

*These notes refer to the Borders, Citizenship and Immigration Bill [HL]
as introduced in the House of Lords on 14th January 2009 [HL Bill 15]*

BORDERS, CITIZENSHIP AND IMMIGRATION BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Borders, Citizenship and Immigration Bill [HL] as introduced in the House of Lords on 14th July 2009. They have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

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

OVERVIEW

3. The Bill is arranged under 4 Parts:

Part 1: Border functions

Part 2: Citizenship

Part 3: Immigration

Part 4: Miscellaneous and General

SUMMARY

Part 1 – Border functions

4. The intention of Part 1 is to provide the legislative framework for immigration officers and officials of the Secretary of State to exercise revenue and customs functions which have up to now been exercised by Her Majesty's Revenue and Customs ("HMRC"). For this purpose it provides for the Secretary of State to exercise certain HMRC functions. It also

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provides for the appointment of a Director of Border Revenue who will be responsible for “customs revenue functions” (the term used in the Bill to describe functions relating to taxes, duties and levies). In practice it is intended that officials of the UK Border Agency (“UKBA”), an executive agency of the Home Office, will exercise these functions on behalf of the Secretary of State and the Director of Border Revenue (“the Director”) respectively. Non-revenue customs functions, for example the prevention of drugs smuggling, will be a matter for the Secretary of State. Customs revenue functions, for example the collection of duties and taxes from passengers and on postal packets and the prevention of smuggling of goods where such duties and taxes have not been paid, will be a matter for the Director. The Director, like HMRC, will act on behalf of the Crown in revenue matters independently of the Home Secretary. In this way Ministers will remain at arms length from tax-related decisions, although officials of the UKBA may have functions in relation to both tax and non-tax matters.

5. It is intended that the customs role of the UKBA will focus on border related matters, such as the importation and exportation of goods and HMRC will continue to exercise revenue and customs functions inland. The latter includes inland checks on excise goods and customs checks and audits at business premises. The processing of customs freight declarations and the collection of duties is a centralised function which will remain with HMRC. Certain non-revenue regimes which are business-based will also remain with HMRC such as strategic export controls and protecting intellectual property rights. The UKBA will carry out physical examinations at the frontier although some of those interventions may be carried out at the request of HMRC, for example, HMRC may ask UKBA to examine a consignment suspected to contain counterfeit goods to ensure the goods are legitimate. Responsibility for overall revenue and customs policy will stay with HMRC.

6. HMRC and UKBA will work closely together in the discharge of their respective customs functions. The UKBA may support HMRC investigations inland into revenue smuggling and HMRC investigators will attend at the border in response to UKBA detections of revenue smuggling. The concurrent exercise of customs functions is therefore necessary.

7. Clauses 1 to 13 enable the Secretary of State to exercise concurrently with the Commissioners for HMRC (“the Commissioners”) functions which are currently exercised by the Commissioners and which relate to general customs matters. They provide for the appointment by the Secretary of State of a Director of Border Revenue and set out the conditions to which such an appointment will be subject and the functions which the Director may exercise. Provision is also made to enable the Secretary of State and the Director to exercise functions conferred on the Commissioners by new enactments. These clauses also enable the Secretary of State to designate officials for the purpose of carrying out general customs matters and the Director to designate officials of the Secretary of State as customs revenue officials for the purposes of the Bill and sets out the framework within which designations will be made and requires designated officials to comply with directions issued by the Secretary of State and the Director.

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8. Clauses 14 to 21 explain how customs information may and may not be used and disclosed and amend the duty to share information set out in the Immigration, Asylum and Nationality Act 2006 (“IANA 2006”).

9. Clause 22 provides that the Secretary of State may by order provide for the application of provisions of the Police and Criminal Evidence Act 1984 (“PACE”) and the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE (NI)”) to persons detained and investigations conducted by designated customs officials and immigration officers. As the provisions of PACE do not apply in Scotland clause 23 amends the Criminal Law (Consolidation) (Scotland) Act 1995 to ensure that in Scotland the current provisions will apply as they apply to HMRC.

10. Clause 24 provides for a scheme, or schemes, to enable the transfer of certain property, rights and liabilities between the Commissioners or officers of Revenue and Customs and the Secretary of State, the Director or designated customs officials. Clause 25 provides for the sharing of facilities and services between HMRC and those exercising immigration, asylum, nationality or customs functions, for the purposes of the exercise of any of those functions.

11. Clauses 26 to 36 make provision for a number of key areas related to the exercise of customs functions by the Secretary of State and the Director, for the modification of enactments, for the making of supplementary, incidental, consequential, transitory, transitional or saving provision as appropriate by virtue of this Part and makes further provision about subordinate legislation made under this Part of the Bill. Provision is made for a framework for inspections (by conferring functions on the Chief Inspector of the UK Border Agency and by enabling the Secretary of State to confer functions on Her Majesty’s Inspectors of Constabulary, the Scottish inspectors and the Northern Ireland inspectors in relation to the exercise of customs functions) and to allow the Attorney General to assign to the Director of Revenue and Customs Prosecutions, functions of prosecuting and advising on criminal investigations carried out by officials of the Secretary of State and other persons, such as constables. Provision is also made for the payment of revenue received by the Secretary of State and the Director of Border Revenue by way of, respectively, a general customs or customs revenue function, to the Commissioners and provision for such revenue to be paid into the Consolidated Fund. Interim provision is also made for the duty regarding the welfare of children until section 55 of this Bill comes into force.

Part 2 – Citizenship

12. Clauses 37 to 39 amend section 6 and parts of Schedule 1 to the British Nationality Act 1981 (“BNA 1981”), which relate to naturalisation as a British citizen. Section 6 sets out the circumstances in which the Secretary of State may grant a certificate of naturalisation as a British citizen, and amended paragraphs 1 to 4B of Schedule 1 contain the revised qualifying criteria.

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13. Clause 40 amends section 1 of the BNA 1981, to provide that children born in the UK or a qualifying territory on or after the commencement of that clause to members of the armed forces will automatically become British citizens if their father or mother is a member of the armed forces at the time of their birth. It also provides for a child born in the UK or a qualifying territory on or after the commencement of the clause to be registered as a British citizen if the child's father or mother becomes a member of the armed forces while the child is a minor.

14. Clause 41 amends section 4C of the BNA 1981, to remove the requirement that an applicant under that section must be born after 7th February 1961. This will enable applicants born before 7th February 1961 to be able to register as British citizens, if they would have become British had the previous nationality law allowed their mother to pass on nationality in the same way as their father could. The amendments made by the clause also widen the scope of section 4C so that it is no longer restricted to the case where the applicant would otherwise have become a citizen of the United Kingdom and Colonies ("CUKC") under section 5 of the British Nationality Act 1948 ("BNA 1948").

15. Clause 42 creates a new registration route in the BNA 1981 for children of members of the armed forces born outside the UK and the qualifying territories on or after the commencement of the clause to become British citizens.

16. Clause 43 moves the requirement for nationality applicants applying for registration to be "of good character" from section 58 of the Immigration, Asylum and Nationality Act 2006 ("IANA 2006") into each of the Acts which contain the relevant registration routes.

17. Clause 44 moves the definition of being "in breach of the immigration laws" from section 11 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") to the BNA 1981, and updates the references to being a qualified person under European Community law.

18. Clause 45 creates various new definitions for the purposes of the BNA 1981 which are relevant to the amendments made to that Act by clauses 37 to 44.

Part 3 – Immigration

19. Clause 46 amends section 1(3) of the Immigration Act 1971 ("IA 1971") to provide the power to routinely control all persons arriving in the UK, by aircraft or ship, from another part of the Common Travel Area ("CTA"), namely the Channel Islands, the Isle of Man and the Republic of Ireland. The clause also amends section 11(2) of the IA 1971 to provide that references to disembarkation and embarkation in that Act apply to journeys from the UK to other places in the CTA or from such places to the UK.

20. Clause 47 amends section 3(1)(c) of the IA 1971 to allow a condition to be imposed on a migrant's limited leave to enter or remain in the UK restricting his studies whilst here.

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21. Clause 48 extends existing powers to take fingerprints in section 141 of the Immigration and Asylum Act 1999 (“IAA 1999”) to include “foreign criminals” subject to the automatic deportation provisions in sections 32 to 38 of the UK Borders Act 2007 (“UKBA 2007”).

22. Clause 49 extends the permissive detention power in section 2 of the UKBA 2007 to designated immigration officers in Scotland and amends section 60(1) of that Act to reflect that sections 1 to 4 extend to Scotland.

Part 4 – Miscellaneous and General

23. Clause 50 relates to judicial review applications in asylum, immigration and nationality matters, and removes the existing bar to those judicial reviews being transferred into the Upper Tribunal of the unified tribunal system established under the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”).

24. Clause 51 imposes a duty on the Secretary of State to make arrangements to ensure that certain specified functions are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. It also imposes a similar duty on the Director in relation to the Director’s functions.

25. Clauses 52 to 55 make general provision on repeals, extent, commencement and the short title of the Bill.

TERRITORIAL EXTENT

26. Subject to certain exceptions set out in subsections (2) to (4) of clause 53 the Bill extends to England, Wales, Scotland and Northern Ireland and amendments and modifications made by this Bill have the same extent as the provisions to which they relate. Provisions, other than those of Part 1 or clause 50, may be extended to any of the Channel Islands or the Isle of Man by Order in Council.

27. At Introduction this Bill contains provisions that trigger the Sewel Convention. The provisions relate to clause 49 which extends the permissive detention power in section 2 of the UKBA 2007 to designated immigration officers in Scotland. The provision will enable an immigration officer designated under section 1 of the UKBA 2007 to detain, at a port in Scotland, an individual whom the immigration officer thinks is subject to a warrant for arrest. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

COMMENTARY

PART 1: BORDER FUNCTIONS

General customs functions of the Secretary of State

Clause 1: General customs functions of the Secretary of State

28. Clause 1 provides for the concurrent exercise by the Secretary of State of functions currently conferred on the Commissioners by an enactment passed or made before the end of the session in which this Bill is passed or an instrument or document issued before the passing of this Bill and which relate to general customs functions. Subsection (2) defines a “general customs matter” as a matter in relation to which the Commissioners have functions other than one of the matters specified in paragraphs (a) to (e) of subsection (2). These specified matters are those listed in Schedule 1 to the Commissioners for Revenue and Customs Act 2005 (“CRCA 2005”) (former Inland Revenue matters), any tax, duty or levy not mentioned in that Schedule, a matter in respect of which functions were transferred to the Commissioners from the Paymaster General, the subject matter of Council Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and the subject matter of EC Regulation 1781/2006 on information on the payer accompanying transfers of funds. In essence, these exclusions mean that the Secretary of State may not exercise any tax function of the Commissioners, former functions of the Office of the Paymaster General or one which relates to the Commissioners’ remit in relation to the regulation of money businesses. Subsection (3) provides that where a function is exercisable concurrently by the Commissioners and the Secretary of State and may be exercised by the Commissioners in relation both to a general customs matter and another matter, the Secretary of State shall exercise it only in relation to the general customs matter.

