

# **BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009**

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## **EXPLANATORY NOTES**

### **COMMENTARY**

#### **Part 1: Border Functions**

##### **General customs functions of the Secretary of State**

###### *Section 1: General customs functions of the Secretary of State*

32. [Section 1](#) provides for the concurrent exercise by the Secretary of State of functions in relation to a general customs matter that are currently conferred on the Commissioners by an enactment passed or made before the end of the session in which the Act is passed. It also ensures that where appropriate any reference to the Commissioners in any such enactment, or in any instrument or document issued before the passing of the Act, is construed as including a reference to the Secretary of State.
33. Subsection (2) defines a “general customs matter” as a matter in relation to which the Commissioners or officers of Revenue and Customs 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 any function which relates to the Commissioners’ remit in relation to the regulation of money businesses. The exclusion of these functions leaves the Secretary of State with the ability to exercise non-revenue customs, shipping and enforcement related functions of HMRC.
34. 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 may exercise it only in relation to the general customs matter.
35. 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 section 1 applies are to be construed as including a reference to the Secretary of State. Subsection (5)(a) provides that references in section 1 (other than in subsection (8)) to functions of the Commissioners are to functions conferred by an enactment to which the section applies; subsection (5)(b) provides that references in section 1 (other than in subsection (8)) to functions of officers of Revenue and Customs

are to functions conferred by an enactment to which section 3 (designation of general customs officials) applies.

36. Subsection (6) specifies that section 1 applies to an enactment passed or made before the end of the session in which the Act is passed and to an instrument or document issued before the passing of the Act. Subsection (7) provides that section 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, as a number of provisions of that Act are either already dealt with in this Act (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 make rewards in section 26 CRCA 2005 would already be available to the Secretary of State under the common law).
37. Subsection (8) defines "general customs function" for the purposes of this Part of the Act as a function exercisable by the Secretary of State by or by virtue of section 1 or by general customs officials by virtue of section 3; a function that is conferred on general customs officials or the Secretary of State by virtue of sections 22 to 23 (investigations and detention); a function under Community law that is exercisable by the Secretary of State or general customs officials in relation to a matter in relation to which functions under Community law are exercisable by the Commissioners or officers of HMRC, and that is not one of the matters listed in subsection (2). In particular this means that subsection (8) defines the "general customs functions" exercisable by the Secretary of State and general customs officials, as including functions under Community law, so that sections 14 to 21 apply to information generated in the exercise of those functions.

### ***Section 2: Power of Secretary of State to modify functions***

38. **Section 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 the Act. The Secretary of State may also by order modify any enactment (including one passed or made after the passing of the Act) in consequence of any provision made under section 2(1)(a), (b) or (c) and modify the definition of "general customs function" to include or exclude, as appropriate, particular functions. Subsection (2) makes clear that an order made under this section may not add a revenue matter to the matters in relation to which functions 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**

#### ***Section 3: Designation of general customs officials***

39. **Section 3(1)** provides that the Secretary of State by whom general customs functions are exercisable may designate an immigration officer or any other of the Secretary of State's officials as a general customs official. 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 section 1.
40. Subsection (3) makes clear that the section 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 devolve 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 may exercise it only in relation to the general customs matter.

41. Subsection (5) provides that in relation to general customs matters, where appropriate, references to an officer of Revenue and Customs, or to HMRC, in an enactment, instrument or document to which section 3 applies are to be construed as including a reference to a general customs official. Subsection (6) provides that references in section 3 to functions of an officer of Revenue and Customs are to functions conferred by an enactment to which section 3 applies. Subsection (7) specifies that this section applies to an enactment passed or made, or to an instrument or document issued, before the Act is passed and, subject to express provision to the contrary, to an enactment passed or made, or to an instrument or document issued, after the Act is passed. Subsection (8), however, provides that section 3 only applies 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) and (5) (conduct of civil proceedings in a magistrates' court or in the sheriff court), 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 section 3 is subject to any limitation specified in the official's designation made under section 4 and to any designation of the same official under section 11 (designation of customs revenue officials).

#### ***Section 4: Designation: supplementary***

42. Section 4 provides at subsection (1) that a designation under section 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.
43. Subsection (3) provides 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 section 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.

