

# Legislative Consent Memorandum

## Nationality and Borders Bill

### Background

1. This memorandum has been lodged by Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government, under Rule 9.B.3.1(a) of the Parliament's standing orders, and is supported by Ash Regan, the Minister for Community Safety and Clare Haughey, the Minister for Children and Young People. The Nationality and Borders Bill was introduced in the House of Commons on 6 July 2021 and progressed to the House of Lords on 9 December 2021. The Bill can be found at [Nationality and Borders Bill - Parliamentary Bills - UK Parliament](#)

2. The current version of the Bill consists of seven parts with 84 clauses and seven schedules. The Lord's Committee stage commences in early February and the Home Office currently expect the legislation to receive Royal Assent before May Recess begins on 28 April.

### Content of the Nationality and Borders Bill

3. The Nationality and Borders Bill is the cornerstone of the UK Government's New Plan for Immigration, and sets out significant legislative changes in relation to nationality, immigration and asylum. The UK Government has set out three key objectives for the Bill:

- To make the system fairer and more effective so that we can better protect and support those in genuine need of asylum.
- To deter illegal entry into the UK breaking the business model of criminal trafficking networks and saving lives.
- To remove from the UK those with no right to be here.

4. The Bill makes provision about nationality, asylum and immigration; provisions about victims of slavery or human trafficking; provides a power for Tribunals to charge participants where their behaviour is considered to have wasted the Tribunal's resources; and for connected purposes.

5. Citizenship provisions make amendments to the British Nationality Act 1981, including remedying historic inability of mothers and unmarried fathers to transmit British overseas territories citizenship. The 1981 Act is also amended to remove the requirement for notice to be given to a person to be deprived of citizenship if it appears to the Secretary of State that they do not have the information needed to be able to give notice, it would not be reasonably practicable to give notice, or notice should not be given for reasons of: national security interests; interests of the relationship between the UK and another country; or otherwise in the public interest. Amendments to the 1981 Act also restrict the circumstances in which a stateless minor can be registered as a British citizen or British overseas territories citizen.

6. Asylum provisions introduce differential treatment of refugees based on how they arrive in the UK and any delay in presenting themselves to authorities. These provisions enable the Secretary of State or an immigration officer to treat refugees differently in respect of: the length of any period of leave given; requirements to be met to be granted indefinite leave to remain; whether a no recourse to public funds (NRPF) condition is applied; and whether leave to enter or remain is given to members of the refugee's family, as well as differential treatment of family members (except where family members are refugees themselves). Provisions require asylum applications to be made at a "designated place". This transfers changes made in December 2020 to Immigration Rules, in light of the 2005 Procedures Directive no longer being applicable to the UK following withdrawal from the European Union, into primary legislation.

7. Provisions make amendments to the Immigration and Asylum Act 1999 in relation to accommodation for asylum seekers and people who have been refused asylum (including enabling the Secretary of State to arrange for the provision of accommodation in an accommodation centre under section 95A or 98A of the 1999 Act).

8. Inadmissibility provisions require the Secretary of State to declare asylum claims made by EU nationals inadmissible. A declaration that an asylum claim is inadmissible is not a decision to refuse a claim and accordingly there is no right of appeal. The Secretary of State may consider exceptional circumstances. The Nationality, Immigration and Asylum Act 2002 is also amended to introduce provision enabling the Secretary of State to declare an asylum claim inadmissible where the applicant has a connection to a safe third State. Consequential amendments to asylum support legislation make entitlement to asylum support for a claimant deemed inadmissible comparable to that of someone who has been refused asylum.

9. Provisions are introduced enabling the Secretary of State or an immigration officer to serve an evidence notice on a person who has made a protection claim or human rights claim requiring evidence to be provided by a specified date. The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (claimant's credibility) is amended to require Tribunals to take account of relevant behaviour by the claimant, including any late provision of evidence. Amendments to the 2004 Act insert definitions for "immigration and nationality functions", "immigration legislation", and "Nationality Acts" which create a principle that if a person making an asylum or human rights claim provides evidence late, or fails to act in good faith, this conduct shall be taken into account by the decision maker as damaging the claimant's credibility.

