

IMMIGRATION BILL

DELEGATED POWERS MEMORANDUM

BY THE HOME OFFICE

INTRODUCTION

1. This Memorandum identifies the provisions of the Immigration Bill which confer powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.
2. The Bill is in 7 parts:
 - Part 1 makes provision for removal and other immigration powers;
 - Part 2 makes provision for immigration appeals and related matters;
 - Part 3 deals with access to certain public services;
 - Part 4 concerns marriage and civil partnership;
 - Part 5 contains provisions on oversight;
 - Part 6 contains provisions on deprivation of citizenship, embarkation checks and fees; and
 - Part 7 contains final provisions including commencement powers and provisions in respect of the Parliamentary procedure to be applied to orders and regulations made under the Bill.

PART 1: REMOVAL AND OTHER POWERS

Single Power of Removal

Clause 1 – Removal of persons unlawfully in the United Kingdom – application to family members

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative resolution

3. Clause 1 substitutes section 10 of the Immigration and Asylum Act 1999 to allow the removal of a person unlawfully in the United Kingdom. New subsection 10(6) provides that the Secretary of State may by regulations make further provision about the removal of family members under the substituted section. The regulations may include provisions about when a person is considered to be a family member, the time period during which a family member may be removed, and the effect that notice of removal will have on a person's leave. These matters can be quite detailed and it may be necessary to alter particular aspects in light of

operational experience, so not considered appropriate for primary legislation. As a result of section 166 of the Immigration and Asylum Act 1999, the regulations are to be subject to the negative resolution procedure. It is considered that this level of scrutiny is appropriate given that the matters left for secondary legislation are only to add detail to the provisions in the new section 10 as a whole.

Bail

Clause 3(3)(c) and 3(6) – Immigration Bail: repeat applications and effect of removal directions

Power conferred on: Tribunal Procedure Committee
Power exercisable by: Rules made by Statutory Instrument
Parliamentary Procedure: Negative resolution

4. Clause 3(3)(c) and (6) amend Schedule 2 to the Immigration Act 1971 in respect of bail applications. Clause 3(3)(c) amends paragraph 25 of Schedule 2 to create a requirement for Tribunal Procedure Rules to secure that, where the First-tier Tribunal has decided not to release a person on bail under paragraph 22, it is required to dismiss without a hearing any further application by the person for release on bail that is made during the period of 28 days starting with the date of the Tribunal's decision unless the person demonstrates that there has been a material change in circumstances. Clause 3(6) inserts new paragraph 33A to Schedule 2. Paragraph 33A provides that Tribunal Procedure Rules must make provision with respect to applications to the First-tier Tribunal under paragraphs 29 to 33, and that Tribunal Procedure Rules must secure that, where the First-tier Tribunal has decided not to release a person on bail under paragraph 29, it is required to dismiss without a hearing any further application by the person for release on bail that is made during the period of 28 days starting with the date of the Tribunal's decision, unless the person demonstrates that there has been a material change in circumstances. It is considered that these are matters properly dealt with in Tribunal Procedure Rules and that, therefore, the procedure prescribed for Tribunal Procedure Rules by paragraph 28 of Schedule 5 to the Tribunal, Courts and Enforcement Act 2007 is appropriate.

Paragraph 7 of Schedule 9 - Transitional and consequential provision: provision relating to bail

Power conferred on: The Lord Chancellor
Power exercisable by: Rules made by Statutory Instrument
Parliamentary Procedure: Affirmative resolution

5. Paragraph 7 of Schedule 9 (Transitional and consequential provision) inserts new subsection (5A) into section 5 of the Special Immigration Appeals Commission Act 1997. New subsection (5A) provides that rules made under section 5, to govern procedure in the Special Immigration Appeals Commission, must secure that, where the Commission has

decided not to release a person on bail under paragraph 22 or 29 of Schedule 2 to the Immigration Act 1971, the Commission is required to dismiss any further application by the person for release on bail that is made during the period of 28 days starting with the date of the Commission's decision, unless the person has demonstrated that there has been a material change in circumstances. It is considered appropriate to use the existing rule-making power in section 5 for this purpose, and therefore to use the standard Parliamentary procedure in respect of rules for the Special Immigration Appeals Commission.

Biometrics

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary Procedure: Affirmative resolution

6. Clause 6 amends section 41 of the British Nationality Act 1981, to provide the Secretary of State with a power to make regulations requiring a person making an application for British citizenship to provide biometric information in connection with that application. Provision is made for section 126(4) to (7) of the Nationality, Immigration and Asylum Act 2002, which set out the framework within which regulations may be drafted and the circumstances in which the power to take biometric information might be exercised against children, apply equally to regulations made under this power.

7. Similar to regulations made under section 126 of the Nationality, Immigration and Asylum Act 2002, after the amendments made to section 41 by this clause the existing power in section 41 will still be subject to the draft affirmative procedure. Applications for British citizenship are already governed by various regulations made under section 41 of the British Nationality Act 1981 (see as an example the British Nationality (General) Regulations 2003 (S.I. 2003/548)). There are different regulations for different types of applicants and each contain a considerable level of detail regarding the manner and form in which such applications are to be made and the circumstances in which such applications will be granted. By making provision for the existing regulations to also be able to require such applications to be accompanied by biometric information, this ensures that each set of regulations are as comprehensive as possible with all details relating to British citizenship applications being located in one place. Furthermore, different provision in respect of requiring the provision of biometric information is also likely to be appropriate for different applicants with, for example, holders of biometric residence permits being exempt from the general requirement to produce biometric information. This lends further weight to the desirability of this amendment being placed into the existing regulation making power.

Clause 8 and Schedule 2: Meaning of biometric information

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary Procedure: Affirmative resolution

8. Clause 8 repeals section 15(1)(b) and (c) of the UK Borders Act 2007 and provides an updated definition of “biometric information” for the purpose of regulations made under section 5 of the UK Borders Act 2007, which require certain persons who are subject to immigration control to obtain biometric immigration documents, namely documents recording biometric information. Schedule 2 provides for the same definition of biometric information to apply automatically to all other statutory references to biometric information within immigration legislation.

9. The definition of biometric information that is provided by the changes made by clause 8 to the 2007 Act is information about a person’s external physical characteristics, including in particular fingerprints and features of the iris, and any other information about a person’s physical characteristics specified in an order made by the Secretary of State. DNA is specifically excluded from the scope of any order by new section 15(1B).

10. It is necessary to have an order-making power to specify new types of biometric information to be able to respond effectively to technological advances. However, because coercive powers will be available to require the production of any other information about a person’s physical characteristics that is specified by order, it is considered that the draft affirmative procedure provides the most appropriate level of Parliamentary scrutiny in respect of this power as provided for by new section 15(1D) of the 2007 Act.