#### ***Section 5: Directions by the Secretary of State***

44. Section 5 requires a general customs official to comply with the directions of the Secretary of State in the exercise of general customs functions.

### **The Director of Border Revenue**

#### ***Section 6: The Director of Border Revenue***

45. Section 6(1) provides that the Secretary of State must designate an official in the department of the Secretary of State by whom general customs functions are exercisable as the Director of Border Revenue. Section 6(2) requires the Secretary of State to obtain the consent of the Treasury to any such designation before making it.

### ***Section 7: Customs revenue functions of the Director***

46. Subsection (1) of section 7 provides that the functions of the Commissioners that are exercisable in relation to customs revenue matters are exercisable concurrently by the Director.
47. Subsection (2) sets out what constitutes a “customs revenue matter” in this Part of the Act, namely agricultural levies, anti-dumping duty, countervailing duty, customs duties, duties of excise (with certain exceptions) and value added tax relating to 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; 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.
48. 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.
49. Subsection (5) provides that where appropriate, in relation to customs revenue matters, references to the Commissioners for Her Majesty’s Revenue and Customs, or to HMRC, in an enactment, instrument or document to which section 7 applies are to be construed as including a reference to the Director. Subsection (6) provides that references in section 7 to functions of the Commissioners are to functions conferred by an enactment to which that section applies. Subsection (7) then specifies that section 7 applies to an enactment passed or made before the end of the session in which the Act is passed, and to an instrument or document issued before the passing of the Act. Subsection (8), however, provides that section 7 only applies to certain sections of the CRCA 2005, namely section 5 (1)(b) and (2)(b) (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), section 26 (rewards), section 31 (obstruction) and section 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 Act as a function exercisable by the Director by virtue of section 7 or by customs revenue officials by virtue of section 11; a function that is conferred on customs revenue officials or the Director by or by virtue of sections 22 to 23 (investigations and detention); a function under Community law that is exercisable by the Director or by customs revenue officials in relation to a customs revenue matter. In particular this means that subsection (9) defines the “customs revenue functions” exercisable by the Director for Border Revenue and customs revenue officials as including functions under Community law, so that sections 14 to 21 apply to information generated in the exercise of those functions.

### ***Section 8: Power of Treasury to modify Director’s functions***

50. Section 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 section provides that the Treasury may, by order, amend the matters that are included within the definition of a customs revenue matter, amend the list of functions excluded from section 7, make provision for section 7 to apply in relation to a function conferred on the Commissioners by an enactment passed or made after the end of the session in which the Act is passed and modify any enactment (including one passed or made after the passing of the Act) in consequence of any provision made under section 8(a), (b) or (c).

### ***Section 9: Delegation of Director's functions***

51. **Section 9(1)** provides that the Director may make arrangements to delegate a function. Subsection (2) states 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 section 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.

### ***Section 10: Compliance with directions etc.***

52. **Section 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 section 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 section 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 section seeks to ensure consistent application of tax policy by HMRC and the Director.

## **Customs revenue officials**

### ***Section 11: Designation of customs revenue officials***

53. **Section 11(1)** provides that the Director may designate an immigration official or other 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 Act. 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 section 7.
54. 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.
55. 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 section 11 applies is to be construed as including a reference to a customs revenue official. Subsection (5) provides that a reference in section 11 to functions of an officer of Revenue and Customs are to functions conferred by an enactment to which section 11 applies. Subsection (6) specifies that section 11 applies to an enactment passed or made, or an instrument or document issued, before the Act is passed and, subject to express provision to the contrary, to an enactment passed or made, or an instrument or document issued, after the Act is passed.
56. Subsection (7) provides that section 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), section 31 (obstruction), section 32 (assault) and section 33 (power 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 may exercise functions under section 11 is subject to any limitation specified in the official's designation under section 12 (supplementary provisions about designation) and to any designation of the same official under section 3 (designation of general customs officials).

### ***Section 12: Designation: supplementary***

57. **Section 12** provides that a designation under section 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.
58. Subsection (3) states 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.

### ***Section 13: Directions by the Director***

59. **Section 13** requires a customs revenue official to comply with the directions of the Director in the exercise of customs revenue functions.