29. Subsection (4) provides that, where appropriate, a reference to the Commissioners for Her Majesty’s Revenue and Customs, or to HMRC, in an enactment, instrument or document to which clause 1 applies are to be construed as including a reference to the Secretary of State. Subsection (5) provides that references in clause 1 to functions of the Commissioners are to functions conferred by an enactment to which the clause applies. Subsection (6) specifies that clause 1 applies to an enactment passed or made before the end of the session in which this Bill is passed and to an instrument or document issued before the passing of this Bill. Subsection (7) provides that clause 1 applies only to certain sections of the CRCA 2005, namely section 5(2)(b) (Commissioners’ initial functions), section 9 (ancillary powers), section 25A(2) (certificates of debt) and sections 31 (obstruction) and 33 (powers of arrest), other than in its application of an offence under section 30 (impersonation). It is unnecessary to apply all provisions of the CRCA 2005 to the Secretary of State. A number of provisions of the CRCA 2005 are either already dealt with in this Bill (such as the provisions concerning confidentiality of information similar to sections 17 to 23 CRCA 2005) or are not required given the common law powers of the Secretary of State (for example the power to

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make rewards in section 26 CRCA 2005 would already be available to the Secretary of State under the common law). Subsection (8) defines “general customs function” for the purposes of this Part of the Bill as a function exercisable in relation to a general customs matter.

Clause 2: Power of Secretary of State to modify functions

30. Clause 2 enables the Secretary of State to make an order to amend the general customs matters in respect of which the Secretary of State has functions and to make provision for the Secretary of State to exercise functions relating to general customs matters that are conferred on the Commissioners by an enactment after the passing of this Bill. The Secretary of State may also by order modify any enactment made after the passing of this Bill in consequence. Subsection (2) makes clear that an order made under this clause may not add a customs revenue matter to those that may be exercised by the Secretary of State. Subsection (3) requires that the Secretary of State consult the Treasury before exercising the power in subsection (1).

General customs officials

Clause 3: Designation of general customs officials

31. Clause 3(1) provides that the Secretary of State by whom general customs functions are exercisable may designate an immigration officer or any other of her officials as a general customs official for the purposes of this Part of the Bill. Subsection (2) provides that in relation to a general customs matter a general customs official has the same functions as an officer of Revenue and Customs would have and that a general customs official may exercise those functions that are conferred on the Secretary of State by clause 1.

32. Subsection (3) makes clear that the clause does not impact in any way on the ability of any other official of the Secretary of State to exercise the Secretary of State’s functions. This preserves the power to delegate ministerial functions to civil servants under *Carltona* (*Carltona Limited v Commissioners of Works* [1943] 2 ER 560 (CA)). Subsection (4) provides that if a function may be exercised in relation to both a general customs matter and another matter, the general customs official shall exercise it only in relation to the general customs matter.

33. Subsection (5) enables a general customs official to exercise powers in relation to general customs matters by providing that, where appropriate, references to an officer of Revenue and Customs, or to HMRC, in an enactment, instrument or document to which clause 3 applies are to be construed as including a reference to a general customs official. Subsection (6) provides that references in clause 3 to functions of an officer of Revenue and Customs are to functions conferred by an enactment to which clause 3 applies. Subsection (7) specifies that this clause applies to an enactment passed or made, or an instrument or document issued, before this Bill is passed and, subject to express provision to the contrary, an enactment passed or made, or an instrument or document issued, after this Bill is passed. Subsection (8), however, provides that clause 3 only applies to certain sections of the CRCA 2005, namely section 2(4) (continuation of anything begun by one officer by another), section

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6 (officers' initial functions), section 25(1) and (5) (conduct of civil proceedings in a magistrates' court or in the sheriff court) and section 25A (1) (certificates of debt) and sections 31 to 33 (assault, obstruction and powers of arrest) excluding the power to arrest a person for the offence of impersonation under section 30. Subsection (9) provides that the extent to which a general customs official may exercise functions under clause 3 is subject to any limitation specified in the official's designation made under clause 4 and to any designation of the same official under clause 11 (designation of customs revenue officials).

Clause 4: Designation: supplementary

34. Clause 4 provides at subsection (1) that a designation under clause 3 will be subject to any limitations specified in the designation and then sets out at subsection (2) that a limitation may in particular relate to the functions which may be exercised by the general customs official or the purposes for which those functions may be exercised.

35. Subsection (3) establishes that a designation may be permanent or made for a specified period and may, in either case, be withdrawn or varied. Subsection (4) provides that the power to designate, withdraw or vary a designation is to be exercised by the Secretary of State giving notice to the official in question. Subsection (5) provides that the Secretary of State may designate an official under clause 3 only if the Secretary of State is satisfied that the official is capable of effectively carrying out the functions exercisable by virtue of the designation and has received adequate training in respect of the exercise of those functions. In addition to these requirements, it also provides that the Secretary of State must be satisfied that the official is otherwise a suitable person to exercise those functions.

Clause 5: Directions by the Secretary of State

36. Clause 5 requires a general customs official to comply with the directions of the Secretary of State in the exercise of functions in relation to a general customs matter.

The Director of Border Revenue

Clause 6: The Director of Border Revenue

37. Clauses 6(1) and (2) provide that the Secretary of State must designate an official in the department of the Secretary of State who may exercise general customs functions as the Director of Border Revenue and that the Secretary of State must obtain the consent of the Treasury to the designation.

Clause 7: Customs revenue functions of the Director

38. Subsection (1) of clause 7 provides that the functions of the Commissioners that are exercisable in relation to customs revenue matters are exercisable concurrently by the Director.

39. Subsection (2) sets out what constitutes a "customs revenue matter" in this Part of the Bill, specifying these (in summary) as agricultural levies, anti-dumping duty, countervailing duty, customs duties, duties of excise (with certain exceptions) and value added tax relating to

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the export of goods from or import of goods into the UK. Subsection (3) makes clear that the Commissioners' functions in relation to the making, by statutory instrument, of any regulations, rules or order may not be exercised by the Director. Nor may the Director exercise any of the Commissioners' functions in relation to the issuing of notices, directions or conditions that relate to value added tax and that apply generally to any person falling within their terms. For example, in accordance with this subsection, the Director would not be able to issue public notices in respect of VAT, for example, Notice 700 is issued by the Commissioners as a guide to the public in relation to all the main VAT rules and procedures and Notice 700/21 gives guidance on how to fill in a VAT return.

40. Subsection (4) provides that if a function exercisable concurrently by the Commissioners and the Director may be exercised by the Commissioners in relation to both a customs revenue matter and another matter, the Director may exercise it only in relation to the customs revenue matter.

41. Subsection (5) enables the Director to exercise powers in relation to customs revenue matters by providing that, where appropriate references to the Commissioners for Her Majesty's Revenue and Customs, or to HMRC, in an enactment, instrument or document to which clause 7 applies are to be construed as including a reference to the Director. Subsection (6) provides that references in clause 7 to functions of the Commissioners are to functions conferred by an enactment to which that clause applies. Subsection (7) then specifies that clause 7 applies to an enactment passed or made before the end of the session in which this Bill is passed, and to an instrument or document issued before the passing of this Bill. Subsection (8), however, provides that clause 7 only applies to certain sections of the CRCA 2005, namely section 5 (1)(b) and (2) (Commissioners' initial functions), section 9 (ancillary powers), section 24(1), (2), (3)(e) and (4) to (7) (evidence), sections 25(1), (1A), (5) and (6) (conduct of civil proceedings), section 25A(2) (certificates of debt) and section 26 (rewards) and sections 31 (obstruction) and 33 (power of arrest) other than in its application to an offence under section 30 of that Act. Subsection (9) defines "customs revenue function" in this Part of the Bill as a function exercisable in relation to a customs revenue matter.

Clause 8: Power of Treasury to modify Director's functions

42. Clause 8 enables the functions relating to customs revenue matters that may be exercised by the Director to be updated where necessary to reflect legislative and other changes. This clause provides that the Treasury may, by order, amend the matters that are included within the definition of a customs revenue matter and make provision, including amendments to clause 7 and to other enactments, so as to enable the Director to exercise additional functions conferred on the Commissioners in future enactments.

Clause 9: Delegation of Director's functions

43. Clause 9(1) provides that the Director may make arrangements to delegate a function of the Director conferred by this or any other enactment. Subsection (2) establishes that the delegation of a function does not prevent the Director from exercising the function and does not prevent the exercise of the function by a customs revenue official designated under clause

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11. Subsection (3) requires that where the Director delegates a function, the Director must monitor the exercise of the function by the person to whom it is delegated and that the person concerned must comply with the directions of the Director in exercising that function.

Clause 10: Compliance with directions etc.

44. Clause 10 applies to the Director in the exercise of the Director's customs revenue functions and to a person to whom such functions have been delegated under clause 9. Subsections (2) and (3) require that such persons must comply, in the exercise of customs revenue functions, with any directions of a general nature given by the Treasury and must apply any concession published by the Commissioners and any interpretation of the law issued by the Commissioners. Subsection (4) imposes an obligation on a person to whom clause 10 applies to comply with any other guidance issued by the Commissioners and to take account of any other material published by them. In summary, the clause ensures consistent application of tax policy by HMRC and the Director.

Customs revenue officials

Clause 11: Designation of customs revenue officials

45. Clause 11(1) provides that the Director may designate an official of the Secretary of State by whom general customs functions are exercisable as a customs revenue official for the purposes of this Part of the Bill. Subsection (2) provides that a customs revenue official has, in relation to a customs revenue matter, the same functions as an officer of Revenue and Customs would have and may exercise the functions that are conferred on the Director by clause 7.

46. Subsection (3) provides that a function that may be exercised in relation to both a customs revenue matter and another matter is exercisable by a customs revenue official only in relation to the customs revenue matter.

47. Subsection (4) provides that, where appropriate, a reference to an officer of Revenue and Customs, or to HMRC, in an enactment, instrument or document to which clause 11 applies is to be construed as including a reference to a customs revenue official. Subsection (5) provides that a reference in clause 11 to functions of an officer of Revenue and Customs are to functions conferred by an enactment to which clause 11 applies. Subsection (6) specifies that clause 11 applies to an enactment passed or made, or an instrument or document issued, before this Bill is passed and, subject to express provision to the contrary, an enactment passed or made, or an instrument or document issued, after this Bill is passed.

48. Subsection (7) provides that clause 11 applies only in relation to certain sections of the CRCA 2005, namely section 2(4) (continuation of anything begun by one officer by another), section 6 (officers' initial functions), section 25(1), (1A) and (5) (evidence), section 25A(1) (certificates of debt) and section 26 (rewards) and sections 31 to 33 (assault, obstruction and powers of arrest) excluding the power to arrest a person for the offence of impersonation under section 30. Subsection (8) provides that the extent to which a customs revenue official

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may exercise functions under clause 11 is subject to any limitation specified in the official's designation under clause 12 (supplementary provisions about designation) and to any designation of the same official under clause 3 (designation of general customs officials).

Clause 12: Designation: supplementary

49. Clause 12 establishes that a designation under clause 11 is subject to such limitations as may be specified in the designation and subsection (2) provides that a limitation may, in particular, relate to the functions which are exercisable by virtue of the designation or the purposes for which those functions are exercisable.

50. Subsection (3) establishes that a designation may be permanent or made for a specified period and may, in either case, be withdrawn or varied. Subsection (4) requires that the power to designate, withdraw or vary a designation must be exercised by the Director giving notice to the official in question. Subsection (5) states that the Director may designate an official only if the Director is satisfied that the official is capable of effectively carrying out the functions that are exercisable by virtue of the designation and has received adequate training in respect of the exercise of those functions. In addition to these requirements, the Director must also be satisfied that the official is otherwise a suitable person to exercise those functions.