Clause 10: Use and retention of biometric information

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary Procedure: Affirmative resolution

11. Through a new section 8 of the UK Borders Act 2007 clause 10 replaces various statutory provisions that currently govern the circumstances in which biometric information, which has been taken by the Secretary of State under powers contained in the Immigration Acts, might be used and retained. It imposes an obligation on the Secretary of State to make regulations about the use and retention of biometric information that has been provided in accordance with regulations made under section 5 of the UK Borders Act 2007, section 126 of the Nationality, Immigration and Asylum Act 2002 or section 41(1)(bza) of the British Nationality Act 1981 and/or taken pursuant to section 141 and regulations made under section 144 of the Immigration and Asylum Act 1999. Such regulations:

- a. must provide that biometric information may be retained only if the Secretary of State thinks that it is necessary to retain it for use in connection with the exercise of an immigration or nationality function;
- b. may include provision for retained biometric information to be used in connection with any of the following statutory purposes; the prevention, investigation or prosecution of an offence; for a purpose which appears to be required in order to protect national security; in connection with identifying victims of an event or situation which has caused loss of human life or human illness or injury; for the purpose of ascertaining whether any person has failed to comply with the law or has gained, or sought to gain, a benefit or service, or has asserted an entitlement, to which he is not by law entitled; or for any other purpose specified by regulations; and
- c. must require the Secretary of State to take all reasonable steps to ensure the destruction of biometric information if it is no longer necessary to retain it for use in connection with the exercise of an immigration or nationality function or if the Secretary of State is satisfied that the person to whom it relates is a British citizen or a Commonwealth citizen with the right of abode (i.e. a right to live in the United Kingdom) as a result of section 2(1)(b) of the Immigration Act 1971. It is considered that this level of detail provides a tightly defined framework within which the regulations are to be made.

12. Similar to the existing regulation making powers regarding the use and retention of biometric information, this provision will be subject to the draft affirmative procedure in view of the details which may be included in the regulations, which it is considered to have provided an adequate level of Parliamentary scrutiny to date.

PART 3: ACCESS TO SERVICES, ETC

Residential Tenancies

Clause 15(7) - Power to amend Schedule 3 to vary the list of agreements of a description excluded from the definition of “residential tenancy agreement”

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>

13. Chapter 1 of Part 3 provides for the creation of a new system of civil penalties for those who authorise the occupation of premises by a person over the age of 18 who is subject to immigration control and who has not been granted leave to enter or remain in the United Kingdom, or whose leave is invalid or has expired and who has not been granted permission to rent property by the Secretary of State.

14. Clause 15(2) sets out the definition of residential tenancy agreements which are subject to the restriction in clause 17. An agreement will not be a residential tenancy agreement subject to the restriction if it falls within the description of an excluded agreement, as set out in Schedule 3. The Schedule sets out the areas where as a matter of principle, arrangements made should not be subject to the restriction; for instance situations where the landlord is already required to consider the immigration status of an occupant before allowing them to take up residence, or where to impose a restriction would frustrate the ability of a public authority to fulfil its statutory obligations and exercise the powers which have been conferred on it. The order making power in clause 15(7) enables the Secretary of State to amend the Schedule so as to add a new description of excluded agreement, remove any description or amend any description. This will ensure that the government can respond to changing circumstances as they emerge following the introduction of the scheme; it is possible that some of the arrangements which have been identified as suitable for exclusion should in fact fall within the scheme, and that others which should be excluded could be identified once the scheme is in operation. A power to amend the Schedule is therefore considered appropriate to ensure that the scheme remains relevant, appropriately targeted and avoids imposing disproportionate burdens on any subsection of the private accommodation market. As it is a power to amend primary legislation, the draft affirmative procedure provides the appropriate level of Parliamentary scrutiny.

Clause 18(6) - Power to amend the maximum sum payable as a penalty by a landlord
Clause 20(5) - Power to amend the maximum sum payable as a penalty by an agent

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>

15. These provisions enable the Secretary of State to amend the maximum sum which may be required as a penalty payable by a landlord or agent who authorises the occupation of premises by a disqualified person under a residential tenancy agreement if in the future the penalty is considered ineffective at this level. The penalty has been set at a level which is intended to provide a proportionate and effective deterrent against breach of the prohibition. The effect of the penalty will need to be kept under review once the scheme is in operation. It is therefore considered appropriate to have a power to amend the maximum sum in order to allow the government to respond should the amount prove to be disproportionate in its impact on landlords, or an ineffective deterrent. The affirmative procedure is therefore considered to provide the appropriate degree of Parliamentary scrutiny. This is consistent with the approach taken in relation to the sum prescribed as the maximum sum payable by employers who employ people present in the United Kingdom in breach of the immigration laws under section 15 of the Immigration, Asylum and Nationality Act 2006.

Clause 19 - Power to prescribe the requirements which, if complied with, excuse landlords from paying a penalty

Clause 21 - Power to prescribe the requirements which, if complied with, excuse agents from paying a penalty

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

16. Clause 19(2)(a) provides for the Secretary of State to prescribe requirements in relation to the steps which must be taken by a landlord to confirm the immigration status of an individual prior to authorising their occupation of premises under a residential tenancy agreement in order to establish an excuse against a penalty for a pre-grant contravention. Subsection (4) provides for the Secretary of State to prescribe the time period in which these requirements must be fulfilled in respect of persons who have a “limited right to rent” within the meaning of clause 16(4). Subsection (7) provides for the Secretary of State to prescribe requirements in relation to the steps which must be taken by the landlord at the end of the eligibility period (as defined in clause 22) in relation to each relevant occupier who has a limited right to take up occupation of the premises, in order to establish an excuse against a penalty for a post-grant contravention. This includes notifying the Secretary of State of the contravention in the prescribed form and manner, as provided for in subsection (8).

17. Clause 21 provides for the Secretary of State to prescribe requirements in relation to the steps which must be taken by a landlord’s agent to confirm the immigration status of an individual where that agent has made arrangements with a landlord and agreed that they will comply with the prescribed requirements on behalf of the landlord under clause 20(2). Clause 21(2) provides for the Secretary of State to prescribe requirements in relation to the steps which must be taken by an agent to establish an excuse against a penalty for a pre-grant contravention. Subsection (4) provides for the Secretary of State to prescribe the time period in which these requirements must be fulfilled in respect of persons who have a “limited right to rent” within the meaning of clause 16(4). Subsection (7) provides for the Secretary of State to prescribe requirements in relation to the steps which must be taken by the agent at the end of the eligibility period (as defined in clause 22) in relation to each relevant occupier who has a limited right to take up occupation of the premises, in order to establish an excuse against a penalty for a post-grant contravention. This includes notifying the Secretary of State of the contravention in the prescribed form and manner, as provided for in subsection (8).

18. Clause 29 provides that an order prescribing requirements made for the purposes of this Part may require a landlord or agent to obtain a document of a prescribed description from prospective tenants or relevant occupiers before or during the course of a residential tenancy agreement, or one document of each of a number of prescribed descriptions, and take steps to verify, retain, copy or record the content of the document and take such other steps before, or during the course of a residential tenancy agreement as the order may specify.

19. It is considered appropriate to set out these matters by order, rather than on the face of the primary legislation, because they will necessarily be detailed. It is also important to have the flexibility to make amendments where relevant without requiring primary legislation; for example to adjust the list of types of document which landlords may accept as evidence of an occupant's immigration status, and the steps that they must take to verify documents which are not sufficiently secure to be acceptable in their own right. This list will change from time to time and the practical application of the scheme will need to be monitored following commencement, and it is therefore considered that an order making power is the appropriate way to ensure that the prescribed requirements and time periods which apply can be updated in line with the operational realities.

20. The order making powers are subject to the negative resolution procedure. Given that they are largely technical and operational in nature, it is considered that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny. This is consistent with the approach taken towards the requirements which must be complied with by employers in order to avoid penalties where they employ a person present in the United Kingdom in breach of the immigration laws in contravention of the restriction in section 15 of the Immigration, Asylum and Nationality Act 2006.