## **Use and disclosure of information**

### ***Section 14: Use and disclosure of customs information***

60. **Section 14** sets out the broad circumstances under which customs information may be used or disclosed and by whom, and defines customs information. It provides that this provision does not supersede any other legislation prohibiting the use or disclosure of information.
61. Subsection (1) of section 14 states the general principle that:
- where a person to whom this section 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 section relates for the purpose of that other person's functions.
62. Subsection (2) sets out to whom this section applies: a designated customs official, an immigration officer, the Secretary of State by whom general customs functions are 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.
63. 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 Act, such as section 15, which prohibits certain disclosures of personal customs information;
  - 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 administrations. An example of an "other" agreement would be the UK and Isle of Man Revenue Sharing Agreement of 15 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.

64. 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.

### ***Section 15: Prohibition on disclosure of personal customs information***

65. **Section 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 section 17 on any person to whom personal customs information has been disclosed under either section 16 or section 17.
66. 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.
67. 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.
68. Subsection (4) defines what is meant in this Part of the Act 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.
69. 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 the Act only restrict the disclosure of that information which the Act 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).
70. Subsection (6) provides that the statutory duty of confidentiality contained in subsections (1) and (2) is subject to the section 16 exceptions and to any other enactment (other than an enactment in this Part of the Act) 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.
71. 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 section 20 of the Act) 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.

***Section 16: Exceptions to section 15 prohibition***

72. **Section 16** sets out the limited number of circumstances where the disclosure of personal customs information is permitted.
73. 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.
74. Subsection (2) ensures that the Commissioners' restrictions do not apply to information which is known to have been acquired otherwise than in the exercise of customs revenue functions.
75. 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.
76. 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. Accordingly, disclosures to public bodies such as the Independent Police Complaints Commission ("IPCC"), as well as to HMRC and RCPO, would be permitted under this section, as would a disclosure by a customs official to the local licensing authority of information relating to a publican convicted of evading excise duty.
77. 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 pursuance of an order of a court such as disclosure made in accordance with a witness summons.
78. 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.
79. 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.
80. Subsection (8) allows for disclosure to persons specified under regulations made jointly by the Secretary of State and the Treasury or disclosures of a kind specified in such regulations.

***Section 17: Prohibition on further disclosure***

81. **Section 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 section 15, in accordance with section 16, or



indeed from other persons (who have received customs information from those persons) under section 17 itself.

82. Subsection (1) states if a disclosure takes place in reliance on section 16 or this section, 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 section 15(3)).
83. 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 section 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.
84. 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.
85. Subsection (4) states that section 17 is subject to any other enactment permitting disclosure. This, for example, would include section 36 of the IANA 2006, as amended by section 21, which requires the Secretary of State, HMRC and the police to share certain information relating to the border with each other.
86. 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.

### ***Section 18: Offence of wrongful disclosure***

87. **Section 18** makes unauthorised disclosure of personal customs information a criminal offence carrying a maximum penalty of two years imprisonment and an unlimited fine.
88. Subsection (1) makes it an offence for any person to contravene the non-disclosure provisions of sections 15(1) or (2) or 17(1) by disclosing personal customs information.
89. 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.
90. 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.
91. Subsection (4) provides that the prosecution of the subsection (1) offence is without prejudice to other remedies for unlawful disclosure contrary to the section 15 duty of confidentiality, for example the seeking of an injunction to restrain an unlawful disclosure.
92. 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 (in England and Wales) or six months' imprisonment (in Northern Ireland), or a fine not exceeding the statutory maximum (currently £5,000), or both; or

*These notes refer to the Borders, Citizenship and Immigration Act 2009 (c.11) which received Royal Assent on 21 July 2009*

- 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.

93. Subsection (6) provides that in relation to an offence under section 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 six months.

### ***Section 19: Application of statutory provisions***

94. [Section 19](#) puts beyond doubt that nothing in sections 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. Section 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.

### ***Section 20: Supply of Revenue and Customs information***

95. [Section 20](#) inserts two new sections 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.

### ***Section 21: Duty to share information***

96. [Section 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 and any person exercising functions of the Director, as well as to 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.