10. Priority Removal Notices (PRN) are introduced to be served to anyone who is liable for removal or deportation. Guidance on factors which may lead to a PRN being issued are to be set out. Anyone subject to a PRN will be required to provide a statement, information and/or evidence within specified time or reason for providing evidence after that date. Once issued, a PRN imposes a duty on the claimant to provide evidence and information on any and all grounds for permission to enter or remain in the UK. Further, clause 21 creates a principle that material that is not provided in compliance with a PRN should be damaging to a claimant's credibility and a principle that evidence raised late should be given minimal weight by decision

makers, unless there are good reasons why the evidence was provided late. An expedited appeal route is created where a PRN has been served and reasons or evidence have been provided after the PRN cut-off date but while the PRN is still in force. Right of appeal will be to the Upper Tribunal instead of the First-tier Tribunal where certified by the Secretary of State.

11. Clause 26 imposes a duty on the Tribunal Procedure Rules Committee to make rules for an accelerated timeframe for certain appeals made from detention. Further provisions relating to appeals remove the in-country and out-of-country rights of appeal for claims that are certified as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002.

12. The Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are amended in relation to the removal of people seeking asylum and those who have had their asylum claim refused, to make provision for the removal of asylum seekers from the UK. The 2002 Act currently prevents the removal of an asylum seeker while their asylum claim is pending. Amending the 2002 Act will provide for the future objective of enabling asylum claims to be processed outside the UK. The explanatory notes for the Bill note that the purpose of such a model is to manage the UK's asylum intake and deter irregular migration and clandestine entry to the UK. Amendment to the 2004 Act will introduce a rebuttable presumption that certain countries specified in Schedule 3 of that Act are safe – meaning that an individual would not face a risk to their rights under Article 3 European Convention on Human Rights.

13. The Bill makes provision to set interpretation of the 1951 UN Refugee Convention in primary legislation for the first time in the UK, and instructs decision makers to use the definitions set out in clauses when considering whether an individual meets the definition of refugee in accordance with the Refugee Convention. Provisions also raise the standard of proof an asylum seeker will need to meet to establish that they have a 'well-founded fear' of persecution. Clause 36 interprets Article 31 of the Refugee Convention in relation to refugee's immunity from penalties for illegally entering or being present in a country and creates an interpretation of the term "coming directly". This stipulates that if they have stopped in another country between leaving the country where they faced persecution and arriving in the UK then, unless they can demonstrate that it was not reasonable to have sought protection in the country they stopped in, they will not be deemed to have come directly and may not be immune to penalties imposed on the grounds of illegal entry or presence in the UK.

14. Immigration offences and enforcement provisions create a new criminal offence of arriving in the UK without a valid entry clearance where required, in addition to entering without leave. Under the Immigration Act 1971, "entry" is defined as meaning disembarking and subsequently leaving the immigration control area. The addition of "arrival" will therefore allow prosecutions of individuals who are intercepted in UK territorial seas and are brought to the UK but don't technically "enter" the UK. The 1971 Act is also amended to allow for prosecutions of those who facilitate the arrival or attempted arrival of persons in breach of immigration law. Maximum penalties for offences are also increased. This includes amendment to the 1971 Act to raise the maximum penalty for facilitation offences from 14 years to life

imprisonment and remove the requirement of facilitation being “for gain”. Provision is also made to amend the Immigration and Asylum Act 1999 to provide for the imposition of a penalty for failure to adequately secure a goods vehicle against unauthorised access.

15. Clause 42 clarifies the legal framework requiring individuals working in UK waters need for permission to do so. Provision amends the Immigration Act 1971 to ensure clarity that all foreign nationals require permission to work in UK waters, consistent with those coming to work on the UK landmass, unless they are covered by an exemption. This also provides a regulation-making power enabling the Secretary of State to make provision to require workers and their sponsor (if applicable) to provide information about the worker’s arrival, entry and departure from the UK. Crew exercising the right of innocent passage or transit passage in the territorial sea are not affected.

