights and some internal training for

immigration officers and caseworkers making removal decisions. The main impact on HM Courts and Tribunals Service comes from fewer statutory appeals and a possible increase in judicial review applications.

SUMMARY OF IMPACT ASSESSMENTS

428. The Bill is accompanied by an overarching impact assessment. A further five impact assessments are available on individual provisions. The impact assessments, signed by Ministers, are available on the Bill website at: https://www.gov.uk/government/organisations/home-office/series/immigration-bill.

429. The individual impact assessments deal with the following provisions:

- Appeals (Part 2)
- Residential Tenancies (Part 3)
- National Health Service (Part 3)
- Marriage and Civil Partnership (Part 4)
- Fees (Part 6)

COMPATIBILITY WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Parliamentary Under Secretary for Criminal Information, Lord Taylor of Holbeach, has made the following statement:

"In my view the provisions of the Immigration Bill are compatible with the Convention rights."

430. The government has published a separate ECHR memorandum with its assessment of the compatibility of the Bill's provisions with the Convention rights; the memorandum is available on the Bill webpage at https://www.gov.uk/government/organisations/home-office/series/immigration-bill.

COMMENCEMENT DATES

431. The substantive provisions of the Bill will be commenced by order under clause 68.

Glossary

1949 Act	Marriage Act 1949
1971 Act	Immigration Act 1971
1981 Act	British Nationality Act 1981
1981 Order	Road Traffic (Northern Ireland) Order 1981
1988 Act	Road Traffic Act 1988
1999 Act	Immigration and Asylum Act 1999
2002 Act	Nationality, Immigration and Asylum Act 2002
2004 Act	Asylum and Immigration (Treatment of Claimants, etc) Act 2004
2006 Act	Immigration, Asylum and Nationality Act 2006
2007 Act	UK Borders Act 2007
ECHR	European Convention on Human Rights
NHS	National Health Service
OISC	Office of the Immigration Services Commissioner
PONI	Police Ombudsman for Northern Ireland
HMRC	HM Revenue & Customs
Non-EEA	non-European Economic Area
The Tribunal	First-tier Tribunal
Immigration Rules	Rules laid down by the Secretary of State pursuant to section 3(2) of the Immigration Act 1971

IMMIGRATION BILL

EXPLANATORY NOTES

These notes refer to the Immigration Bill
as brought from the House of Commons on 30th January 2014
[HL Bill 84]

Order to be Printed,
30th January 2014

PUBLISHED BY AUTHORITY OF THE HOUSE OF LORDS

LONDON – THE STATIONERY OFFICE LIMITED

Printed in the United Kingdom by
The Stationery Office Limited

£x.00

HL Bill 84—EN 55/3