### ***Section 22: Application of the PACE orders***

97. [Section 22](#) applies provisions of PACE and PACE (NI) to criminal investigations conducted by designated customs officials in relation to a general customs or customs revenue matter, and to persons detained by such designated customs officials (subsections (1) and (2)).
98. It does so by applying the [Police and Criminal Evidence Act 1984 \(Application to Revenue and Customs\) Order 2007 \(S.I. 2007/3175\)](#) and the [Police and Criminal Evidence \(Application to Revenue and Customs\) Order \(Northern Ireland\) 2007 \(S.R. 2007/464\)](#) ("the Revenue and Customs PACE orders"), which in turn apply PACE and PACE (NI) to those officers of HM Revenue and Customs who carry out equivalent functions.
99. Subsection (3) sets out how such terms and references in the Revenue and Customs PACE orders should be read in respect of the UK Border Agency. For example, references to an officer of Her Majesty's Revenue and Customs are to be read as references to designated customs officials, references to the Commissioners are to be read as references to the Secretary of State or Director of Border Revenue, as

appropriate, and references to an office of Revenue and Customs are to be read as references to an office of the UK Border Agency.

100. Subsection (4) defines “an office of the UK Border Agency” as premises wholly or partly occupied by designated customs officials and clarifies that a person is in UK Border Agency detention if that person has been taken to such an office after being arrested for an offence, or is arrested at such an office. This definition of UK Border Agency detention does not cover persons detained under paragraph 16 of Schedule 2 to the IA 1971 or paragraph 2 of Schedule 3 to the Immigration Act 1971 or sections 2 or 36 of the UKBA 2007.
101. There are a few provisions of PACE and PACE (NI) which apply to those officers of HM Revenue and Customs carrying out customs functions at the border currently which it is not proposed to apply to the designated customs officials of the UK Border Agency. Those functions are set out in subsection (5) and relate to tax investigations, which will not be carried out by the UK Border Agency, and to the authorisation process which the Commissioners are required to undertake before HMRC officers may exercise powers under PACE. Consideration will be given during the designation process, under section 3, by the Secretary of State, and under section 7, by the Director of Border Revenue, to which powers it is appropriate for designated customs officials to exercise, including those under PACE. Accordingly, it is unnecessary to apply a further authorisation process.
102. Subsections (6) and (7) provides for the transfer of persons between UK Border Agency detention, HM Revenue and Customs detention and police detention.
103. Subsection (8) provides that any expression used in section 22 which is defined in a Revenue and Customs PACE order shall have the same meaning as in that order.
104. Subsection (9) provides that section 22 does not affect the generality of sections 1(4), 3(5), 7(5) and 11(4) of the Act which provide for references in enactments, instruments or documents mentioned in those sections to the Commissioners, or the officers of HMRC, or to HMRC itself, to be construed as including references to the Secretary of State, the Director of Border Revenue, designated general customs officials or designated customs revenue officials, as appropriate.

### ***Section 23: Investigations and detention: England and Wales and Northern Ireland***

105. Sections 24(1) and (2) allow the Secretary of State by order to provide for the application of provisions of PACE and PACE (NI) to criminal investigations conducted by designated customs officials or immigration officers, or to persons detained by such officials or officers as part of a criminal investigation, subject to such modifications as the order may specify.
106. Subsection (3) provides that an order made under section 23 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).
107. Subsection (4) provides that, if an order under section 23 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.
108. Subsection (5) provides for an order made under this section to amend or repeal section 22. This will enable the provisions of PACE or PACE (NI), as the case may be, and the associated Codes of Practice, to be applied more directly to designated customs officials, rather than by transposing provisions in the Revenue and Customs PACE Orders as is the case under section 22. It will also allow the specification of relevant provisions of PACE, PACE (NI) and the associated Codes of Practice which will apply

to any criminal investigation conducted by immigration officers and to persons detained by those officers as part of any criminal investigation.

### ***Section 24: Investigations and detentions: Scotland***

109. **Section 24(1)** inserts new section 26C to the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) so that Part 3 of that Act applies to criminal investigations conducted by designated customs officials and references in that Part to the Commissioners apply # - - -in relation to investigations relating to general customs matters # to the Secretary of State and # in relation to investigations relating to customs revenue matters # to the Director. The provisions of PACE do not extend to Scotland, where the powers of HMRC to detain and search suspects are contained in the Criminal Law (Consolidation) (Scotland) Act 1995. This amendment will ensure that the same powers will be available to, and the same obligations will be imposed upon, officers conducting criminal investigations in Scotland 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 in the 1995 Act to an office of the Revenue and Customs will be construed to include offices occupied by designated customs officials and references in the same Act to a superior officer shall be an immigration officer of the grade of Inspector, a senior executive officer or a person of equivalent grade.
110. **Section 24(2)** provides that the amendment made by section 24(1) does not affect the generality of sections 1(4), 3(5), 7(5) and 11(4) of the Act.