Clause 13: Directions by the Director

51. Clause 13 requires a customs revenue official to comply with the directions of the Director in the exercise of functions in relation to a customs revenue matter.

Customs information

Clause 14: Use and disclosure of customs information

52. Clause 14 sets out the broad circumstances under which customs information may be used and by whom, and defines customs information. It provides that this provision does not supersede any other legislation prohibiting the disclosure of information.

53. Subsection (1) of clause 14 states the general principle that:

- where a person to whom this clause relates acquires customs information in connection with one function, they may use that information for the purpose of any of their functions; and
- that person may also disclose customs information to any other person to whom the clause relates for the purpose of that other person's functions.

54. Subsection (2) sets out to whom this clause applies. They are a designated customs official, an immigration officer, the Secretary of State by whom general customs functions are

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exercisable, any other Minister of the Crown in that Secretary of State's department, the Director and a person acting on behalf of any of the above.

55. Subsection (3) makes the general principle in subsection (1) subject to certain exceptions. These exceptions are any restriction or prohibition which limits the use of information, as imposed by:

- this Part of the Bill, such as clause 16(1)(b), which prohibits the use of customs revenue information where to do so would contravene any restriction imposed by the Commissioners;
- any other enactment; or
- any international or other agreement to which the UK or Her Majesty's Government is party. An example of an international agreement would be the Naples II convention on mutual assistance and cooperation between customs. An example of an "other" agreement would be the UK and Isle of Man Revenue Sharing Agreement of 15th October 1979, as amended, containing a limitation on use of information obtained from the Isle of Man Customs and Excise Service. As the Isle of Man is not a state in international law, it does not have the capacity to conclude international agreements.

56. Subsection (4) states that the term "enactment" referred to in subsection (3) does not relate to an Act of the Scottish Parliament, a Measure or Act of the National Assembly for Wales, or Northern Ireland legislation.

57. Subsection (5) states that clause 14 is without prejudice to either the use, or disclosure, of information other than customs information.

58. Subsection (6) defines for the purposes of this Part of the Bill "customs function", "customs information", "customs revenue information" and "designated customs official."

59. Subsection (7)(a) states that, for the purposes of the definitions in subsection (6), it is immaterial whether the information was acquired or is capable of being acquired by the person holding the information or another person. Subsection (7)(b) states it is immaterial whether the information was also acquired or is also capable of being acquired in the exercise of any other function. Therefore information which has been obtained relying on both a customs function and any other function of the person acquiring the information (or is capable of being acquired under that other function) will still fall within the definition of customs information.

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Clause 15: Prohibition on disclosure of personal customs information

60. Clause 15 imposes a statutory duty of confidentiality on the Secretary of State by whom general customs functions are exercisable, a Minister of the Crown, and officials, in that Secretary of State's department, immigration officers, the Director and any person acting on behalf of any of those persons. A similar obligation is imposed in clause 17 on any person to whom personal customs information has been disclosed under either clause 16 or clause 17.

61. Subsection (1) lays down the principle that "personal customs information" may not be disclosed by a relevant official, the Secretary of State by whom general customs functions are exercisable or by another Minister of the Crown in that Secretary of State's department to anyone who is not a relevant official or a Minister of the Crown. "Relevant official" is defined in subsection (3) to mean a designated customs official, an immigration officer, the Director and any other person acting on behalf of the Secretary of State by whom general customs functions are exercisable or the Director, a designated customs official or an immigration officer.

62. Subsection (2) preserves the general principle that Ministers should remain at arm's length from taxpayer information. It creates a further statutory duty of confidentiality to protect personal customs revenue information from being disclosed to a Minister of the Crown by a person who is or was a relevant official.

63. Subsection (4) defines what is meant in this Part of the Bill by "personal customs information" and "personal customs revenue information". These terms include information relating to persons who are deceased, as well as those who are living, and to corporate bodies which no longer exist, as well as those which are still active.

64. Subsection (5) provides that a person does not breach the subsection (1) duty of confidentiality by disclosing information which that person knows to have been acquired otherwise than as the result of the exercise of a customs function. It also provides that a person does not breach the subsection (2) duty of confidentiality by disclosing information which that person knows to have been acquired otherwise than as the result of the exercise of a customs revenue function. These provisions ensure that the duties of confidentiality created by this Bill only restrict the disclosure of that information which the Bill is intended to regulate (namely information which it is known was acquired, or might have been so acquired, as the result of the exercise of a customs function, or customs revenue functions, as appropriate).

65. Subsection (6) provides that the statutory duty of confidentiality contained in subsections (1) and (2) are subject to the clause 16 exceptions and to any other enactment (other than an enactment in this Part of the Bill) permitting disclosure where such a disclosure does not contravene any restriction imposed by the Commissioners. An example of another enactment permitting disclosure of information that would otherwise be regarded as confidential under this provision would be the Criminal Procedure and Investigations Act 1996. That Act governs disclosure of information in the context of criminal proceedings.

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66. Subsection (7) provides that this section does not apply to information supplied by or on behalf of HMRC or the Revenue and Customs Prosecutions Office (“RCPO”). This is without prejudice to any other restriction on the disclosure of such information. The confidentiality of information disclosed to a relevant official by HMRC and RCPO will continue to be governed by section 41 (as well as the new sections 41A and 41B inserted by clause 20 of this Bill) of the UKBA 2007. The reference to any other restrictions on the disclosure of such information is in reference to the restrictions in section 41B in particular.

67. Subsection (8) states that the term “enactment” referred to in subsection (6) does not relate to an Act of the Scottish Parliament or a Measure or Act of the National Assembly for Wales or Northern Ireland legislation.

Clause 16: Exceptions to section 15 prohibition

68. Clause 16 sets out the limited number of circumstances where the disclosure of personal customs information is permitted.

69. Subsection (1) allows the disclosure of personal customs information where provided for in subsections (3) to (8) and when, in the case of customs revenue information, such disclosure does not contravene any restriction imposed by the Commissioners.

70. Subsection (2) ensures that the Commissioners’ restrictions do not apply to information which has been acquired otherwise than in the exercise of customs revenue functions.

71. Subsection (3) allows a disclosure to be made for the purposes of a customs function, a function relating to immigration, asylum or nationality, a function relating to national security, or a function relating to the prevention or detection of crime.

72. Subsection (4) allows a disclosure to be made to a person exercising public functions, whether in the UK or abroad, in order to assist them in carrying out those functions. This clause will be relied upon in order to make disclosures to public bodies such as the Independent Police Complaints Commission (“IPCC”), as well as HMRC and RCPO. A further example of where this provision may be relied on is where a customs official has information relating to a publican convicted of evading excise duty. In accordance with this provision he could disclose this information to the local licensing authority.

73. Subsection (5) allows a disclosure to be made for the purposes of civil proceedings, a criminal investigation or criminal proceedings (whether or not within the UK). Disclosures relating to civil proceedings must be for proceedings relating to a function set out in subsection (3). This would cover, for example, information required in relation to proceedings for recovery of a debt owed to another customs authority. Disclosures for the purposes of criminal investigations or proceedings are not limited and may relate, for example, to an investigation of a robbery. Subsection (5) also allows a disclosure in

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pursuance of an order of a court such as disclosure made in accordance with a witness summons.

74. Subsection (6) enables a disclosure to be made with the consent of each person to whom the information relates. This would cover for example an individual case where a person raised their circumstances with their Member of Parliament, asked them to take the case up with the relevant Government Minister, and authorised a relevant official to disclose what they knew of the case to the Minister for that purpose.

75. Subsection (7) allows a disclosure to be made in order to comply with an obligation of the UK, or Her Majesty's Government, under an international or other agreement. The agreements in question will typically be Memoranda of Understanding with public authorities abroad for the purposes of securing the due administration of their respective customs laws.

76. Subsection (8) allows for disclosure to persons specified under Treasury regulations or disclosures of a kind specified in such regulations.

Clause 17: Prohibition on further disclosure

77. Clause 17 sets out the circumstances where the further onward disclosure of personal customs information may be allowed. It applies to persons who will have received information from persons specified in clause 15, in accordance with clause 16, or indeed from other persons (who have received customs information from those persons) under clause 17 itself.

78. Subsection (1) states if a disclosure takes place in reliance on clause 16 or this clause, the person to whom that disclosure was made is prohibited from further disclosing the information without the consent of a relevant official (as defined in clause 15(3)).

79. Subsection (2) states that a person does not breach subsection (1) if the disclosure has been made in accordance with subsections (3) to (8) of clause 16, and provided that, in the case of the disclosure of customs revenue information, such disclosure does not contravene any restriction imposed by the Commissioners.

80. Subsection (3) provides that the Commissioners' restrictions do not apply if the person making the onward disclosure knows that the information was acquired other than through the exercise of a customs revenue function.

81. Subsection (4) states that clause 17 is subject to any other enactment permitting disclosure. This, for example, would include section 36 of the IANA 2006, as amended by clause 21, which requires the Secretary of State, HMRC and the police to share certain information relating to the border with each other.

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82. Subsection (5) states that the term “enactment” referred to in subsection (4) does not relate to an Act of the Scottish Parliament or a Measure or Act of the National Assembly for Wales or Northern Ireland legislation.

Clause 18: Offence of wrongful disclosure

83. Clause 18 makes unauthorised disclosure of personal customs information a criminal offence carrying a maximum penalty of two years imprisonment and an unlimited fine.

84. Subsection (1) makes it an offence for any person to contravene the non-disclosure provisions of clauses 15(1) or (2) or 17(1) by disclosing personal customs information.

85. Subsection (2) provides certain defences for a person charged with the offence of wrongful disclosure. In particular, a person will not be guilty of the offence if they prove that they reasonably believed that the disclosure was lawful. Similarly, a person would not be guilty if they proved that they reasonably believed that the information had already and lawfully been made available to the public; it would be no defence as regards subsequent disclosure to say that the information had been disclosed previously, unless the person making the disclosure could also establish reasonable belief that that earlier disclosure had been lawful.

86. Subsection (3) provides that prosecutions for the offence may be instituted in England and Wales with the consent of the Director of Public Prosecutions or the Director of Revenue and Customs Prosecutions, and in Northern Ireland only with the consent of the Director of Public Prosecutions for Northern Ireland. No comparable provision is needed in Scotland, because the Procurator Fiscal and the Crown Office automatically have exclusive cognisance of summary and indictable offences in Scotland, under the law relating to Scotland, without the need for specific enabling provision.

87. Subsection (4) provides that the prosecution of the subsection (1) offence is without prejudice to other remedies for unlawful disclosure contrary to the clause 15 duty of confidentiality e.g. the seeking of an injunction to restrain an unlawful disclosure.

88. Subsection (5) lays down the penalties for those found guilty of the offence under subsection (1). The offence is triable either way, that is either:

- summarily, where the maximum penalty will be 12 months imprisonment, or a fine not exceeding the statutory maximum (currently £5000), or both; or
- on indictment, when the maximum penalty will be two years’ imprisonment, or an unlimited fine or both.

Provision is also made for penalties in Scotland and Northern Ireland.

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89. Subsection (6) provides that in relation to an offence under clause 18 committed before the commencement of section 282 of the Criminal Justice Act 2003, the reference in subsection 5(b)(i) to 12 months has effect as if it were a reference to 6 months.