16. Clause 44 and accompanying Schedule 6 expand maritime enforcement powers to enable maritime enforcement action to take place outside of UK waters. This includes powers to require migrant vessels to leave UK waters as well as powers intended to support the disembarkation of non-compliant passengers at non-UK Ports.

17. The legislation contains a range of provisions impacting on how children and young people seeking asylum in the UK will have their age determined, the subsequent support to which they are entitled and their overall legal status.

- Provision is made for the establishment of a National Age Assessment Board (NAAB) for immigration purposes, conferring power on the Secretary of State to conduct full age assessments on age-disputed persons for the purposes of deciding whether or how to exercise any immigration functions.
- Provision is made for local authorities to refer cases to the NAAB, but also for the NAAB to conduct an age assessment prior to a local authority referral i.e. where the Secretary of State has *reason to doubt* an age assessment conducted by a local authority or a decision by a local authority not to conduct an age assessment.
- Provision is made for use of scientific methods in age assessments and for a decision maker to be able to infer negative credibility from a refusal to comply with a request to undergo a scientific age assessment. The Secretary of State will have new powers to make regulations concerning the use of scientific methods of age assessment, including specifying scientific methods that may be used.
- Age assessment provisions introduce power for the Secretary of State to set (and revise) regulations on the process of conducting age assessments on age-disputed persons, including those carried out by local authorities and designated persons.
- The Secretary of State may make further provision about the referral process by a local authority of an age-disputed person, including how and when a local authority must inform the Secretary of State of the outcome of its age assessment decision and the evidence which may be required when a local authority conducts an assessment itself or accepts the claimed age of an individual.

18. Age assessment provisions introduce power for the Secretary of State to set regulations on the process of conducting age assessments on age-disputed persons, including those carried out by local authorities and designated persons. The Secretary of State may make further provision about the referral process by a local authority of an age-disputed person, including how and when a local authority must inform the Secretary of State of the outcome of its age assessment decision and the evidence which may be required when a local authority conducts an assessment itself or accepts the claimed age of an individual.

19. A right of appeal to the First-Tier Tribunal for an age-disputed person who is assessed as being a different age to the age they claim is provided. At present appeal can only be made via judicial review. Provision is also made for a process for assessing new evidence coming to light after an age assessment has been made.

20. Clause 57 enables the Secretary of State to serve a slavery or trafficking information notice on a person who has made a protection (i.e. asylum) or human rights claim. Such a notice requires the person to provide relevant information relating to being a victim of slavery or human trafficking within a specified period and, if providing information outside that period, to provide a statement setting out the reasons why the information was not able to be provided previously. The intended purpose is to enable earlier identification of potential victims of modern slavery and trafficking and enable potential grounds to be considered alongside a protection or human rights claim, with all information considered at the same time by decision makers.

21. Clause 58 sets out that where a person provides the information required by clause 57 outside of the relevant timeframe, this late provision of the information is to be considered as damaging the credibility of the person, by those making decisions in the National Referral Mechanism (those making reasonable and conclusive grounds decision as to whether a person is a victim of human trafficking or modern slavery).

22. Modern slavery provisions also make changes in relation to identification of potential victims of slavery or human trafficking (some changes only apply in England and Wales) and implement the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) obligations to provide a recovery period, during which victims of modern slavery must not be removed from the UK. Provision is made for disqualification from protection where the individual is a threat to public order or has claimed to be a victim in bad faith. Further provision makes it clear that only one period of recovery will be provided to a potential victim, unless there are particular circumstances or there is further instance of exploitation occurring after the previous recovery period.