### ***Section 25: Short-term holding facilities***

111. **Section 25** amends the definition of a “short-term holding facility” in section 147 the 1999 Act.
112. The amended definition retains the existing definition of a “short-term holding facility” but adds a second limb to the definition which will mean that a short-term holding facility may be used to detain not only detained persons (as also defined in section 147 of the 1999 Act) for periods of not more than seven days but also other persons for other periods.
113. These modifications will mean that a short-term holding facility does not cease to be a short-term holding facility when it is used to detain a person who is not an immigration detainee. Thus the related provisions in 1999 Act (on contracting out, the activities of detainee custody officers etc.) will continue to apply in relation to a short-term holding facility.

## **Transfer of property etc**

### ***Section 26: Transfer schemes***

114. **Section 26(1)** provides for the making of a scheme, or schemes, by the Commissioners for the transfer of specified property, rights or liabilities # or for 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.
115. Subsection (2) provides 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. Subsection (2) further provides that any such scheme may apportion property, rights or liabilities between a transferor and a transferee.
116. 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. Under subsection (3) any such scheme may also provide for references to a transferor in any agreement, instrument or document relating to anything transferred by the scheme to be treated as references to a transferee and may make other incidental, supplementary, consequential, transitional or transitory provision or savings.

117. 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. Under subsection (5) 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.
118. Subsection (6) makes provision in respect of the coming into 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 section 26.

### ***Section 27: Facilities and services***

119. **Section 27** 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 of UKBA’s custody facilities. The provision also covers contractors who exercise detention and escort functions on behalf of the Secretary of State.

## **Inspection and oversight**

### ***Section 28: Inspections by the Chief Inspector of the UK Border Agency***

120. **Sections 28(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 a reference to “the UK Border Agency” for the reference to “the Border and Immigration Agency” in section 48(1) of the 2007 Act. Subsection (2) inserts a new subsection (1A) into section 48 which specifies that the functions of the Chief Inspector apply to the efficiency and effectiveness of the performance of functions by 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 functions or functions relating to immigration, asylum or nationality, the Director and any person exercising functions of the Director.
121. **Section 28(3)** makes further amendments to section 48 of the UKBA 2007 consequential on the changes made in subsections (1) and (2). It also makes provision to require the independent Chief Inspector to monitor and report on (i) UKBA’s practice and procedure in relation to criminal matters, both immigration- and customs-

related, and (ii) whether customs functions are being appropriately exercised by the Secretary of State and Director of Border Revenue. Section 28(4) also inserts the new subsection (2A) into section 48 of the UKBA 2007 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.

122. Section 28(5) to (9) makes further consequential amendments and section 28(10) enables the Chief Inspector of the Border and Immigration Agency to be treated immediately when this section comes into force as if appointed as the Chief Inspector of the UK Border Agency.

### ***Section 29: Inspections by Her Majesty's Inspectors of Constabulary etc.***

123. Section 29(1) provides that the Secretary of State may make regulations conferring 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, and anyone providing services relating to the discharge of functions by any of these persons.
124. The inspectors to whom section 29 applies already have functions conferred on them in existing legislation and subsection (2) provides that regulations made under subsection (1) may apply, with or without modification or make provision similar to (a) in the case of Her Majesty's Inspectors of Constabulary sections 54 to 56 of the Police Act 1996, (b) in the case of the Scottish inspectors section 33 or 34 of the Police (Scotland) Act 1967 and (c) in relation to the Northern Ireland inspectors section 41 or 42 of the Police (Northern Ireland) Act 1998.
125. Subsection (3), (4), (5) and (6) of section 29 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 the inspectors mentioned in subsection (1).
126. Subsection (4) provides 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 section 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.