Clause 19: Application of statutory provisions

90. Clause 19 puts beyond doubt that nothing in clauses 14 to 17 authorises the making of a disclosure which contravenes the provisions of the Data Protection Act 1998 or Part 1 of the Regulation of Investigatory Powers Act 2000. Clause 19 also provides that information which is subject to the duty of confidentiality is exempt information for the purposes of the Freedom of Information Act 2000. It makes clear that exceptions to the duty are disregarded for the purposes of this analysis as to do otherwise would be at odds with an FOI regime that does not require a requester to justify a request. There is a consequential amendment to section 23 of the CRCA 2005 in similar terms.

Clause 20: Supply of Revenue and Customs information

91. Clause 20 inserts two clauses after section 41 of the UKBA 2007, which enable HMRC and RCPO to disclose customs information to designated customs officials, the Secretary of State by whom general customs functions are exercisable, the Director and any other person acting on behalf of these persons. It also sets out the circumstances where the further onward disclosure of personal customs information provided through those channels may be allowed.

Clause 21: Duty to share information

92. Clause 21 amends section 36 of the IANA 2006, so that the duty to share information under that section applies to designated customs officials, immigration officers, the Secretary of State in so far as the Secretary of State has general customs functions or functions relating to immigration, asylum or nationality, the Director of Border Revenue, any person exercising functions of the Director, the police and HMRC. The information to be shared by these persons is information on travel and freight to the extent that it is likely to be useful for immigration or police purposes or for Revenue and Customs purposes.

Clause 22: Investigations and detention: England and Wales and Northern Ireland

93. Clauses 22(1) and (2) provides that the Secretary of State may by order provide for the application of PACE and PACE (NI) provisions to investigations conducted by designated customs officials, to persons detained by designated customs officials, to investigations conducted by immigration officers, or to persons detained by immigration officers, subject to such modifications as the order may specify.

94. Subsection (3) provides that an order made under clause 22 may make similar provision for designated customs officials, immigration officers, the Secretary of State or the Director to that which may be made in relation to officers of Revenue and Customs or the Commissioners for Her Majesty's Revenue and Customs under Section 114 of PACE and Article 85 of PACE (NI).

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95. Subsection (4) provides that, if an order under clause 22 stipulates that a function may be exercised only by a person with the authority of the Secretary of State or the Director, a certificate of the Secretary of State or, as the case may be, the Director that the person had the requisite authority shall be conclusive evidence of that fact.

Clause 23: Investigations and detentions: Scotland

96. Clause 23(1) inserts new section 26C to the Criminal Law (Consolidation) (Scotland) Act 1995 so that this part of the Act applies to investigations conducted by designated customs officials and that references to the Commissioners apply to the Secretary of State in relation to investigations relating to general customs matters or the Director in relation to investigations relating to customs revenue matters. The provisions of PACE do not extend to Scotland, where the powers of the HMRC to detain and search suspects are contained in the Criminal Law (Consolidation) (Scotland) Act 1995. This amendment will ensure that in Scotland the same powers will continue to apply to officers when they cease to be officers of HMRC and become designated officials of the Secretary of State and the Director of Border Revenue respectively. Similarly references to an office of the Revenue and Customs shall include offices occupied by designated customs officials and references to a superior officer shall be an immigration officer of the grade of Inspector, a senior executive officer or a person of a grade equivalent to those positions.

97. Clause 23(2) provides that the amendment made by clause 23(1) does not affect the generality of clauses 1(4), 3(5), 7(5) and 11(4) of this Bill. The amendment largely reflects what would otherwise be the effect of those provisions, though it does clarify the meaning of “superior officer” in the 1995 Act.

Transfer of property etc

Clause 24: Transfer schemes

98. Clause 24(1) provides for the making of a scheme, or schemes, by the Commissioners for the transfer of specified property, rights or liabilities or property, rights or liabilities of a specified description between the Commissioners or officers of Revenue and Customs and the Secretary of State, the Director or designated customs officials.

99. Subsection (2) sets out that a scheme made under subsection (1) may, in particular, create interests or rights, or impose liabilities, in relation to the transferred property, rights or liabilities. The scheme may also apportion property, rights or liabilities between a transferor and a transferee.

100. Subsection (3) enables a scheme made under subsection (1) to provide for anything done by or in relation to a transferor in connection with anything transferred to have effect as if done by or in relation to a transferee and to permit anything, including legal proceedings, relating to anything transferred by the scheme which is in the process of being done by or in relation to a transferor when the transfer takes effect to be continued by or in relation to a transferee. The scheme may also provide for references to a transferor in any agreement,

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instrument or document relating to anything transferred by the scheme to be treated as references to a transferee. Subsection (3) also allows a scheme to make other incidental, supplementary, consequential, transitional, or saving provision.

101. Subsection (4) provides that a scheme made under subsection (1) may provide for a transfer of property, rights or liabilities whether or not they would otherwise be capable of being transferred, without any instrument or other formality being required, and irrespective of any requirement for consent that would otherwise apply. Subsection (5) enables the Commissioners to make a scheme providing for any specified thing or anything of a specified description done by or in relation to the Commissioners or an officer of Revenue and Customs in connection with a relevant function to have effect as if done by the Secretary of State, the Director or a designated customs official. A scheme may also provide for any specified thing or anything of a specified description (including any legal proceedings) relating to a relevant function done by or in relation to the Commissioners or an officer of Revenue and Customs to be continued by or in relation to the Secretary of State, the Director or a designated customs official. This will enable, for example, ongoing legal proceedings and liability for certain matters to be transferred from HMRC and customs officers to the Secretary of State, the Director or a designated customs official as appropriate.

102. Subsection (6) makes provision in respect of the coming in to force of any scheme and provides that such a scheme may be revoked or amended. Subsection (7) defines the terms “relevant function” and “specified” for the purposes of clause 24.

Clause 25: Facilities and services

103. Clause 25 makes provision to enable HMRC and any person by whom functions relating to immigration, asylum, nationality or customs are exercisable to make facilities and services available to each other for the purpose of exercising any of those functions. This ensures that UKBA and HMRC will be able to provide facilities and services to each other so that, for example, the Director will be able to share services and facilities with HMRC and HMRC will be able to use any custody facilities managed by UKBA. The provision also covers contractors who exercise detention and escort functions on behalf of the Secretary of State.

Inspection and oversight

Clause 26: Inspections by the Chief Inspector of the UK Border Agency

104. Clauses 26(1) and (2) make amendments to section 48 of the UKBA 2007 which established a single independent inspectorate for the Border and Immigration Agency. Subsection (1) substitutes “the UK Border Agency” for “the Border and Immigration Agency”. Subsection (2) inserts subsection (1A) which specifies that the functions of the Chief Inspector apply to designated customs officials, immigration officers and officials of the Secretary of State exercising customs functions or functions relating to immigration, asylum or nationality, the Secretary of State in so far as the Secretary of State has general customs

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functions or functions relating to immigration, asylum or nationality, the Director and any person exercising functions of the Director.

105. Clause 26(3) makes further amendments to section 48 consequential on the changes made in subsections (1) and (2). Clause 26(4) reflects the wider functions of the Chief Inspector, and subsection (4) also inserts subsection (2B) which sets out the functions that will not fall within the remit of the Inspector unless directed to do so by the Secretary of State.

106. Clauses 26(5) to (9) make further consequential amendments and clause 26(10) enables the Chief Inspector of the Border and Immigration Agency to be treated immediately when this clause comes into force as if appointed as the Chief Inspector of the UK Border Agency.

Clause 27: Inspections by Her Majesty's Inspectors of Constabulary etc.

107. Clause 27(1) provides that the Secretary of State may, by regulations, confer functions on Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors in relation to designated customs officials and officials of the Secretary of State exercising customs functions, immigration officers, and officials of the Secretary of State exercising functions relating to immigration, asylum or nationality, the Secretary of State in so far as the Secretary of State has general customs functions and functions relating to immigration, asylum and nationality, the Director and any person exercising functions of the Director.

108. These inspectors already have functions in existing legislation and subsection (2) sets out those provisions which may be applied and modified in respect of their application to the Secretary of State, the officials of the Secretary of State and the Director. In relation to Her Majesty's Inspectors of Constabulary, provision may be made to apply (with or without modification) or to make provision similar to any provision of sections 54 to 56 of the Police Act 1996. Similar provision may be made in relation to section 33 or 34 of the Police (Scotland) Act 1967 in relation to the Scottish inspectors and section 41 or 42 of the Police (Northern Ireland) Act 1998 in relation to the Northern Ireland inspectors.

109. Subsection (3), (4), (5) and (6) establish the framework, to be provided for in the regulations, for the commissioning and carrying out of inspections, for the reporting of their results and for the making of payments for the inspections. Subsection (3) provides that the regulations may enable a Minister of the Crown to require an inspection to be carried out; that regulations must provide for a report of an inspection to be made and, subject to any exceptions required or permitted by the regulations, published. Regulations must also provide for an annual report to be made by Her Majesty's Inspectors of Constabulary. Finally, regulations may make provision for payment to or in respect of those mentioned in subsection (1).

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110. Subsection (4) establishes that an inspection carried out by virtue of this section may not address a matter of a kind which the Comptroller and Auditor General may examine under section 6 of the National Audit Act 1983 (the examination of public bodies in respect of economy, efficiency and effectiveness in the discharge of their functions). Subsection (5) requires that an inspection carried out by virtue of this clause must be carried out jointly by Her Majesty's Inspectors of Constabulary and the Scottish inspectors if the inspection is carried out wholly in Scotland or, in a case where it is carried out partly in Scotland, to the extent that it is carried out there. Subsection (6) defines "the Scottish inspectors" and "the Northern Ireland inspectors" for the purpose of this section.

Clause 28: Complaints and misconduct

111. Clause 28(1) to (3) amends section 41 of the Police and Justice Act 2006, which provides the power to confer functions on the IPCC in respect of the exercise of immigration functions. Amendments are made so as to expand the functions which the Secretary of State may confer on the IPCC so that they may carry out investigations in relation to the exercise of customs functions by (a) designated customs officials, (b) officials of the Secretary of State, (c) any person exercising functions of the Director and (d) contractors providing services pursuant to arrangements relating to the discharge of the functions referred to in (a), (b) and (c). The functions may be conferred on the IPCC by the Secretary of State making regulations under the existing provision in the Police and Justice Act 2006.

Clause 29: Prosecution of offences

112. Clause 29 enables the Attorney General to assign functions to the Director of Revenue and Customs Prosecutions to institute and assume the conduct of prosecutions in England and Wales and to provide advice relating to criminal investigations carried out by the persons specified at subsection (2), namely, designated customs officials, immigration officers, officials of the Secretary of State, the Secretary of State, the Director, a person acting on behalf of any of those persons and constables. Subsection (1) provides an order-making power to enable the Attorney General to assign functions to the Director of Revenue and Customs Prosecution. Subsection (1) also sets out the functions that may be assigned by the Attorney General. These are the functions of instituting or assuming the conduct of criminal proceedings in England or Wales, or providing legal advice.

113. Subsection (3) ensures that the provisions of the CRCA 2005 relating to the exercise of the functions of the Director of Revenue and Customs Prosecutions apply also to the exercise of functions conferred by this section. Subsection (4) applies the prosecutor functions in respect of charging decisions contained in section 37 to 37B of PACE to the functions exercised by the Director of Revenue and Customs Prosecutions under this section. Subsection (5) provides an order under this section may include incidental, supplementary and consequential provision, may make transitional or transitory provision or savings, or may be amended or revoked. Subsection (6) provides that the reference in this clause to instituting criminal proceedings is to be construed in accordance with Section 15(2) of the Prosecution of Offences Act 1985. Subsection (7) specifies the meaning of "criminal investigation" for the purpose of this clause.