23. The Bill makes a number of miscellaneous provisions, including: allowing the Secretary of State to impose visa penalties on any country that does not cooperate in the removal of its nationals who do not have a legal right to be in the UK; enabling the Secretary of State to introduce Electronic Travel Authorisations (ETAs) requiring individuals who do not need a visa, entry clearance or other specified immigration status to obtain permission to travel in advance of their journey to the UK and an associated carriers liability to incentivise carriers to check travellers hold an ETA or

another form of permission (e.g. visa); and a new power for the First-Tier and Upper-Tier Tribunals to order a party to pay a charge in respect of wasted or unnecessary tribunal costs incurred, including where an individual's representatives have failed to comply with tribunal directions.

## Provisions which relate to Scotland

24. The Bill predominantly relates to the reserved matter of nationality and immigration, including the UK asylum system. Provisions in the Bill will affect people living in communities across Scotland as well as people who arrive in Scotland in future; including people with visas, people seeking asylum and victims of human trafficking.

## Reasons for considering legislative consent

25. Section 28(8) of the Scotland Act 1998 recognises that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. Devolution Guidance Note 10 states that Bills require the consent of the Scottish Parliament if they contain provision applying to Scotland and which are “for devolved purposes” or if they alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers.

26. The UK Government position is that they consider the Bill to be entirely reserved as it relates to nationality and immigration (Schedule 5, section B6 of the Scotland Act 1998 which also includes asylum and the status and capacity of persons in the United Kingdom who are not British citizens). Two provisions in the Bill have been identified as legislating in a devolved area or for a devolved purpose or altering the executive functions of the Scottish Ministers. These are clause 49, which relates to age assessment, and clause 58, which relates to modern slavery.

## Clause 49 – age assessment

27. Age assessment of age disputed persons is carried out by both local authorities and immigration services for different purposes. Scottish local authorities carry out age assessments for devolved purposes to establish if an age-disputed person is a child to whom the local authority owes a duty of care and support under devolved legislation such as, for example, section 22 of the [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](#) and section 12 of the [Human Trafficking and Exploitation \(Scotland\) Act 2015 \(legislation.gov.uk\)](#).

28. Whilst clause 50 provides for the carrying out age assessments for the purpose of exercising immigration functions (which is reserved), clause 49 legislates in a devolved area or for a devolved purpose – namely local authority provision of care and support to age-disputed individuals under devolved legislation. Clause 49(3)(a) allows local authorities to refer an age assessment to person designated by the Secretary of State (this will be to the NAAB) but the resulting age assessment would be binding on the local authorities when exercising their devolved functions (clause 49(7)(b)).

29. Clause 49 as currently drafted legislates in relation to the carrying out of age assessments by Scottish Local Authorities when exercising functions under children's legislation for devolved purposes - this is not merely consequential or of no real significance to provisions which relate to reserved matters (Imperial Tobacco Ltd v The Lord Advocate [2012] UKSI 61), but legislates in a way which will directly affect the exercise of functions exercised by Scottish local authorities and health boards under devolved legislation. The judge in the case of R. (on the application of B) v Merton LBC (2003) EWHC 1689 (Admin)) confirmed that the local authority "cannot simply adopt a decision made by the Home Office" and in the case of R. (on the application of S) v Croydon LBC ([2017] EWHC 265 (Admin)), the judge stated that a local authority is exercising its social services functions towards children not merely when actually providing support to children, but also when carrying out ancillary functions such as determining which individuals are and are not children.

30. The provisions can also compel local authorities to share their information about age assessments conducted for devolved purposes (i.e. access to social work services under statutory duties to support children).

31. Under the current system in Scotland, the Home Office does not scrutinise the age assessment material of Scottish local authorities in detail. The Nationality and Borders Bill provisions would allow the Home Office to choose to deploy the NAAB in a more interventionist manner which would significantly alter age assessment processes (and likely outcomes) in Scotland. In particular, the NAAB will be empowered to use scientific techniques as part of age assessment, Scottish Government guidance has consistently advised against use of such techniques on child welfare grounds as well as reasons of scientific unreliability.