### ***Section 30: Complaints and misconduct***

127. Sections 30(1) to (3) amend section 41 of the Police and Justice Act 2006 (power to confer functions on the Independent Police Complaints Commission ("the IPCC) in respect of the exercise of immigration and asylum functions), to expand the functions which the Secretary of State may confer on the IPCC. The amendments provide that the IPCC may carry out investigations in relation to the exercise of specified immigration and asylum enforcement functions by contractors and in relation to the exercise of

customs functions by (a) designated customs officials and officials of the Secretary of State, (b) the Director and any person exercising functions of the Director and (c) contractors providing services pursuant to arrangements relating to the discharge of the functions referred to in (a) or (b). 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, as amended by this section.

### ***Section 31: Prosecution of offences***

128. **Section 31** 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.
129. 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 section 31. 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 section 31. Subsection (5) provides that an order under section 31 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 section 31 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 section.

### ***Section 32: Payment of revenue to the Commissioners***

130. **Section 32** requires the Director (subsection (1)) and the Secretary of State (subsection (2)) to pay to the Commissioners any money received by way of revenue or security in the exercise of, as regards the Director, customs revenue functions and, in relation to the Secretary of State, general customs functions. Subsection (3) provides that any such 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.
131. Subsection (4) provides that, should they consider the funds available to the Director or Secretary of State insufficient to cover any payment due in connection with drawback or repayment, the Commissioners may pay money to the Director or Secretary of State as applicable to enable the necessary payment or repayment to be made, or may themselves 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.
132. 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 for payment by the Commissioners into the Consolidated Fund and provides that such payment should be made after the deduction of any disbursements covered by section 44(3). Subsection (7) provides definitions of the terms “repayments”, “revenue” and “security for revenue” for the purposes of section 32.

***Section 33: Power to require payment into the Consolidated Fund***

133. **Section 33(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.
134. **Section 33(2)** provides an order-making power to amend or repeal section 32. 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 section 32. 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 flexibility for the monies they collect to be paid directly into the Consolidated Fund rather than through the Commissioners' accounts.

***Section 34: Children***

135. **Sections 34(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 section 34(3). Subsections (2), (4) and (5) of section 34 further amend section 21 to reflect the replacement of the Border and Immigration Agency with the UK Border Agency.
136. **Section 34(6)** provides for section 34 to cease to have effect when section 57 comes into force.

**Supplementary**

***Section 35: Power to modify enactments***

137. **Section 35** 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, the Director, designated customs officials, immigration officers 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.
138. Subsection (3) states that an order made under this section 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.
139. Subsection (4) obliges the Secretary of State to consult with the Commissioners before making an order under section 35 relating to customs matters or the exercise of a customs function.

***Section 36: Power to make supplementary etc. provision***

140. **Section 36(1)** provides the Secretary of State with an order-making power for the purpose of making such incidental, supplementary, consequential provision, or such transitional or transitory provision or savings, as considered appropriate for the



purposes of this Part of the Act, or in consequence, or for giving full effect to, any provision made by or under this Part of the Act.

141. **Section 36(2)** provides that an order made under section 36 may amend, repeal, revoke or otherwise modify any enactment, including the Act, 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.
142. **Section 36(4)** provides that nothing in Part 1 of the Act affects the generality of the power in section 36.

### ***Section 37: Subordinate legislation***

143. **Section 37** makes further provision for the making of subordinate legislation under this Part. Subsection (1) provides that the orders and regulations under Part 1 of the Act must be made by statutory instrument, and subsection (2) provides that such instruments may include incidental, supplementary and consequential provision; make transitional or transitory provision 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 Part 1 are subject. Statutory instruments containing an order or regulations to which subsection (4) applies are subject to the affirmative resolution procedure. These are the orders or regulations made under section 2, 8, 16(8), 23, or 35 and any order containing provision amending or repealing primary legislation by virtue of section 36(2). Statutory instruments containing regulations under section 29, or an order under section 36 that does not amend or repeal primary legislation, are subject to the negative resolution procedure. An order under section 33 (power to require payment into the consolidated fund) is subject to annulment by the House of Commons. Subsection (7) defines primary legislation for the purpose of section 37, while subsection (8) makes it clear that that section does not apply to an order made under section 31 of the Act (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 those 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.

### ***Section 38: Interpretation***

144. **Section 38** sets out the interpretation of the terminology used in this Part.