Clause 24 - Power to prescribe the manner and period for a landlord or agent to give a notice of objection to a penalty

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

21. Clause 24 provides that a landlord or agent to whom a penalty notice is given under clause 18 or 20 may give a notice of objection to the Secretary of State.

22. Clause 24(3)(c) provides for the Secretary of State to prescribe the manner in which the objection must be made and clause 24(3)(d) provides for the Secretary of State to prescribe the period in which an objection must be given. Under subsection (6)(a), the prescribed period in (3)(d) also applies to the time within which the Secretary of State will inform the objector of his decision, unless a longer period is agreed. It is considered appropriate to set out these matters by order as they form part of the practical application of the scheme and they will need to be monitored following commencement. It is therefore believed that an order making power is the appropriate to facilitate amendment if necessary.

23. The order making powers are subject to the negative resolution procedure. Given that they are largely technical or procedural in nature, it is considered that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny.

Clause 27 - General matters: Power to issue code of practice

Power conferred on: Secretary of State
Power exercisable by: Code of practice
Parliamentary procedure: Laid only

24. Clause 27 requires the Secretary of State to issue a code of practice for the purposes of this Part. The code must specify the factors which the Secretary of State will consider when determining the amount of a penalty issued to a landlord or agent, and may contain guidance regarding (a) the factors that the Secretary of State will consider when determining whether or not a residential tenancy agreement confers a right to occupy premises as an only or main residence, (b) the steps a landlord may take to determine the identity of prospective tenants in relation to a residential tenancy agreement (so far as they are not named in the agreement) and any other matters that the Secretary of State considers appropriate. Subsection (5) provides that the Secretary of State is required to review the Code from time to time, and may revise and re-issue it.

25. The code will set out the framework for the civil penalty scheme and cover matters such as the level of penalty which would be appropriate for first time transgressors as opposed to landlords and agents found to be letting to illegal migrants on multiple occasions without carrying out proper checks, and any differential treatment to be afforded to landlords depending on whether they are operating in order to generate a profit or have taken in a lodger on an informal arrangement in order to contribute to the costs of running their own home. Subsection (6) provides that the Secretary of State must lay the code, and any revision of the code, before Parliament. This requirement is intended to allow Parliament to scrutinise the framework. The matters to be set out in the code are practical, detailed matters to be considered by the Secretary of State operating the scheme and may need to be adjusted in the light of experience of operating the civil penalty arrangements. The code of practice format is considered appropriate for the level of technical and operational detail necessary and to allow the flexibility to amend the guidance and the operating framework for the penalty scheme where necessary. The code will come into force on a date specified within the document itself. As the parameters for the code will have been set out in the primary and other secondary legislation, it is considered that laying the code will provide the appropriate degree of Parliamentary scrutiny.

Clause 28 - Discrimination: Power to issue code of practice

Power conferred on: Secretary of State
Power exercisable by: Code of practice
Parliamentary procedure: Laid only

26. Clause 28 requires the Secretary of State to issue a code of practice specifying what a landlord or agent should or should not do to ensure that, while avoiding liability to a penalty

under clauses 18 or 20 they do not contravene the Equality Act 2010 so far as relating to race, or the Race Relations (Northern Ireland) Order 1997.

27. The purpose of the code is to provide practical guidance to landlords and agents on how to comply with the obligation not to allow the occupation of premises contrary to the provisions in the Bill without discriminating on grounds of race. The code itself does not impose new or different legal requirements on landlords or agents, it simply reflects the requirements introduced by other statutory provisions.

28. Clause 28(3) acknowledges the importance of engaging with statutory bodies responsible for discrimination issues and provides that before issuing the code, the Secretary of State shall consult the Commission for Equality and Human Rights and the Equality Commission for Northern Ireland. Under clause 28(4)-(6) the Secretary of State must publish a draft code after that consultation and consider any representations about the published draft and lay a draft code before Parliament, with or without modifications to reflect the representations.

29. The matters to be set out in the code are practical, detailed matters which may need to be adjusted in the light of experience of operating the civil penalty arrangements. The code of practice format is considered appropriate for the level of operational detail necessary and to allow the flexibility to amend the guidance where necessary. Following laying of the draft code before Parliament, the code will then come into force on a date specified within the document. In view of the stringent consultation requirements in respect of the code, it is considered that this provides an appropriate level of Parliamentary scrutiny.

Clause 30 – Transitional provision

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>None</i>

30. Subsection (1) provides that Chapter 1 of Part 3 does not apply in relation to a residential tenancy agreement entered into before the commencement day. Subsection (2) provides that the Chapter does not apply to residential tenancy agreements entered into on or after the commencement day where another residential tenancy agreement has been entered before commencement day between the same parties, and the tenant has always had a right of occupation of the premises under the renewed agreement since entering the original agreement.

31. Subsection (3) contains a power for the Secretary of State to appoint the commencement days 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 provisions set out in clauses 67 and 68. As the new regime under Chapter 1 of Part 3 may be commenced under those provisions 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 transitional provisions under this clause. This provision provides the flexibility to appoint those different commencement days. It is considered that an appropriate level of Parliamentary scrutiny is provided through clauses 67 and 68 and no further specific scrutiny is required in relation to this provision.

Clause 32 - Interpretation: Power to prescribe cases in which a residential tenancy agreement is, or is not, to be treated as being “entered into”

Power conferred on: Secretary of State
Power exercisable by: Statutory Instrument
Parliamentary procedure: Negative resolution

32. Clause 32(6) provides for the Secretary of State to prescribe cases in which a residential tenancy agreement is, or is not, to be treated as being “entered into” for the purposes of Chapter 1 of Part 3, and cases where a person is or is not, to be treated as occupying premises as an only or main residence for the purposes of the Chapter. Subsection (7) provides that any order made under subsection (6) may modify the application of the Chapter in that case. As set out in subsection (8), the cases mentioned in subsection (6) include, in particular, cases where (a) an agreement includes an option to renew, (b) rights of occupation under an agreement are varied, (c) an agreement is assigned (whether by the landlord or the tenant), (d) a periodic tenancy arises at the end of a fixed term, (e) an agreement grants a right of occupation on satisfaction of a condition, and (f) there is a change in the persons in occupation of the premises leased under the agreement or in the circumstances of any such person.

33. It is considered appropriate to set out these matters by order, rather than on the face of the primary legislation, because they will necessarily be detailed. It is also important to have the flexibility to make amendments where relevant without requiring primary legislation; for example to adjust the list of types of agreement and the circumstances in which a renewal or variation of an agreement should not be treated as “entering into” a new residential tenancy agreement and so should not oblige the landlord to repeat the prescribed requirements where this would be unnecessary. The practical application of the scheme will need to be monitored following commencement, and it is therefore believed that an order making power is the appropriate way to ensure that the circumstances in which prescribed requirements must and need not be complied with can be updated in line with the operational realities. This will ensure that the scheme remains appropriately targeted and prevents disproportionate burdens arising on landlords in relation to the renewal, variation and assignment of residential tenancy agreements, and that anti-avoidance measures can be put in place should these prove necessary. In view of the technical and operational nature of the power, it is considered that the negative procedure will offer an appropriate level of Parliamentary scrutiny.

Other services: National Health Service

Clause 33 – Immigration health charge

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>

34. Clause 33(1) provides that the Secretary of State may by order provide for a charge to be imposed on persons who apply for immigration permission or any description of such persons. Immigration permission means an application for entry clearance for a limited period or limited leave to enter or remain in the United Kingdom, including an application to vary limited leave.