## Clause 58 – modern slavery

32. The provisions in clause 58 require the competent authority making decisions about whether someone is a victim of human trafficking/modern slavery to take account of late provision of information as damaging to a person's credibility. The making of decisions as to who is a victim of human trafficking/modern slavery for the purposes of providing support is considered to be a devolved matter. Clause 58 impacts on decisions on identification of victims, and is drafted in a manner that suggests the requirements set out would have to be followed for decisions about victim status and support. Therefore the provision makes provision in a devolved area.

33. Decisions in Scotland are currently made by one of two Home Office competent authorities under the National Referral Mechanism (NRM). Scotland's participation in the NRM, and use of Home Office competent authorities, is through choice. Should a Scottish competent authority be set up, clause 58 provisions would constrain the Scottish Ministers by requiring late provision of information in support of a trafficking claim to be considered as damaging to a person's credibility. The legislation therefore affects existing powers of the Scottish Ministers to make regulations designating the competent authority in Scotland, and detailing how any potential future Scottish competent authority would make decisions about who is a victim of human trafficking. Clause 58 therefore alters the executive competence of the Scottish Ministers.

34. As currently drafted, the Bill sets out that potential victims of human trafficking and exploitation who have made a protection or human rights claim may be served with a slavery or trafficking information notice by the Home Secretary. This notice will require the provision of relevant trafficking information by a specified date. A failure to meet this deadline will be taken into account as damaging the credibility of the potential victim. Victims of human trafficking are some of the most traumatised and vulnerable in society and require time to develop trust, meaning many are unlikely to be able to recount the extent of their experience within a set timeframe. The Scottish Government does not agree that potential victims of human trafficking should have the outcome of their claim influenced by the provision of information after an arbitrary deadline and as such consent should be withheld.

## Consultation

35. The UK Government undertook consultation on the New Plan for Immigration<sup>1</sup> prior to the Nationality and Borders Bill being tabled in the House of Commons. That consultation took place from 24 March to 6 May 2021. UK Government consultation response was published in July 2021.<sup>2</sup>

36. The Bill was drafted and introduced by the Home Office. The Scottish Government has not conducted consultation in relation to the Bill.

## Financial implications

37. There are no direct financial implications of the parliament agreeing, or not agreeing, to a legislative consent motion.

38. There are provisions in the Bill that are likely to affect devolved services and may have financial or resource implications depending on implementation. It is not possible to fully assess potential financial implications of implementation of the provisions set out in the Bill on devolved services. The Bill itself does not set out any specific financial responsibilities for the Scottish Parliament or Scottish Government.

## Conclusion

39. Scottish Ministers cannot recommend to the Scottish Parliament to give its consent to the Bill in relation to clause 49 and clause 58.

40. Clause 49 as currently drafted legislates in relation to the carrying out of age assessments by Scottish Local Authorities when exercising functions under children's legislation for devolved purposes - it will directly affect the exercise of functions exercised by Scottish local authorities and health boards under devolved legislation.

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<sup>1</sup> [New Plan for Immigration Consultation](#)

<sup>2</sup> [UK Government consultation response](#)



41. Clause 58 provision would constrain any future Scottish competent authority responsible for determining whether someone is a victim of human trafficking or modern slavery by requiring such an authority to accept and follow certain requirements which would inform identification of a victim of human trafficking and access to support. This clause would also influence the assessment of a human trafficking claim on credibility grounds if the requested information was provided outwith a specified timeframe. This approach fails to recognise the impact of trauma on victims of human trafficking and the safety and space they require to set out their experiences.

42. The Scottish Government has explained to the UK Government that we consider the Bill to be making provisions within the legislative competence of the Scottish Parliament and which alter the executive competence of Scottish Ministers. The UK Government position remains that the Bill is entirely reserved.

Scottish Government  
February 2022

This Legislative Consent Memorandum relates to the Nationality and Borders Bill (UK legislation) and was lodged with the Scottish Parliament on 1 February 2022

# Nationality and Borders Bill – Legislative Consent Memorandum

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