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Clause 30: Payment of revenue to the Commissioners

114. Clause 30 requires the Director (subsection (1)) and the Secretary of State (subsection (2)) to pay any money received by way of revenue or security in the exercise of their customs revenue and general customs functions, to the Commissioners. Subsection (3) provides that a payment by the Director or Secretary of State must be made at such times and in such manner as the Treasury directs and after deductions of payments in connection with drawback and repayments.

115. Subsection (4) provides for a situation where the funds available to the Director or Secretary of State are considered insufficient by the Commissioners to cover the payment that is due in connection with drawback or repayment. In such a case, the Commissioners may pay money to the Director or Secretary of State as applicable to enable the payment or repayment to be made or they may make a payment or repayment on behalf of the Director or the Secretary of State. Subsection (5) provides that subsection (4) will apply whether or not the reason for the deficiency is or may be that an amount has been paid or retained on the basis of an estimate that has proved or may prove inaccurate.

116. Subsection (6) provides that a payment by the Commissioners under subsection (4) is to be treated for the purposes of the CRCA 2005 as a disbursement of a kind specified in section 44(3) of that Act. Section 44(3) of the CRCA 2005 covers the arrangements whereby the Commissioners make payments into the Consolidated Fund and provides that payment should be made after the deduction of any disbursements covered by section 44(3) of that Act. Subsection (7) provides definitions for the terms “repayments”, “revenue” and “security for revenue” for the purposes of clause 30.

Clause 31: Power to require payment into the Consolidated Fund

117. Clause 31(1) makes provision for an order-making power to enable the Treasury to direct the Secretary of State or the Director to pay the money received in the exercise of their customs functions into the Consolidated Fund and to require the Secretary of State or Director to provide accounts of the receipt and disposal of revenue. The order may also permit the deduction of disbursements before such payments are made and permit the Treasury to make payments out of the Consolidated Fund, to enable the Secretary of State or the Director to make disbursements.

118. Clause 31(2) provides an order-making power to amend or repeal clause 30. It is intended that the Secretary of State and Director will collect revenue but pay those monies directly into the Commissioners’ accounts in accordance with clause 30. The Commissioners will be responsible for accounting for the monies received by the UK Border Agency and reports to the Comptroller and Auditor General in respect of accounting for those receipts. However, should circumstances change and the Secretary of State and Director begin to run their own accounts this order making provision provides for the flexibility for the monies they collect to be paid directly into the Consolidated Fund rather than through the Commissioners’ accounts.

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Clause 32: Children

119. Clauses 32(1) to (5) amend section 21 of the UKBA 2007 to apply the Code of Practice regarding children's welfare introduced in that section to specific individuals. Those individuals are named in the new section 21(4A), inserted by clause 32(3). Subsections (2), (4) and (5) of clause 32 further amend section 21 to reflect the replacement of the Border and Immigration Agency with the UK Border Agency.

120. Clause 32(6) provides for this clause to cease to have effect when Clause 51 of this Bill comes into force.

Supplementary

Clause 33: Power to modify enactments

121. Clause 33 provides an order-making power for the Secretary of State to modify enactments. Subsection (1) provides that an order made by the Secretary of State may provide for an enactment or description of enactments to apply, with such modification as considered necessary or expedient, in relation to relevant persons (as defined in subsection (2)) or to the exercise of functions by those persons. Subsection (2) defines "relevant persons" as the Secretary of State by whom general functions are exercisable, officials of the Secretary of State, the Director, designated customs officials, immigration officials and officials in the department of that Secretary of State, and provides that a reference to relevant persons includes a reference to any description of relevant persons.

122. Subsection (3) sets out that an order made under this clause may, in particular, include provision for, or in connection with, extending to the persons specified in subsection (2) an exemption or protection afforded to other persons in another enactment and providing for the disclosure of information to, or for doing other things in relation to, the relevant persons.

123. Subsection (4) obliges the Secretary of State to consult with the Commissioners before making an order relating to customs matters or the exercise of a customs function.

Clause 34: Power to make supplementary etc provision

124. Clause 34(1) provides the Secretary of State with an order-making power for the purpose of making such incidental, supplementary, consequential, transitional or transitory provision, or saving, as considered appropriate for the purposes of this Part of the Bill, or in consequence, or for giving full effect to, any provision made by or under this Part of the Bill.

125. Clause 34(2) provides that an order made under clause 34 may amend, repeal, revoke or otherwise modify any enactment, including this Bill, and subsection (3) provides that the power to make an order under subsection (1) includes the power to repeal or revoke an enactment that is spent.

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126. Clause 34(4) provides that before exercising the power conferred in subsection (1) in relation to an enactment that extends to Scotland the Secretary of State must consult the Scottish Ministers. Subsection (5) states that where the provision to be made would be within the legislative competence of the Scottish Ministers then the power conferred by subsection (1) is exercisable by the Scottish Ministers rather than by the Secretary of State. Subsection (6) states that nothing in Part 1 of the Bill affects the generality of the power in clause 34.

Clause 35: Subordinate legislation

127. Clause 35 makes further provision for the making of subordinate legislation under this Part. Subsection (1) provides that the orders and regulations under this Part of the Bill must be made by statutory instrument, and subsection (2) sets out that such instruments may include incidental, supplementary and consequential provision; make transitional or transitory provisions or savings; and make different provision for different cases or circumstances. Subsections (3) to (6) establish the parliamentary procedures to which orders and regulations made under this Part of the Bill are subject. Statutory instruments containing an order or regulations under this Part made under provisions listed in subsection (4) are subject to the affirmative resolution procedure. These are the orders or regulations made under clause 2, 8, 16, 22, or 33 and any order containing provision amending or repealing primary legislation by virtue of clause 34(2). Statutory instruments containing a regulations under clause 27, an order under clause 31 or an order under clause 34 that does not amend or repeal primary legislation are subject to the negative resolution procedure. Subsection (7) sets out the procedure in relation to orders made by the Scottish Ministers and subsection (8) defines primary legislation for the purpose of this clause. Subsection (9) makes it clear that this clause does not apply to an order made under clause 29 of the Bill (assignment of functions to the Director of Revenue and Customs Prosecutions by the Attorney General). Those orders are not made by statutory instrument and follow no Parliamentary procedure. This is consistent with other similar order-making powers of the Attorney General such as that found in section 35 of the CRCA 2005 relating to Revenue and Customs Prosecutions and section 3(2)(g) of the Prosecution of Offences Act 1985 in relation to the assignment of functions to the Director of Public Prosecutions.

Clause 36: Interpretation

128. Clause 36 sets out the interpretation of the terminology used in this part.

Schedule 1: Repeals: Part 1 Border Functions

129. Section 21(5)(a) of the UKBA 2007 is repealed and replaced by clause 32. Clause 26 repeals and replaces section 48(2)(a) of the UKBA 2007 – from the beginning to the word “Agency”- and repeals section 48(3) of that Act.

PART 2: CITIZENSHIP

Acquisition of British citizenship by naturalisation

Clause 37: Application requirements: general

130. Clause 37 amends the requirements to be met by those applying for naturalisation under section 6(1) of the BNA 1981. By virtue of paragraph 1(1) of Schedule 1 to that Act applicants will still be required to be of good character – a person can be refused on the basis, for example, of a criminal conviction or failure to pay taxes. They will also still be required to have a sufficient knowledge of English, Welsh or Scottish Gaelic, have a sufficient knowledge about life in the UK and, normally, intend to make the UK their home.

131. Clause 37(2) replaces sub-paragraph 1(2) of Schedule 1 to the BNA 1981. This sets out six requirements which mostly relate to the applicant's presence in the UK during the qualifying period. The requirements provide that an applicant:

- must have been in the UK at the beginning of the qualifying period;
- must not have been absent from the UK for more than 90 days in each year of the qualifying period;
- must have been in the UK for the qualifying period with a qualifying immigration status (as defined in new paragraph 2A of Schedule 1 to the BNA 1981 which is inserted by clause 37(11));
- on the date of the application for naturalisation, must have either probationary citizenship leave, permanent residence leave, a Commonwealth right of abode, or a permanent EEA entitlement (as defined in new paragraph 11 of Schedule 1 to the BNA 1981 which is inserted by clause 45(3));
- who, on the date of the application for naturalisation, has probationary citizenship leave granted for the purpose of taking employment in the UK, has been in continuous employment since the date of the grant of that leave. ("Employment" is defined in paragraph 2(5) of Schedule 1 to the BNA 1981 which is inserted by clause 37(10) as including self-employment); and
- must not, at any time in the qualifying period, have been in the UK in breach of immigration laws (as defined in clause 44).

132. Clause 37(1) and (3) repeal paragraph 1(3) of Schedule 1 to the BNA 1981 (and the reference to it in paragraph 1(1)). This relates to those in Crown service under the government of the UK. Instead there is a discretion in the new paragraph 2(2) (as inserted by clause

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37(9)) to waive certain requirements in respect of applicants who have performed exceptional Crown service under the government of the UK.

133. Clause 37(4) to (9) amend paragraph 2 of Schedule 1 to the BNA 1981. These amendments relate to the discretion the Secretary of State has in the special circumstances of a particular case to waive various requirements for naturalisation set out in paragraph 1 or to treat them as fulfilled.

134. Clause 37(9) inserts new paragraphs 2(2) to (4) in Schedule 1 to the BNA 1981. These provide a new discretion for individual cases involving members of the armed forces or those who have performed exceptional Crown service under the government of the UK. In the special circumstances of a particular case, the Secretary of State can waive some or all of the requirements in paragraph 1(2), which relate to the qualifying period. A definition of “member of the armed forces” is inserted into section 50 of the BNA 1981 by clause 45(1). That section already contains a definition of “Crown service under the government of the United Kingdom”.

135. Clause 37(11) inserts a new paragraph 2A in Schedule 1 to the BNA 1981. This defines qualifying immigration status for the purposes of paragraph 1(2). Only the following forms of status will count as qualifying immigration status: qualifying temporary residence leave; probationary citizenship leave; permanent residence leave; a Commonwealth right of abode; or a temporary or permanent EEA entitlement (all of these terms are defined in paragraph 11 of Schedule 1 to the BNA 1981 which is inserted by clause 45(3)).

136. New paragraph 2A(2) provides that an applicant need not have held the same qualifying immigration status for the whole of the qualifying period. For example, an applicant who had been in the UK for the whole of the qualifying period with a combination of temporary residence leave and probationary citizenship leave would be able to count both of those periods towards the requirement to have had qualifying immigration status for the whole of the qualifying period.

Clause 38: Application requirements: family members etc.

137. Clause 38 amends the requirements to be met by those applying for naturalisation under section 6(2) of the BNA 1981.

138. Clause 38(1) and (2) amend section 6 of the BNA 1981. Clause 38(1) removes the requirement in section 6(2) that an applicant must be married to, or the civil partner of, a British citizen, and replaces it with a requirement that an applicant must have a relevant family association. Clause 38(2) inserts new section 6(3) and (4) which provide that a person (“A”) has a relevant family association if A has a connection of a prescribed description to a person of a prescribed description. “Prescribed” means prescribed by regulations made under section 41 of the BNA 1981 (see section 50(1) of that Act). The regulations may, for example, prescribe that a person has a relevant family association if the person is married to, or the civil partner of, a British citizen or a person with permanent residence leave in the UK. The new

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section 6(4) provides discretion in individual cases, for the purposes of section 6(3), to treat a person as having a relevant family association on the date of application even though the association ceased to exist before that date.