35. Clause 33(3) provides that the order may impose a separate charge on a person in respect of each application made by that person. It may make provision determining the amount of the charge about when or how the charge may or must be paid to the Secretary of State, about the consequences of non-payment of the charge (including provision for the person's application for entry clearance or leave to be refused). Clause 33(3) also enables the Secretary of State to provide for exemptions from the charge, and for reduction, waiver or refund of the charge, including by conferring a discretion.

36. Clause 33(4) provides that where the Secretary of State sets the amount of the charge this is to be determined with regard to the range of health services likely to be available free of charge to persons who have been given immigration permission.

37. Under clause 33(5), sums paid under this section must be paid into the Consolidated Fund or applied in such other way as the order may specify.

38. The order making power in clause 33 enables a full scheme for the administration of the immigration health charge to be set out. This could include a variety of charge levels, a number of exceptions, and detailed procedures on how to pay, all of which might alter over time in light of experience of how the charge was operating. As such it is considered it would not be appropriate for these details to be on the face of the Bill. However, it is considered that the appropriate level of scrutiny is by draft affirmative resolution.

Other services: Bank accounts

Clause 35 – Prohibition on opening bank accounts

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

39. Clause 35 provides that a bank or building society must not open a current account for a person who falls within the group specified at subsection (2) (that is persons present in the United Kingdom who are subject to immigration control and who are present in breach of the immigration laws), unless it has first carried out a “status check” which indicates that the person is not a disqualified person, or at the time when the account is opened, it is unable to undertake such a check due to circumstances that cannot reasonably be regarded as within its control. Subsection (3) defines a status check as a check with a specified anti-fraud organisation or data matching authority to determine whether, according to information supplied to that organisation or authority by the Secretary of State, the applicant is a “disqualified person”, as defined in subsection (3)(b). A disqualified person is a person who falls within the group specified in subsection (2) and in respect of whom the Secretary of State has considered that a current account should not be opened by a bank or building society. Where the status check indicates that the applicant is disqualified, the bank or building society is prohibited from opening the account.

40. Subsections (3) and (4) enable the Secretary of State to specify by order for the purposes of this provision an anti-fraud organisation within the meaning of section 68 of the Serious Crime Act 2007, and/or a data matching authority, meaning a person or body which conducts 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. Under section 68 of the Serious Crime Act 2007, specified anti-fraud organisations are organisations which are specified by order made by the Secretary of State, to which public authorities may disclose information for the purposes of preventing fraud or a particular kind of fraud. The Local Audit and Accountability Bill is currently before Parliament. Data matching exercises within the meaning of Schedule 9 to that Bill are currently exercised by the Audit Commission. It is anticipated that if that Bill passes through Parliament and receives Royal Assent, following commencement those powers will be exercisable by the Secretary of State for the Cabinet Office. It is considered appropriate to prescribe the relevant organisation by order, as any organisation and/or authority designated for this purpose will need to be reviewed from time to time. There will also need to be flexibility to change the organisation or authority should it cease to operate or be unable to continue to perform this role for any other reason.

41. The order making power is subject to the negative resolution procedure. Given that it largely procedural in nature, it is considered that the negative resolution procedure provides an appropriate level of Parliamentary scrutiny.

Clause 36 – Power to issue regulations for Financial Conduct Authority enforcement.

Power conferred on: *HM Treasury*
Power exercisable by: *Regulations made by Statutory Instrument*
Parliamentary procedure: *Affirmative resolution*

42. Clause 36 provides that the Treasury may make regulations to enable the Financial Conduct Authority to take action arrangements for monitoring and enforcing compliance with the prohibition imposed on banks and building societies by clause 35. By subsection (2), the regulations may provide for the Financial Conduct Authority to be given free access to the information to which banks and building societies are given access when carrying out status checks under clause 35, and may apply or make provisions corresponding to any of the provisions of the Financial Services and Markets Act 2000 with or without modification including in particular (a) provisions about investigations, including powers of entry and search and criminal offences, (b) provisions for the grant of an injunction (or, in Scotland an interdict) in relation to a contravention or anticipated contravention, (c) provisions giving the Financial Conduct Authority powers to impose disciplinary measures (including financial penalties) or to give directions (d) provisions giving Ministers or the Financial Conduct Authority powers to make subordinate legislation, and (e) provisions for the Financial Conduct Authority to charge fees.

43. This is in line with other instances in which a similar approach has been taken to tasking the Financial Conduct Authority with responsibility for enforcing regimes, and given the potentially significant demands that might be placed on banks and building societies by the Financial Conduct Authority in the course of such enforcement, it seems most appropriate to ensure Parliamentary scrutiny in this instance through the draft affirmative procedure.

Clause 38 – Power to amend definitions

Power conferred on: *HM Treasury*
Power exercisable by: *Order made by Statutory Instrument*
Parliamentary procedure: *Affirmative resolution*

44. Subsections (1) and (4) of clause 37 provides a definition of a “bank” for the purposes of clauses 35 to 38: a bank means an authorised deposit taker that has its head office, or one or more branches, in the United Kingdom. Bank does not include a building society, a person who is specified or is within a class of persons specified by an order under section 38 of the Financial Services and Markets Act 2000, a credit union within the meaning given by section 31(1) of the Credit Unions Act 1979 or by Article 2(2) of the Credit Unions (Northern Ireland) Order 1985, or a friendly society within the meaning given by section 116 of the Friendly Societies Act 1992.

45. The operation of the scheme will need to be monitored following commencement and it is possible that in future the government may need to amend the definitions in order to alter

the range of institutions falling bring other institutions within the scope of the restriction. It is therefore considered that an amending power, as set out in subsection (1) of clause 38 is appropriate.

46. Subsection (1) of clause 35 prohibits banks and building societies from opening “current accounts”. The term “current account” is not defined in the clauses - as is the case in other legislation (see e.g. the Consumer Credit Act 1974). The operation of the scheme will need to be monitored following commencement and it is possible that in future the government may wish to alter or define more precisely the financial products within the scope of the restriction so that it applies to other types of financial products, or does not apply to financial products operated by specific groups of people or bodies. This is to ensure that the measure is appropriately targeted and that anti-avoidance measures may be taken if necessary. Subsection (1)(b), (c) and (d) of clause 38 provides the powers to amend clauses 35 to 37 to make the prohibition at section 35(1) apply to different kinds of account from those for the time being specified and to define categories of accounts specified in that section, and to provide that the restriction should not apply in the case of accounts to be, or which are, operated by or for a person or body of a specified description.

47. As a power to amend primary legislation, it is considered that the draft affirmative procedure would provide the appropriate level of Parliamentary scrutiny for these provisions.

48. It is also possible that, should such amendment be required, it would be appropriate to enable specific definitions regarding types of account, financial institutions, or persons or bodies operating accounts to be set out in secondary legislation. For instance, it may be considered appropriate to define the scope of the restriction by reference to monetary thresholds, such as the turnover of a body corporate in respect of which the account is to be operated, in which case it would be advisable for an operational matter such as this to be specified in secondary legislation rather than on the face of the provisions. Subsection (2) confirms that the power to amend the clauses includes the power to amend a section so that it provides for any of these matters to be specified in a further order to be made by the Treasury. Any such orders would be subject to the draft affirmative procedure which would provide an appropriate level of Parliamentary scrutiny given the potentially significant demands that might be placed on banks and building societies.

PART 4: MARRIAGE AND CIVIL PARTNERSHIP

Clause 44(3) – Exempt persons: exempt from immigration control

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

49. Clause 44 defines an exempt person, which is relevant to the circumstances in which the Secretary of State may decide to investigate whether a proposed marriage or civil partnership is a sham. Under clause 44(1) a party to a proposed marriage or civil partnership is an exempt person if they (a) are a relevant national; (b) have the appropriate immigration status; or (c) hold a relevant visa. Clause 44(2) sets out the circumstances in which a person has the appropriate immigration status. This includes (b) where the person is exempt from immigration control. Clause 44(3) provides that the question of whether a person is exempt from immigration control is to be determined in accordance with regulations made by the Secretary of State. These regulations might, for example, set out criteria for determining who is a member of the household of a Head of State. In the circumstances regulations seem suitable both because of the likely level of detail and also so as to give flexibility to amend the provisions from time to time and the negative resolution procedure seems to offer the appropriate level of Parliamentary scrutiny.

Clause 44 (4) – Exempt persons: relevant visa

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

50. As set out above, under clause 44(1) a party to a proposed marriage or civil partnership is an exempt person if such person holds a relevant visa. Clause 44(4) provides that a person holds a relevant visa if the person holds a visa or other authorisation that is of a kind specified in regulations made by the Secretary of State. A power has been taken to specify relevant visas in secondary legislation to give flexibility; for example, so that the provisions may be amended when changes are made to the types of visa or other authorisation issued. It is considered that the negative resolution procedure provides the appropriate level of Parliamentary scrutiny for these regulations.

Clause 45(1), (5) and (9) – Conduct of investigations

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

51. Clause 45 makes provision about investigations by the Secretary of State into whether a proposed marriage or civil partnership is a sham. Clause 45(1) provides that an investigation must be conducted in accordance with any regulations made by the Secretary of State. It is considered that delegated legislation is appropriate for the level of detail that will be required and also so as to give flexibility to amend procedures in the light of experience. Clause 45(2) provides for the Secretary of State also to issue statutory guidance in relation to the conduct of investigations. It is envisaged that the guidance would contain detailed guidance for Home Office staff as to how investigations were to be conducted, for example as to the approach to be taken and the means of investigation which might be used. Clause 45(3) requires both parties to comply with any requirements notified to them by the Secretary of State as specified in regulations.

52. Under clause 45(4) the Secretary of State must decide as part of the investigation whether both of the relevant parties have complied with the investigation (the “compliance question”). Clause 45(5) provides that the compliance question is to be decided in accordance with any regulations made by the Secretary of State. Clause 45(9) provides that those regulations may in particular deal with (a) the circumstances in which a relevant party is to be taken to have failed to comply with a relevant requirement, and (b) the consequences of a relevant party’s failure to comply with a relevant requirement. “Relevant requirement” is defined in clause 45(11). Clause 45(10) provides that the regulations may include provision for the compliance question to be decided (in whole or in part) by reference to a relevant party’s compliance with one or more relevant requirements. The consequences of a decision that a party has not complied with the investigation are significant in that in those circumstances the party will not have completed the marriage preliminaries and therefore the marriage cannot go ahead. It is appropriate therefore for provision about what constitutes compliance or non-compliance to be set out in regulations. It is considered the negative resolution procedure provides the appropriate level of Parliamentary scrutiny for the regulations to be made under this clause.

53. There is also provision in clause 45(6) for statutory guidance in relation to the compliance question; it is envisaged that the guidance will set out more detail than is appropriate or necessary for the regulations.

Clause 46(1) and (3) to (5) – Investigations: supplementary

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

54. Clause 46 makes further provision about investigations. Clause 46(1) contains a power for the Secretary of State to prescribe information which needs to be included in a notice under clause 43 of the Bill, informing the parties to a proposed marriage/civil partnership that there will be an investigation. Certain information to be included is set out on the face of the Bill (clause 46(1)(a), (b) and (c)) and there is a power to prescribe further information. Subsection (3) sets out details of the types of information that may be prescribed. Subsections (4) and (5) provide for the regulations to impose requirements on the parties relating to the investigation and list particular requirements that may be imposed. Given the framework set out in clause 46 within which the enabling power is to be exercised, it is considered that the negative resolution procedure gives the appropriate level of Parliamentary scrutiny.

Clause 48 – Extension of scheme to Scotland and Northern Ireland

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>

55. Clause 48(1) provides an order-making power to make such provision as the Secretary of State considers necessary to extend the referral and investigation scheme to Scotland and Northern Ireland. Subsection (2) provides that an order may (a) make provision having a similar effect to that made by clause 53 (requirement to give notice of marriage or civil partnership at a designated office), and Schedule 4 (which contains amendments to the Marriage Act 1949 and Civil Partnership Act 2004 consequential on the scheme) and Parts 1, 2 and 4 of Schedule 6 (information); (b) confer functions on any person; and (c) amend, repeal or revoke any enactment (including an enactment contained in the Bill). Subsection (3) provides that the power under (b) includes a power to impose a duty to refer a marriage or civil partnership to the Secretary of State on persons exercising functions in Scotland and Northern Ireland in relation to marriage or civil partnership. This is subject to subsection (4) which provides that an order may not impose a duty or otherwise confer a function on Scottish Ministers or the Northern Ireland Executive.

56. In order to make the referral and investigation scheme effective in Scotland and Northern Ireland it may be necessary to make some detailed modifications of Scottish and Northern Ireland legislation. Also there are specific provisions in both Scotland and Northern Ireland (such as the possibility of giving postal notice of marriage) which may require consequential amendments to make the scheme effective. This will require detailed input from the devolved administrations which might itself be consequential on the main clauses and Parliament's views on them. It is considered appropriate for this to be done in secondary

legislation once the main clauses have been approved by Parliament. This is a power to amend primary legislation and it is therefore considered appropriate for the draft affirmative procedure to apply.

Clause 49(2) – Supplementary provision

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

57. Clause 49(2) gives the Secretary of State the power by regulations to make administration provision of any kind set out in Schedule 5 in connection with the application of the referral and investigation scheme to proposed marriages or civil partnerships in Scotland and Northern Ireland. As noted earlier, the order-making power in clause 48 allows the Secretary of State to make such provision as she considers appropriate for extending the scheme to Scotland and Northern Ireland. If the scheme is so extended, detailed provision about matters such as the information and evidence persons subject to the scheme need to provide will be required. As described above, Schedule 4 contains a number of regulation-making powers to enable this provision to be made in relation to England and Wales. This clause and Schedule 5 enable the Secretary of State to make equivalent provision in relation to Scotland and Northern Ireland. The Secretary of State is required to consult the Registrar General for Scotland or (as the case may be) Northern Ireland before making regulations. The negative resolution procedure is considered appropriate for this type of detailed administrative provision.

Clause 49(4) - Supplementary provision

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution

58. This subsection gives the Secretary of State the power by order to make provision about the information and evidence to be given by parties to a proposed marriage or civil partnership in Scotland or Northern Ireland, where one or both of the parties is not a relevant national. Such an order may amend, repeal or revoke any enactment. In particular this power may be used to amend provision made in an order under clause 48 extending the scheme to Scotland or Northern Ireland. The equivalent provision in relation to England and Wales is in new sections 28F of the Marriage Act 1949 and 9D of the Civil Partnership Act 2004 (inserted by paragraphs 7 and 21 of Schedule 4). The Secretary of State is required to consult the Registrar General for Scotland or (as the case may be) Northern Ireland before making an order. The draft affirmative procedure is considered appropriate for this order-making power, given that it may be used to amend primary legislation.