139. Clause 38(3) replaces paragraph 3 of Schedule 1 to the BNA 1981. This sets out the requirements that an applicant needs to meet in order to be naturalised as a British citizen under section 6(2) of that Act. By virtue of the new paragraph 3(1), applicants will still be required to be of good character – a person can be refused on the basis, for example, of a criminal conviction or failure to pay taxes. They will also still be required to have a sufficient knowledge of English, Welsh or Scottish Gaelic, and have a sufficient knowledge about life in the UK. New paragraph 3(2) sets out the requirements relating to the applicant's presence in the UK during the qualifying period. These are largely the same as for applicants applying under section 6(1) of the BNA 1981, except for the additional requirements that an applicant must have had a qualifying immigration status based on a relevant family association throughout the qualifying period; and that the applicant must have probationary citizenship leave or permanent residence leave based on a relevant family association on the date they apply for naturalisation.

140. New paragraphs 3(3) and (4) relate to the applicant's intentions once naturalised. It is a similar requirement to the one for applicants applying under section 6(1), although it recognises that applicants under section 6(2) may intend to accompany their family member overseas in Crown or other service rather than undertake such service outside the UK themselves.

141. New paragraphs 3(5) and (6) introduce a new requirement that, where the applicant is applying on the basis of being the partner of a British citizen or someone with permanent residence leave, they have had a qualifying immigration status throughout the qualifying period based on being that person's partner.

142. Clause 38(4) replaces paragraph 4 of Schedule 1 to the BNA 1981. These amendments relate to the discretion the Secretary of State has in the special circumstances of a particular case to waive various requirements for naturalisation for applicants applying under section 6(2) of the BNA 1981 or to treat them as fulfilled. These are similar to the discretionary powers in paragraph 2(1) for applicants applying under section 6(1), but they also contain a discretion which could be used in the special circumstances of a particular case where a relevant family association has broken down. Clause 38(4) maintains the existing power to waive relevant requirements if the applicant is applying on the basis of a relationship with a person in Crown service or other service to which section 2(1)(b) of the BNA 1981 applies who was recruited for that service in the UK.

143. Clause 38(5) inserts new paragraph 4A into Schedule 1 to the BNA 1981. This defines qualifying immigration status for the purposes of paragraph 3. This is defined in the same way as for applicants applying under section 6(1), except that it does not include a Commonwealth right of abode, or temporary or permanent EEA entitlements. New paragraph

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4A(3) provides that an applicant need not have held the same qualifying immigration status for the whole of the qualifying period nor, subject to paragraph 3(5) (that those applying as a partner must have had a qualifying immigration status throughout the qualifying period based on being that person's partner), need they rely on the same relevant family association throughout the qualifying period. New paragraph 4A(4) provides that where an applicant is required to have a qualifying immigration status based on being a person's partner, the relationship does not need to be the same throughout the qualifying period. This would cover, for example, an applicant who started their qualifying period with temporary residence leave as the unmarried partner of a British citizen or a person with permanent residence leave but the applicant then married that partner and completed the qualifying period with probationary citizenship leave granted on the basis of being that person's spouse. In this case, paragraph 4A(4) ensures that the applicant can count both periods of leave towards the qualifying period despite the nature of the relationship changing (although the partner has remained the same throughout).

Clause 39: The qualifying period

144. Clause 39 sets out the qualifying period for naturalisation as a British citizen.

145. Clause 39(1) inserts a new paragraph 4B into Schedule 1 to the BNA 1981. This sets out what the qualifying period will be for naturalisation as a British citizen. The qualifying period is different depending on whether the applicant is applying under section 6(1) or (2) of the BNA 1981. For applicants applying under section 6(1) of the BNA 1981, the default qualifying period is 8 years. For applicants applying under section 6(2) of the BNA 1981, the default qualifying period is 5 years. These periods can be reduced to 6 years or 3 years respectively if the applicant meets the activity condition. The activity condition is further defined in paragraph 4B(5).

146. According to paragraph 4B(1) the qualifying period is a period of years ending with the date of the application. This means the qualifying period must be a consecutive period of years.

147. Subsections (2) to (5) of clause 39 amend section 41 of the BNA 1981, which relates to the Secretary of State's regulation-making powers:

- Clause 39(2) inserts new regulation-making powers into section 41(1) of the BNA 1981. These enable the Secretary of State to make regulations amending the length of the qualifying period (including the length of time by which it may be decreased for meeting the activity condition), and for determining whether an applicant has met the activity condition (whether because they have carried out relevant activities or because they are deemed to have done so).
- Clauses 39(3) inserts new subsections into section 41 of the BNA 1981 which relate to regulations about the activity condition. Such regulations can provide that meeting the activity condition will have no effect on the qualifying period, by making the

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qualifying period the same whether an applicant meets this condition or not (new section 41(1B)). The regulations can make provision about prescribed activities in relation to the time before commencement of this clause (new section 41(1C)(a)). For example, regulations might provide for activities carried out prior to commencement of this clause to count as prescribed activities. And regulations determining whether a person has or is to be treated as having participated in prescribed activities can also enable the Secretary of State to make arrangements for such persons as the Secretary of State thinks appropriate to determine whether, in accordance with the regulations, a person has participated or is to be treated as having participated in an activity (new section 41(1C)(b)). Under this last provision, the Secretary of State could for example enable others to verify that an applicant meets the activity condition.

- Clauses 39(4) and (5) amend section 41 of the BNA 1981 setting out the Parliamentary procedure which applies to the new regulation-making powers.

Acquisition of British citizenship by birth

Clause 40: Children born in UK etc. to members of the armed forces

148. Clause 40 amends section 1 of the BNA 1981 to provide that a child born in the UK or a qualifying territory (as defined in section 50(1) of that Act) on or after the commencement of the clause will automatically become a British citizen if their father or mother is a member of the armed forces at the time of their birth. Where that is not the case when the child is born but a parent subsequently becomes a member of the armed forces while the child is still a minor, the child is entitled to be registered as a British citizen. There is also a requirement that the Secretary of State must be satisfied that the applicant is of good character – see section 41A(1) of the BNA 1981 (which is inserted by clause 43).

Acquisition of British citizenship etc. by registration

Clause 41: Descent through the female line

149. Clause 41 amends section 4C of the BNA 1981 to allow applicants born before 7th February 1961 to be able to register as British citizens, provided they meet the other requirements in section 4C. The amendments made by the clause also widen the scope of section 4C so that it is no longer restricted to the case where the applicant would otherwise have become a CUKC under section 5 of the BNA 1948.

150. Section 4C, as inserted by section 13 of the NIAA 2002, conferred an entitlement to registration as a British citizen on persons born between 7th February 1961 and 1st January 1983 who, but for the inability (at that time) of women to pass on their citizenship, would have acquired British citizenship automatically when the BNA 1981 came into force.

151. Clause 41(2) removes the 7th February 1961 cut-off point from section 4C, so that persons born before that date can apply for registration as British citizens. The requirement that the applicant must have been born before 1st January 1983 is, however, retained since

sections 1(1) and 2(1) of the BNA 1981 already provide for persons born after this date to acquire citizenship by descent from their mother or father.

152. Clause 41(3) inserts into section 4C of the BNA 1981 new subsections (3) to (3D). Those subsections examine whether the applicant would have become a CUKC under various provisions of the BNA 1948 if certain assumptions had been applied. Under those assumptions certain provisions are read as if they provided for citizenship to pass by descent from the applicant's mother in the same terms as they provided for descent from the applicant's father. The references to the applicant's mother limit the extent of the clause; an applicant must show that his or her mother had the relevant type of status (which she would have been able to transmit had the law permitted descent from mothers in the same way as fathers).

153. Subsections (3) to (3C) cover both cases where certain provisions of the BNA 1948 provided expressly for descent from a father only (see assumption A in subsection (3A)) and those cases where certain provisions of the BNA 1948 enabled an applicant to become a CUKC if the applicant had a particular nationality status immediately before commencement of the BNA 1948 and a provision of legislation prior to the BNA 1948 prevented the applicant from acquiring that status by descent from his or her mother in the same terms as it provided for descent from the applicant's father (see assumption B in subsection (3B)).

154. Subsection (3C) clarifies that assumption B only applies to cases of automatic acquisition of citizenship, and not to provisions where the applicant's acquisition of the nationality status depended upon an application for registration as such.

155. Subsection (3D) provides that, for the purposes of determining whether the applicant would have become a CUKC, it should not be assumed that any registration or other requirements were met, if in fact they were not. For example if, applying the assumptions, the applicant would have become a CUKC had the applicant's birth been registered at a particular time – and it was not in fact so registered - it should not be assumed that the birth would have been registered had the assumptions applied at the relevant time.

156. Subsection (4) inserts a new subsection (5) into section 4C. For the purposes of interpreting section 5 of the BNA 1948 when applying section 4C of the BNA 1981, where a female person (i.e. the applicant's mother) became a CUKC under the provisions listed in subsection (5)(a) to (d), she should be deemed to be a CUKC by descent only (and not a CUKC otherwise than by descent). This replicates the existing position for a male person (i.e. the applicant's father) who becomes a CUKC under those same provisions.

Clause 42: Children born outside UK etc. to members of the armed forces

157. Clause 42 inserts new section 4D into the BNA 1981, which provides an entitlement to registration as a British citizen for children born outside the UK and qualifying territories on or after the commencement of the clause to a father or mother who is a member of the armed forces who is serving outside the UK and the qualifying territories.

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158. According to section 4D(3), if the applicant (“P”) is a minor on the date of application, P’s father and mother must both consent to P’s registration as a British citizen. Subsection (4) provides that, where one of P’s parents dies on or before the date of application, either parent can consent to P’s registration. Subsection (5) gives the Secretary of State discretion to waive the requirement for consent.

159. There is also a requirement that the Secretary of State must be satisfied that the applicant is of good character – see section 41A(1) of the BNA 1981 (which is inserted by clause 43).

160. An applicant is not expressly excluded from the entitlement to register if, at the time of P’s birth, P’s father or mother is a British citizen serving in the armed forces outside the UK and qualifying territories, who was recruited in the UK or a qualifying territory. But, in that case, P will automatically become a British citizen by virtue of section 2(1)(b) of the BNA 1981, and will not need to apply for registration under section 4D.

Clause 43: Good character requirement

161. Clause 43 moves the existing requirement in section 58 of the IANA 2006 for adults or young persons applying for registration as a British citizen, a British overseas territories citizen, a British Overseas citizen or as a British subject to be of “good character” into the various different Acts which contain the relevant registration routes. The underlying requirement to be “of good character” remains unchanged.

162. Thus, subsection (1) creates a new section 41A in the BNA 1981, for registration routes contained in that Act. Subsection (2) inserts the requirement into section 1 of the Hong Kong (War Wives and Widows) Act 1996, and subsection (3) inserts the requirement into section 1 of the British Nationality (Hong Kong) Act 1997.

163. Subsections (4) and (5) make consequential changes to the existing powers to supply the Secretary of State with information relevant to the good character requirement in section 131 of the NIAA 2002 and section 40 of the UKBA 2007.

Interpretation

Clause 44: Meaning of references to being in breach of immigration laws

164. Clause 44 inserts a new section 50A into the BNA 1981, the effect of which is to move the definition of being “in breach of the immigration laws” from section 11 of the NIAA 2002 to the BNA 1981. At the same time, clause 44 replaces the references in section 11(2)(d) and (e) to being a qualified person (or family member of such a person) within the meaning of the Immigration (European Economic Area) Regulations 2000 (S.I. 2000/2326) (now repealed) with a reference to having an entitlement to reside by virtue of any provision made under section 2(2) of the European Communities Act 1972.