Clause 49(6) – Supplemental provision

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution

59. Clause 49(6) enables the Secretary of State, if an order under clause 48 (extending the referral and investigation scheme to Scotland or Northern Ireland) makes provision similar to paragraph 2 of Schedule 6 (disclosure of information by registration officials for immigration purposes), to specify by order other immigration purposes for which information may be disclosed under the provisions of the clause 48 order. This is equivalent to the order-making power in paragraph 2(3)(e) of Schedule 6, which extends to England and Wales. The negative resolution procedure is considered appropriate for this order, given that it will add further types of information to an existing disclosure framework.

Clause 55 – Regulations about evidence

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

60. Clause 55 contains a power to make regulations about evidence relevant to the determination of various questions under Part 4 of the Bill. Subsection (2) contains a non-exhaustive detailed list of 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. Subsection (3) provides for the Registrar General to be consulted before regulations are made.

61. It is considered appropriate for detailed provisions of this nature to be set out in secondary legislation and for the negative resolution procedure to apply.

Clause 56 - Notices

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

62. Clause 56 contains a power to make regulations about the giving of notices under Part 4 of the Bill and under amendments made to the Marriage Act 1949 and the Civil Partnership Act 2004. Subsection (2) provides that such regulations may in particular make provision about deemed notice. Subsection (3) provides for the Registrar General to be consulted before regulations are made. These regulations are likely to make provision about the method and

timing of service of notice. It is considered appropriate for detailed provisions of this nature to be set out in secondary legislation and for the negative resolution procedure to apply.

Paragraph 7 of Schedule 4 (new section 28D of the Marriage Act 1949) – Change of usual address or United Kingdom contact address

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

63. Paragraph 7 of Schedule 4 to the Bill inserts new sections 28B to 28G after section 28A of the Marriage Act 1949. Section 28D enables the Secretary of State to make provision in regulations for the giving of notice to the Secretary of State of a person's usual address (where this has changed) or United Kingdom contact address, or any change in that address, and also the giving of evidence of an address notified in accordance with the regulations. Subsection (2) provides that the regulations may include provision imposing a requirement on a person (for example this might include a requirement for a person who is given notice of an address or evidence of an address to pass that on to the Secretary of State or another person) and provision about the rejection of information/evidence which there are reasonable grounds to suspect to be false. Subsection (3) provides that the regulations may in particular make provision of the kind that may be made under section 28G(3); this includes the kind of evidence to be supplied and the form and manner in which it is to be supplied. It is important that the Secretary of State has up-to-date contact details in the United Kingdom for the purpose of serving notices under the referral and investigation scheme. Subordinate legislation is considered appropriate for this sort of detailed provision and the negative resolution procedure is thought to offer the appropriate level of Parliamentary scrutiny for these regulations.

Paragraph 7 of Schedule 4 (new section 28F of the Marriage Act 1949) – amendment of notice and evidence provisions

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution

64. New section 28F allows the Secretary of State by order to amend the information and evidence requirements set out respectively in sections 27 or 27E or 28C of the Marriage Act 1949. It also allows the Secretary of State to make consequential provision, including provision amending section 27ZA, 28D or 28G or any other enactment. Subsection (2) requires the Secretary of State to consult the Registrar General before making such an order. The power provides flexibility for changes to be made to the information or evidence requirements, for example to reflect changes in the documentation issued to evidence immigration status. As the power allows for the amendment of primary legislation, the new section provides for the draft affirmative procedure.

Paragraph 7 of Schedule 4 (new section 28G of the Marriage Act 1949) – Specified evidence

Power conferred on: Registrar General/Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution (for Secretary of State regulations only)

65. New section 28G(1) allows the Registrar General, having obtained the prior approval of the Secretary of State, to make regulations about the evidence that is required to be given for the purposes of sections 8, 16, or 28B of the Marriage Act 1949. It is considered appropriate for the Registrar General (rather than the Secretary of State) to make these regulations since they relate to evidence to be provided by any party to a proposed marriage. Subsection (2) provides for the Secretary of State, having consulted the Registrar General, to make regulations about the evidence required to be given for the purposes of section 28C. Subsection (3) sets out particular provision that may be made by the regulations, including the kind of evidence (defined as including photographs) which is to be supplied and the form and manner in which it is to be supplied. It is considered appropriate for detailed provisions of this nature to be set out in secondary legislation. The negative resolution procedure appears to provide the appropriate level of Parliamentary approval in the case of regulations made by the Secretary of State. The regulations made by the Registrar General, under subsection (1), are subject to no Parliamentary procedure. This is consistent with the Registrar General's existing powers to make regulations under section 74 of the Marriage Act 1949.

Paragraph 8 of Schedule 4 (new section 28H of the Marriage Act 1949) – Referral of proposed marriage to Secretary of State

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

66. Paragraph 8 of Schedule 4 inserts a new section 28H in the Marriage Act 1949. Subsection (5) requires a superintendent registrar who decides that either or both of the parties to a proposed marriage is not exempt from the referral and investigation scheme to refer the proposed marriage to the Secretary of State. Section 28H(6) requires a superintendent registrar, when referring a proposed marriage, to act in accordance with regulations made by the Secretary of State. Subsection (7) provides that the regulations may in particular make provision about the form, manner or timing of a referral or the information which is to be included. Subsection (10) requires the Registrar General to be consulted before any regulations are made. It is considered appropriate for detailed provisions of this nature to be set out in secondary legislation and for the negative resolution procedure to apply.

Paragraph 10 of Schedule 4 - notice period

Power conferred on: Secretary of State
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: None

67. Paragraph 10 of Schedule 4 amends section 31 of the Marriage Act 1949. There is in the current provisions a procedure whereby the Registrar General may, pursuant to an application, reduce the 15 day notice period for marriage if satisfied that there are compelling reasons to do so. There is a power under subsection (5D) for the Registrar General (with the approval of the Secretary of State) to make provision in regulations with respect to the making and granting of such applications. Paragraph 10(3) amends section 31 with the effect that any application to reduce the notice period in respect of a marriage which has been referred to the Secretary of State under the scheme is to be made to the Secretary of State rather than the Registrar General. Subsection (5EC) provides that regulations made by the Registrar General do not apply to applications made to the Secretary of State and there is a new enabling power in subsection (5ED) for the Secretary of State to make provision in relation to such applications. The Secretary of State must consult the Registrar General before making regulations under (5ED). This power mirrors the existing enabling power conferred on the Registrar General. Since the existing power is not subject to any Parliamentary procedure it is considered appropriate that the equivalent power conferred by the Bill should also not be subject to Parliamentary procedure.

Paragraph 21 of Schedule 4 (new section 9B of the Civil Partnership Act 2004) – Change of usual address or United Kingdom contact address (civil partnership)

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

68. New section 9B of the Civil Partnership Act 2004 contains provision in relation to civil partnership equivalent to new section 28D of the Marriage Act 1949.

Paragraph 21 of Schedule 4 (new section 9D of the Civil Partnership Act 2004) – Amendment of notice and evidence provisions (civil partnership)

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution

69. New section 9D of the Civil Partnership Act 2004 contains provision in relation to civil partnership equivalent to new section 28F of the Marriage Act 1949. Subsection (2) provides for the Registrar General to be consulted before regulations are made.

Paragraph 21 of Schedule 4 (new section 9E of the Civil Partnership Act 2004) – Specified evidence (civil partnership)

Power conferred on: Registrar General/Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution (for Secretary of State regulations only)

70. New section 9E(1) of the Civil Partnership Act 2004 allows the Registrar General, having obtained the prior approval of the Secretary of State, to make regulations about the evidence that is required to be given for the purposes of section 9 of the Civil Partnership Act 2004. It is considered appropriate for the Registrar General (rather than the Secretary of State) to make these regulations since they relate to evidence to be provided by any party to a proposed civil partnership. Subsection (2) provides for the Secretary of State, having consulted with the Registrar General, to make regulations about the evidence that is required to be given for the purposes of section 9A. Subsection (3) sets out particular provision that may be made by the regulations, including the kind of evidence (defined as including photographs) which is to be supplied and the form and manner in which it is to be supplied. It is considered appropriate for detailed provisions of this nature to be set out in secondary legislation. The negative resolution procedure appears to provide the appropriate level of Parliamentary approval in the case of regulations made by the Secretary of State. The regulations made by the Registrar General, under subsection (1) are subject to no Parliamentary procedure. This is consistent with the Registrar General's existing powers to make regulations under section 36(3) of the Civil Partnership Act 2004.

Paragraph 23 of Schedule 4 (Notice period)

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: None

71. Section 12 of the Civil Partnership Act 2004 sets out a procedure whereby the Registrar General may, pursuant to an application, reduce the 15 day waiting period for civil partnership, if satisfied that there are compelling reasons to do so. There is a power under section 12(1) for the Registrar General (with the approval of the Secretary of State) to make provision in regulations with regard to the making and granting of such applications. Paragraph 23(3) amends section 12 with the effect that any application to reduce the waiting period in respect of a proposed civil partnership which has been referred to the Secretary of State under the scheme is to be made to the Secretary of State rather than the Registrar General. Subsection (6) provides that regulations made by the Registrar General do not apply to applications made to the Secretary of State and there is a new enabling power in subsection (7) for the Secretary of State to make provision in relation to such applications. The Secretary of State must consult the Registrar General before making regulations under subsection (7). This power mirrors the existing enabling power conferred on the Registrar General. Since the existing power is not subject to any Parliamentary procedure it is considered appropriate that

the equivalent power conferred by the Bill should also not be subject to Parliamentary procedure.

Paragraph 24 of Schedule 4 (new section 12A of the Civil Partnership Act 2004) – Referral of proposed civil partnership to Secretary of State

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

72. New section 12A of the Civil Partnership Act 2004 contains provision in relation to the Civil Partnership Act 2004 equivalent to new section 28H of the Marriage Act 1949. The Registrar General must be consulted before regulations are made.

Paragraph 2 of Schedule 5 - Notices

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

73. Paragraph 2 enables the Secretary of State to make regulations about the giving of notices under the referral and investigation scheme in relation to proposed marriages or civil partnerships in Scotland or Northern Ireland. The regulations may in particular make provision about deemed notice. This is an equivalent power to that contained in clause 55 which relates to notices given under provisions of the Marriage Act 1949 and the Civil Partnership Act 2004.

Paragraph 3 of Schedule 5 - Evidence

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

74. Paragraph 3 enables the Secretary of State by regulations to make provision about the supply of evidence in relation to a proposed marriage or civil partnership in Scotland or Northern Ireland, where one or both parties concerned is not a relevant national. Provision that may be made includes provision about the kind of evidence to be supplied and the form and manner in which it is to be supplied. This is equivalent to the provision made in relation to England and Wales in paragraphs 7 (new section 28G of the Marriage Act 1949) and 21 (new section 9E of the Civil Partnership Act 2004) of Schedule 4. The negative resolution procedure is considered appropriate given the detailed nature of this provision.

Paragraph 4 of Schedule 5 - Change of address

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

75. Paragraph 4 provides a power for the Secretary of State to make provision in regulations about the giving of notice of a change of a relevant person's usual address or UK contact address and about evidence to be supplied of any change of address so notified. A relevant person for these purposes is a person who is a party to a proposed marriage or civil partnership in Scotland or Northern Ireland in a case where one or both of the parties to the marriage/civil partnership is not a relevant national. The equivalent provisions for England and Wales are in paragraphs 7 (new section 28D of the Marriage Act 1949) and 21 (new section 9B of the Civil Partnership Act 2004). The negative resolution procedure is considered appropriate for this kind of detailed provision.

Paragraph 5 of Schedule 5 - Referral

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

76. Paragraph 5(1) contains a power for the Secretary of State in regulations to require a person to act in accordance with those regulations when complying with a duty to refer a proposed Scottish or Northern Ireland marriage or civil partnership to the Secretary of State under the referral and investigation scheme. There is a duty inserted into the Marriage Act 1949 and the Civil Partnership Act 2004 in relation to England and Wales by paragraphs 8 and 24 of Schedule 4 for the relevant registration authority to refer a proposed marriage or civil partnership to the Secretary of State where either or both of the parties is not an exempt person. An order under clause 48 (extension of scheme to Scotland and Northern Ireland) may make equivalent provision in relation to Scotland and Northern Ireland. Regulations under this provision can then specify details such as the form, manner or timing of the referral and information or evidence to be included with the referral. The equivalent provisions in relation to England and Wales are in paragraphs 8 (new section 28H(6) and (7) of the Marriage Act 1949) and 24 (new section 12A(6) and (7) of the Civil Partnership Act 2004) of Schedule 4.

77. Paragraph 5(3) enables the Secretary of State to make regulations requiring a person who refers a proposed marriage or civil partnership in Scotland or Northern Ireland to the Secretary of State under the scheme to give the parties prescribed information about the effects of the referral and any requirements to notify the Secretary of State of a change of address. The equivalent provision in relation to England and Wales is in paragraphs 8 (new section 28H(5) of the Marriage Act 1949) and 24 (new section 12A(5) of the Civil Partnership Act 2004) of Schedule 4.

78. The negative resolution procedure is considered appropriate for the detailed administrative provision that may be made under both of these paragraphs.

Paragraph 6 of Schedule 5 – Applications for shortening of waiting period

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

79. Paragraph 6 enables the Secretary of State by regulations to make provision 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. The equivalent provision in relation to England and Wales is in paragraphs 10 (new section 31(5ED) of the Marriage Act 1949) and 23 (new section 12(7) of the Civil Partnership Act 2004) of Schedule 4. The negative resolution procedure is considered appropriate for the detailed nature of the provision to be made under these regulations.

Paragraph 2(3)(e) of Schedule 6 - Disclosures by registration officials

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution

80. Paragraph 2 of Schedule 6 enables registration officials to disclose information and documents to the Secretary of State for immigration purposes and other specified purposes. Immigration purposes are defined at paragraph 2(3). The power enables the Secretary of State to specify further ‘immigration purposes’ for which information and documents may be disclosed. This is required to enable the power to keep pace with developments in the law.

81. There are similar powers in sections 20 and 21 of the Immigration and Asylum Act 1999, which also enable the Secretary of State to specify, by order, further immigration purposes for which information may be shared. Those powers are subject to the draft affirmative procedure (see section 166(4) of the 1999 Act). However, they are considerably wider than the Schedule 6 power: the 1999 Act powers enable the Secretary of State not only to specify additional *immigration* purposes, but also to specify additional persons by or with whom information may be shared, and additional purposes (including additional police and customs purposes) for which information may be shared.