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165. New section 50A (2) and (3) provide that the revised definition shall apply to the sections of the BNA 1981 listed in subsection (2) after the clause is commenced. In relation to persons born before commencement, or specified applications made before commencement but not decided until after commencement, clause 44 (3) provides that section 11 of the NIAA 2002 shall continue to apply.

166. Furthermore clause 44(4) provides that for the purposes of determining whether a person was in breach of the immigration laws prior to 7th November 2002, section 11 of the NIAA 2002 (including the provision in section 11(4)) shall continue to apply instead of the new section 50A.

167. Clause 44(6) makes a consequential amendment to Schedule 3 to the NIAA 2002, replacing the reference to section 11 of that Act with a reference to new section 50A of the BNA 1981.

Clause 45: Other interpretation etc.

168. Clause 45 amends section 50 of, and Schedule 1 to, the BNA 1981 to introduce various definitions which are relevant to the amendments made to that Act by this Part.

169. Clause 45(1) inserts into section 50 of the BNA 1981 a definition of “member of the armed forces”. This will affect those who apply for naturalisation as a British citizen under section 6(1) of the BNA 1981, as well as new section 1(1A) and (3A) of the BNA 1981 (for children born in the UK to a member of the armed forces) and new section 4D of the BNA 1981 (for children born outside the UK to a member of the armed forces).

170. Clause 45(3) inserts new paragraph 11 into Schedule 1 to the BNA 1981. This defines qualifying temporary residence leave; probationary citizenship leave; permanent residence leave; a Commonwealth right of abode; a permanent EEA entitlement and a temporary EEA entitlement for the purposes of being able to apply for a certificate of naturalisation under section 6 of the BNA 1981.

PART 3: IMMIGRATION

Clause 46: Common Travel Area

171. Subsection (1) of this clause amends section 1(3) of the IA 1971 by deleting the provision that a person arriving in or departing from the UK from or to another part of the CTA shall not be subject to control. This amendment will enable the routine control of all persons arriving in or departing from the UK via the CTA by aircraft or ship.

172. The clause does not affect the position that persons arriving from the CTA shall not require leave to enter the UK, unless they fall within one or more of the existing exceptions in section 9(4) of, or Schedule 4 to, the IA 1971, or in an order made under section 9(2) and (6) of that Act.

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173. Subsection (2) amends the definition in section 11(2) of the IA 1971 of references in that Act to disembarking or embarking in the UK. At present disembarking or embarking from or to a place in the CTA is not included in such references. The amendment made by subsection (2) provides for journeys from or to a place in the CTA other than a place in the UK to be included in such references.

174. The effect is that the provisions of section 3(7) and paragraphs 3, 5 and 26 of Schedule 2 to the IA 1971, and the powers which are attendant to these provisions, and the related offences in sections 24(1)(g), 26(1)(e) and 27 of the IA 1971 will apply in the case of embarkation in the UK for a journey to a place in the CTA other than a place in the UK.

175. Similarly, paragraphs 5, 16(3) and (4), and 26 and 27(1) of Schedule 2 to the IA 1971, and the powers which are attendant to these provisions, and the related offences in sections 26(1)(e) and 27 of the IA 1971 will apply in the case of disembarkation in the UK after a journey from a place in the CTA other than a place in the UK.

Clause 47: Restriction on studies

176. Clause 47 amends section 3(1)(c) of the IA 1971 to allow a condition to be imposed on a migrant's limited leave to enter or remain in the UK, restricting his studies whilst here. It will not apply to migrants who are, or have been, granted indefinite leave to enter or remain.

177. This condition could be used, for example, to stipulate an educational institution at which a student migrant is granted leave to study, with the result that any change of institution would require an application to the UK Border Agency for variation of condition. Breach of the condition will be a criminal offence under section 24(1)(b)(ii) of the IA 1971 and may result in removal from the UK.

Clause 48: Fingerprinting of foreign criminals liable to automatic deportation

178. Clause 48 amends section 141 of the IAA 1999 to insert a provision to allow fingerprints to be taken from a person who is a foreign criminal within the meaning of section 32 of the UKBA 2007 and in respect of whom a decision is taken that the automatic deportation provisions in that Act apply.

179. The amendments operate by extending the definition of the existing category C person in respect of whom fingerprints may be taken under section 141 of the IAA 1999 to include the foreign criminal described in paragraph 177 above. The provisions of sections 141 to 146 of the IAA 1999 which apply in relation to a category C person will apply accordingly.

180. Subsection (2) excludes dependants of a foreign criminal from the section 141 fingerprinting provisions.

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Clause 49: Extension of sections 1 to 4 of the UK Borders Act 2007 to Scotland

181. Clause 49(1) extends the permissive detention power in section 2 of the UKBA 2007 to designated immigration officers in Scotland. The provision will enable an immigration officer designated under section 1 of the UKBA 2007 to detain, at a port in Scotland, an individual whom the immigration officer thinks is subject to a warrant for arrest. Detention may be for up to three hours pending the arrival of a constable. Section 4 of the UKBA 2007 contains an interpretative provision on the meaning of “port”.

182. There are related offences in section 3 of the UKBA 2007 where, for example, a person absconds from detention under section 1 of that Act. Subsection (2) of the clause makes provision for the sentences for those offences in Scotland.

183. Subsection (3) amends section 60 of the UKBA 2007 to reflect the fact that sections 1 to 4 are to extend to Scotland.

PART 4: MISCELLANEOUS AND GENERAL

Judicial review

Clause 50: Transfer of immigration or nationality judicial review applications

184. Section 19 of the TCEA 2007 amended the Supreme Court Act 1981 and the Judicature (Northern Ireland) Act 1978, to provide for the transfer of judicial review applications to the Upper Tribunal. Sections 20 of the TCEA 2007 made equivalent provision for Scotland. Under these provisions a judicial review application may not be transferred if it calls into question a decision under the Immigration Acts, the BNA 1981, an instrument having effect under those enactments or any other provision of law determining British citizenship. Clause 50 removes this restriction on transferring judicial review applications in England and Wales, Scotland and Northern Ireland, with the effect that, subject to the other specified restrictions, judicial review applications relating to immigration or nationality decisions can be transferred to the Upper Tribunal.

Clause 51: Duty regarding the welfare of children

185. Clause 51 imposes a duty on the Secretary of State to make arrangements to ensure that certain specified functions are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. Subsection (1)(b) requires the Secretary of State to make similar arrangements to ensure that other persons, including contractors, who carry out those functions also have regard to the need to safeguard and promote the welfare of children.

186. Subsection (2) sets out the list of functions which the Secretary of State must make arrangements for ensuring are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. These include the immigration and nationality functions of the Secretary of State, and any function conferred upon an immigration officer by

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or by virtue of the Immigration Acts. Further, they include the general customs functions of the Secretary of State, and the customs functions of a designated customs official.

187. Subsection (3) requires anyone carrying out any of the functions listed to have regard to any guidance issued to them by the Secretary of State for the purposes of subsection (1).

188. Subsection (4) imposes a duty on the Director to make arrangements for ensuring that the Director's functions are carried out having regard to the need to safeguard and promote the welfare of children who are in the UK. Subsection 4(b) requires the Director to make similar arrangements to ensure that other persons carrying out the Director's functions also have regard to the need to safeguard and promote the welfare of children.

189. Subsection (5) requires any person exercising a function of the Director to have regard to any guidance issued by the Secretary of State for the purpose of subsection (4).

190. Subsection (6) confirms that for the purposes of this section, "children" means persons who are under the age of 18.

191. Subsection (7) confirms that any reference to the Immigration Acts in an enactment other than this Act includes this section.

192. Subsection (8) repeals section 21 of the UKBA 2007, which imposes a duty on the Secretary of State to issue a code of practice designed to ensure that, in exercising its functions, the Border and Immigration Agency (now the UK Border Agency) takes appropriate steps to ensure that while children are in the UK they are safe from harm.

Clause 52: Repeals

193. Clause 52 introduces the Schedule which sets out the extent to which current legislation is repealed by the provisions of this Bill.

Clause 53: Extent

194. Subject to certain exceptions set out in subsections (2) to (4), clause 53 provides that this Bill extends to England, Wales, Scotland and Northern Ireland and amendments, modifications and repeals effected by this Bill have the same extent as the provisions to which they relate. Provisions, other than those of Part 1 or clause 50, may be extended to any of the Channel Islands or the Isle of Man by Order in Council.

Clause 54: Commencement

195. Clause 54 contains provisions relating to the coming into force of the Bill. Subsections (2) and (3)(a) provide for specified provisions to come into force on such days as the Secretary of State by order appoint. Subsection (4)(a) provides for clause 50 to come into force on such day as the Lord Chancellor by order appoints. Part 1 and clause 47 come into

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force on the passing of the Bill. Subsection (11) provides that before commencing clause 49 (detention at ports in Scotland) the Secretary of State will consult the Scottish ministers.

FINANCIAL EFFECTS OF BILL

196. Financial effects of the Bill have been considered in the accompanying impact assessment. We do not anticipate new costs likely to fall on the Consolidated Fund or National Loans Fund due to the provisions in the Bill.

EFFECTS OF BILL ON PUBLIC SECTOR MANPOWER

197. Effects of the Bill on public sector manpower have been considered in the accompanying impact assessment. Public sector manpower will be transferred from HMRC to UKBA under the provisions at Part 1 of this Bill. The provisions under clause 46 may require additional staff to be recruited from the UK Border Agency's existing budget.

SUMMARY OF IMPACT ASSESSMENT

198. Four Impact Assessments relating to the provisions of the Bill have been published. An overall Impact Assessment for the Bill shows the impact of all of the provisions of the Bill excepting those from Part 1 (border functions), Part 2 (citizenship) and clause 46 (Common Travel Area). Due to the nature of the border functions and citizenship provisions separate Impact Assessments demonstrate the effect of the proposed clauses in the context of the associated programmes for their implementation.

199. For the clause on the Common Travel Area, as this is an element of the Government's wider programme for the reform of the Common Travel Area, the effect of the provision has been illustrated in the Bill's Impact Assessment but the costs are accounted for as part of the wider CTA Reform Impact Assessment.

200. All of these Impact Assessments are available on the following website:
www.ukba.homeoffice.gov.uk/managingborders/borderscitizenshipbill.

201. The Impact Assessments demonstrate how the provisions in the Bill will improve the operational effectiveness and capabilities of UKBA in areas where there are existing gaps or inconsistencies. The Impact Assessments also set out the key costs of making these changes including transitional set up costs to the public sector of training case workers, customs officials and immigration officers on the Bill and their new powers and responsibilities. The Bill's provisions do not create a carbon impact.

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EUROPEAN CONVENTION ON HUMAN RIGHTS

202. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The statement has to be made before Second Reading. Lord West of Spithead has made the following statement:

“In my view, the provisions of the Borders, Citizenship and Immigration Bill [HL] are compatible with the Convention rights.”

PART 1: BORDER FUNCTIONS

Concurrent exercise of functions

203. It is not considered necessary or appropriate to analyse the compatibility of the underlying customs functions which are to be exercised concurrently by virtue of the Bill. The Bill merely permits the concurrent exercise of functions, already exercisable by HMRC, so that they are now exercisable by another Government department. It does not change the substance of any of the underlying HMRC functions. By reason of the conferral there is no intention for these functions to be carried out in a manner which is substantively different to the way the functions are currently exercised by HMRC and indeed the safeguards which HMRC currently apply to the exercise of those functions will continue to apply. Given that no new issues arise as a result of the conferral of these functions the Minister in charge of this Bill is not required to turn his mind to the compatibility of each individual power or duty to be conferred under this Bill. Such an approach was recognised as appropriate by the Joint Committee on Human Rights (see the Committee’s comment in respect of the Commissioners for Revenue and Customs Bill in paragraph 1.5 of the Session 2004 -2005 Sixth Report JCHR).

204. Were the Bill to broaden the basis on which the relevant functions could be exercised, it would be necessary for the Minister in charge of the Bill to consider the compatibility of the underlying functions. That is not the case, however. Indeed, on analysis, the reverse is true, as the Bill incorporates “ring-fencing clauses”. For example, it provides that a function which may be exercised by the Commissioners in relation to a general customs matter or a customs revenue matter, may only be exercised in relation to a general customs matter when exercised by the Secretary of State (clause 1) or a general customs official (clause 3), and may only be exercised in relation to a customs revenue matter when exercised by the Director of Border Revenue (clause 7) or a customs revenue official (clause 11). This reflects one of the core principles underpinning the Bill, namely that revenue functions are not exercisable by the Secretary of State and that she should not have access to customs revenue information except when disclosure of such information to her is (a) expressly permitted under clause 16 and (b) is not precluded by any restriction of the Commissioners.

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205. In any event, prior to these functions being transferred to the Commissioners, they were exercised by HMRC, and were assessed on various occasions by that department for compatibility with the European Convention on Human Rights (the “ECHR”). Further, it has been open to anyone wishing to do so while the functions in question have been exercisable solely by the Commissioners to challenge the nature of any of those functions on grounds of their incompatibility with the ECHR. However, no successful challenge of that sort has in fact been made. Accordingly, the Department does not consider that the conferring of those functions on other officials in clauses 1 to 13 gives rise to any ECHR concerns.

206. There are further safeguards which will provide for the compatible exercise of these functions. For example, in accordance with clauses 4 and 12 an official can only be designated if the Secretary of State or the Director is satisfied that he is capable of effectively carrying out the functions, has received adequate training and is otherwise a suitable person.

207. Further, clauses 26 to 28 make provision for the inspection and oversight of the exercise of powers by officials of the Secretary of State (including designated officials), the Secretary of State and the Director of Border Revenue.

Data use and sharing and related provisions

208. The information, sharing and use of data which will be permitted under clause 14 or disclosure of which will be permitted under clause 16 or clause 17 will constitute “personal data” for the purposes of the Data Protection Act 1998 (the “DPA 1998”). Article 8 of the ECHR is broad in scope and covers the collection, use and exchange of personal data. It is the Government’s view, however, that any interference with Article 8 can be justified. Each of the purposes for which information is permitted either to be used or shared, is capable of falling within the permitted interferences under ECHR Article 8(2).

209. The Government considers that the use and disclosure of the information is proportionate to the aims pursued and that the proposed measures are suitable for achieving legitimate objectives. Further, the Government considers that there is no less intrusive method for achieving those objectives. The powers will only be exercised when it is lawful to do so, and will be processed in accordance with the DPA 1998 as applicable (see clause 19). Both HMRC and UKBA provide detailed guidance to staff on information handling and disclosure. This guidance is available to staff as a source of reference at all times. Training and further guidance, as necessary, is also provided to staff on the use and disclosure of information. There are also Codes of Practice which will remain relevant to the use of information by UKBA. These include the Code of Practice relating to data sharing under the IANA 2006 and the 2006 Code of Practice for the Management of Police Information, the principles of which are applied by HMRC in relation to certain types of information. UKBA will provide staff with any necessary further guidance and training to ensure that they are aware of their obligations under the new provisions.

210. A regulation-making power has been included in subsection (8) of clause 16. Regulations under that subsection will be subject to the affirmative resolution procedure

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which means that Ministers will be required to make a declaration of ECHR compatibility in relation to each new set of regulations.

211. Further, the offence of wrongful disclosure in clause 18 will give any person considering whether or not to disclose personal information which is obtained for a customs function, or is cross-cutting information, reason to pause. The Government views this offence as a significant deterrent to unlawful disclosure which might otherwise occur, particularly given the available sentences for anyone convicted of it.

212. Clause 18 provides a defence to any person charged with the offence who can show that they reasonably believed that the disclosure was lawful or that the relevant information had already been made available lawfully to the public. This mirrors the defence to other similar offences such as that in section 19 of the CRCA 2005 and paragraph 24 of Schedule 5 to the Finance Act 2006.

213. The Government also accepts that Article 6 ECHR is engaged, but considers clause 18 (which reflects many other provisions, including, notably, section 19 of the CRCA 2005) to be compatible with it. First, as regards Article 6(1), an individual charged with the offence of wrongful disclosure will be tried before an appropriate court, with all the relevant protections to ensure a fair trial. Secondly, clause 18 is also compatible with Article 6(2). The prosecution must prove the crux of the offence, namely a disclosure in breach of clause 15(1). The Government considers it to be reasonable and proportionate – particularly given the legitimate objective of protecting Government-held financial information from disclosure - to impose the burden of proof on the defendant to establish whether or not he reasonably believed that it was lawful to disclose the information or that it had already lawfully been made public. Those are matters that he is much better placed to prove on the balance of probabilities than the prosecution is to prove beyond reasonable doubt.

214. Clause 19 provides that information which is subject to the duty of confidentiality is exempt information for the purposes of the Freedom of Information Act 2000. It makes clear that exceptions to the duty are disregarded for the purposes of this analysis as to do otherwise would be at odds with an FOI regime that does not require a requestor to justify a request. There is a consequential amendment to section 23 of the CRCA 2005 in similar terms (see subsection 4).

215. Clause 19 could be said to engage Article 10 ECHR in so far as it relates to the right of an individual to receive information. A right of access to official information is not explicitly recognised by ECHR and such rights are rarely recognised. The Government considers that any such interference as was established would be justified under Article 10(2) on the basis that it was for the purposes of protecting the rights or reputation of others or preventing the disclosure of information received in confidence. A balance must be struck between the rights of persons to receive information and the rights of privacy of those to whom the information relates, and the purpose of this clause is to ensure that personal

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information, including information about the tax affairs of an individual, is restricted from disclosure to another individual under the FOI regime.

216. Clause 20 provides for amendment of the UKBA 2007 to:

- permit the supply of information by HMRC and RCPO to the Secretary of State (insofar as she has general customs functions), any official of the Secretary of State exercising customs functions and the Director of Border Revenue; and
- define the circumstances in which any recipient of such information may disclose it.

217. The Government also recognises that the information, disclosure of which will be permitted under clause 20, will constitute “personal data” for the purposes of the DPA 1998 and that it is likely therefore that ECHR Article 8 will be engaged. However, the Government considers that any such interference with this right can be justified.

218. More specifically, clause 20 adopts the framework, defined in sections 40 and 41 of the UKBA 2007, for disclosure of customs information by HMRC and the RCPO to the Secretary of State for her immigration functions, and adapts it for use in relation to the disclosure of customs information to the persons specified in section 41B of the UKBA 2007 for their newly-acquired customs functions. The provision is central therefore to the proper discharge by those persons of their functions.

219. Current arrangements for the disclosure of customs information by HMRC and the RCPO to the Secretary of State for her immigration functions are governed by a Memorandum of Understanding. Guidance for staff is also available and a UKBA-wide training programme was delivered when the provisions in the UKBA 2007 were introduced. UKBA will ensure that staff members receive any further, necessary guidance and training to ensure that they are aware of their obligations under the amended provisions.

220. Sections 40 and 41 of the UKBA 2007 were assessed for compliance with the ECHR when the UK Borders Bill (as it then was) was before Parliament, and Parliament was duly satisfied. There is nothing to lead to any different conclusion about clause 20.

221. Further, any disclosure of information made under section 41A would only be made for customs purposes which are capable of falling within the permitted interferences under ECHR Article 8(2).

PART 2: CITIZENSHIP

222. The Government does not believe the provisions in this Part raise any ECHR issues.

PART 3: IMMIGRATION

Common Travel Area

223. Clause 46 enables routine immigration control, in particular the power to examine, to be applied to those entering, or who have entered, the UK from the CTA and to those leaving the UK for the CTA. At present such journeys are not subject to routine immigration control. The proposal does not in itself raise any ECHR issues. Where a person is examined any subsequent decision to refuse that person leave to enter the UK, or the use of any detention, search, seizure or arrest power, would have to be in accordance with the ECHR, as with the exercise of such powers when examining a person entering the UK from outside the CTA.

Fingerprinting of foreign criminals liable to automatic deportation

224. Clause 48 amends section 141 of the IAA 1999 to insert a provision to allow fingerprints to be taken from a person who is a foreign criminal within the meaning of section 32 UKBA 2007 and in respect of whom a section 32(5) decision is taken that the automatic deportation provisions in that Act apply. The amendments extend the definition of the existing category C person in respect of whom fingerprints may be taken under section 141 to include such a person. Subsection (2) excludes their dependants from the section 141 fingerprinting provisions. The provisions of section 141 to 146 of the IAA 1999 which apply in relation to a category C person otherwise apply accordingly.

225. The taking and retention of fingerprints potentially engages Article 8(1) as constituting an interference with private life. However, the Government considers that any interference is justified and proportionate. In the Government's view, the proposals are in accordance with the law. Furthermore, the Government considers the proposals can be justified as necessary and proportionate under Article 8(2) in the interests of the economic well being of the UK, in the interests of public safety, and for the prevention of disorder or crime.

226. Any interference with Article 8 constituted by retention is lawful in that there is a clear and limited scheme in the IAA 1999. Fingerprints must be destroyed after a period of ten years. The ten-year retention period is proportionate in this context and strikes a fair balance between the competing public and private interests. The retention of data in this context allows for the verification of identity for those seeking to re-enter the UK following deportation.

Detention at ports - Scotland

227. Clause 49 extends the powers in section 1 to 4 of the UKBA 2007 to Scotland in relation to a person subject to a warrant for arrest. A designated immigration officer at port may detain a person, for up to 3 hours pending the arrival of a constable, where the officer thinks a warrant is outstanding for that person.

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228. Designated officers exercising this power of detention will have limited powers to search the individual to check for weapons and/or documents and to seize any relevant items found.

229. The Government considers that this power to detain falls within the permitted cases for detention, namely Article 5(1)(a) and (c). These provisions permit the lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or detention when it is reasonably necessary to prevent a person committing an offence or fleeing after having done so.

230. The power to search individuals, and seize weapons or documents, raises potential issues under Article 8 and Article 1 Protocol 1, but in the Government's view any interference under either Article can be justified. The powers of search and seizure pursue the legitimate aim of the public safety, the economic well-being of the country, and/or the prevention of disorder or crime, and are proportionate. The power to search is for very specific and limited purposes and will be carried out by designated officers who the Secretary of State has concluded are fit and proper for this purpose and have received suitable training.

PART 4: MISCELLANEOUS AND GENERAL

231. The Government does not believe the provisions in this Part raise any ECHR issues.

BORDERS, CITIZENSHIP AND IMMIGRATION BILL [HL]

EXPLANATORY NOTES

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