82. In view of the much narrower nature of the power in paragraph 2(3)(e) of Schedule 6, it is considered appropriate to provide for the negative resolution procedure.

PART 5: OVERSIGHT

Clause 59 - Police Ombudsman for Northern Ireland

Power conferred on: *Secretary of State*
Power exercisable by: *Order made by Statutory Instrument*
Parliamentary Procedure: *Negative resolution*

83. By inserting new sections 60ZB and 60ZC into the Police (Northern Ireland) Act 1998 clause 59 makes provision for the Police Ombudsman of Northern Ireland and the Secretary of State to enter into agreements to establish procedures in relation to the Ombudsman's oversight of incidents and complaints regarding the exercise of specified immigration and customs enforcement functions by relevant officials. Where agreement has not been reached in relation to a particular kind of official, the Secretary of State may by order establish procedures in relation to the exercise of specified enforcement functions by them. The need for an order-making power in cases where agreement has not been reached is essential to ensure the oversight of enforcement functions being exercised relation to immigration and customs matters in Northern Ireland and there is a statutory obligation on the Secretary of State to consult the Ombudsman and any other persons who the Secretary of State thinks appropriate in such cases.

84. The order-making power is tightly prescribed by new section 60ZB(1), in that procedures specified must correspond or be similar to those applicable to police complaints and disciplinary proceedings, set out at Part 7 of the Police (Northern Ireland) Act 1998. The power to make regulations to establish equivalent complaints and oversight procedures in England and Wales, contained at section 41 of the Police and Justice Act 2006 in relation to the Independent Police Complaints Commission, is subject to the negative resolution procedure. It is therefore considered that this order making power, which is also subject to the negative resolution procedure, provides adequate Parliamentary scrutiny.

PART 6: MISCELLANEOUS

Fees

Clauses 62 to 64: Power to charge a fee in respect of functions in connection with immigration and nationality

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by Statutory Instrument, and Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>The Order will be subject to affirmative resolution. The Regulations will be subject to negative resolution.</i>

85. These provisions retain the present three-tier structure in setting fees. The primary power is contained in clause 62(1), which provides that the Secretary of State may charge a fee in respect of the exercise of functions in connection with immigration and nationality. The factors to which she is permitted to have regard in setting the fee are set out in clause 62(9). The second tier of the framework is established by clause 62(2), which provides that the functions in respect of which a fee can be charged are to be specified in a fees order. The fees order will also state whether the fee is to be a fixed amount, or calculated with reference to an hourly rate (or other factor), and the maximum fee which can be charged in respect of each function. It is considered that the extent of the order making power is such that it is appropriate for this to be subject to the draft affirmative procedure. (This is also consistent with the current fees framework). Finally, the third tier of the framework is established by clause 62(7), which provides that the amount of the fee is to be set by the Secretary of State in regulations. These are subject to the negative resolution procedure. This represents a slight apparent diminution in Parliamentary scrutiny, insofar as the existing framework provides that regulations specifying fees set above cost are subject to the draft affirmative procedure (whilst fees set at or below cost are subject to the negative resolution procedure). Under the current proposals, regulations in respect of all fees will be subject to the latter. The aim of this alteration is to increase the Secretary of State's ability to respond quickly to changing circumstances. However, it is considered that Parliamentary scrutiny will in practice be enhanced by the increased detail to be placed in the fees order (which, as set out above, is subject to the draft affirmative procedure): in particular, the fact that the latter will set out the maximum permitted fee in respect of each function. Thus, unlike under the present framework, Parliament will be able to debate the charged products and the upper parameters of the fee simultaneously. It is considered that in this context, the negative resolution procedure provides adequate Parliamentary scrutiny of the regulations.

86. Clause 64 makes specific provision for fees for certain bespoke 'attendance services', provided to applicants overseas, to be charged separately, without requiring the fee (or a maximum thereof) to be set out in an order or regulations. This is necessary because it is not regarded as possible to set a universal fee for this service (the costs of providing which are likely to vary considerably) such that it can be placed into regulations, without jeopardising

the ability to provide the service at all. The fee will be set on a case by case basis, at cost recovery levels.

87. Finally, clause 63(1) provides that both fees orders and fees regulations can only be made with the consent of the Treasury.

PART 7: FINAL PROVISIONS

Clause 66(1) - Power to make transitional, transitory or saving provision

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: None

88. Clause 66(1) confers power on the Secretary of State to make transitional, transitory or savings provisions the Secretary of State considers appropriate in connection with the coming into force of the Act. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner. Such powers are often included as part of the power to make commencement orders (for example, section 116 of the Protection of Freedoms Act 2012) and, as such, are not subject to any Parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free standing power on this occasion, the same principle applies and accordingly the power is not subject to any Parliamentary procedure. Both this power and that in clause 66(2) are limited by definition to the matters in the Bill itself and the implementation of that Bill once it becomes an Act of Parliament. As such, from a devolution perspective these powers do not reach beyond the reserved purpose and content of the Bill.

Clause 66(2) - Power to make consequential provision

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution unless the order amends or repeals primary legislation in which case affirmative resolution

89. Clause 66(2) confers a power on the Secretary of State to make such consequential provision as considered appropriate for the purposes of the Bill. The powers conferred by this clause are wide. But there are various precedents for such provisions including section 115 of the Protection of Freedoms Act 2012 and section 59 of the Crime and Courts Act 2013. Whilst clause 66(6) and Schedule 9 seek to identify the necessary transitional and consequential provisions arising out of the Bill, the Bill contains far-reaching changes to immigration law and it is possible that not all of the consequences of them have been

identified in the Bill's preparation. It is considered it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation. An order under clause 66(2) will normally be subject to the negative resolution procedure. However, clause 67 provides that the affirmative procedure is required if such an order amends or repeals primary legislation. It is considered that this provides the appropriate level of Parliamentary scrutiny for this power.

Clause 68 - Commencement power

Power conferred on: Secretary of State
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: None / Negative resolution in respect of subsequent orders which commence a provision in Chapter 1 of Part 3.

90. Clause 68(3) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement order. With the exception of any subsequent order made under this provision which brings into force for a particular area within England and Wales, Scotland or Northern Ireland, a provision of Chapter 1 of Part 3 (residential tenancies), then as usual with commencement powers, orders made under this clause are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.

91. It is intended that the operation of the provisions in Chapter 1 of Part 3 relating to residential tenancies should be rolled out on a phased geographical basis across the United Kingdom. It is intended that following implementation in the first area, a review will be undertaken to consider whether further roll out should take place. Commencement of the initial implementation will, as usual with commencement powers, be by order which is not subject to any Parliamentary procedure. Clause 67(7) provides that any such subsequent commencement order made under clause 68 is subject to the negative Parliamentary procedure. This will provide parliament with the opportunity to scrutinise the plans for the further roll out of that Chapter in light of the evaluation of the initial implementation. The negative resolution procedure is considered to provide an appropriate degree of scrutiny to facilitate this.

Clause 69 – Extension to Channel Islands or Isle of Man

Power conferred on: Her Majesty
Power exercisable by: Order in Council
Parliamentary procedure: None

92. Clause 69(6) permits Her Majesty by Order in Council to extend any of the provisions of the Bill to the Channel Islands or the Isle of Man, with or without modification. Similar

provision is found in other immigration legislation, for example, section 57 of the Borders, Citizenship and Immigration Act 2009.

Home Office

31 January 2014