

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

BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Borders, Citizenship and Immigration Act 2009 which received Royal Assent on 21st July 2009. They have been prepared by the Home Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

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

OVERVIEW

3. The Act is arranged under four 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 to date been exercised by Her Majesty's Revenue and Customs ("HMRC"). Part 1 also provides for the Secretary of State to exercise certain HMRC functions, and provides for the appointment of a Director of Border Revenue who will be responsible for "customs revenue functions" (the term used in the Act to describe functions relating to taxes, duties and levies). In practice the Government intends that officials of the UK Border Agency ("UKBA"), an executive agency of the Home Office, will exercise these functions on behalf

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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 and general customs officials. 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 and customs revenue officials. The Director, like HMRC, will exercise revenue functions independently of Ministers, subject only to the general direction of the Treasury. Ministers intend that in this way they will remain at arm’s length from tax-related decisions, although UKBA officials may have functions in relation to both tax and non-tax matters.

5. The Government intends that UKBA’s customs role will be focused on border-related matters, such as the importation and exportation of goods, while 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. 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. UKBA may support HMRC’s inland investigations into revenue smuggling and HMRC investigators will attend at the border in response to revenue smuggling detected by UKBA. The concurrent exercise of customs functions is therefore necessary.

7. Sections 1 to 13 enable the Secretary of State and the Director of Border Revenue 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 and customs revenue matters. These sections also enable the Secretary of State to designate officials for the purpose of carrying out functions relating to general customs matters and the Director to designate officials of the Secretary of State for the purpose of carrying out functions relating to customs revenue matters. They set out the framework within which designations will be made and require designated officials to comply with relevant directions issued by the Secretary of State and the Director.

8. Sections 14 to 21 explain how customs information may be used and disclosed and amend the duty to share information in section 36 of the Immigration, Asylum and Nationality Act 2006 (“IANA 2006”).

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9. Section 22 applies provisions of the Police and Criminal Evidence Act 1984 (PACE) and the Police and Criminal Evidence (Northern Ireland) Order 1989 (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. The provisions of PACE and PACE (NI) to be applied broadly mirror the provisions applied to those officers of HMRC who carry out equivalent functions currently.

10. Section 23 provides that the Secretary of State may by order apply provisions of PACE and PACE (NI) to persons detained by immigration officers or designated customs officials as part of a criminal investigation, as well as to any such investigation conducted by those officers or officials. As the provisions of PACE do not apply in Scotland section 24 amends the Criminal Law (Consolidation) (Scotland) Act 1995 so that in Scotland the current provisions will apply to UKBA as they apply currently to HMRC.

11. Section 25 amends the definition of a short-term holding facility in section 147 of the Immigration and Asylum Act 1999 (“the 1999 Act”).

12. Section 26 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. Section 27 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.

13. Sections 28 to 30 make provision for a framework for inspections (conferring functions on the Chief Inspector of the UK Border Agency and 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). Section 31 allows 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. Section 32 makes provision for the payment to the Commissioners of revenue received by the Secretary of State and the Director of Border Revenue as a result of exercising, respectively, a general customs function or a customs revenue function, while section 33 allows for provision to be made in the future for such revenue to be paid into the Consolidated Fund. Section 34 makes interim provision for the duty regarding the welfare of children until section 55 of the Act comes into force.

Part 2 – Citizenship

14. Sections 39 to 41 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 of the BNA 1981 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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15. Section 42 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 section 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 section 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.

16. Section 43 amends section 3(2) of the BNA 1981 to remove the requirement that an application for the registration of a child under that subsection must be made within twelve months of the child's birth. This will enable an application to be made at any time before the child's 18th birthday.

17. Section 44 amends section 4B of the BNA 1981. This adds British Nationals (Overseas) to those who are eligible to apply for registration under this section, which currently includes British Overseas citizens, British subjects and British protected persons. The amendment will allow British Nationals (Overseas) to be registered as British citizens if they do not hold any other citizenship or nationality, and have not done anything to effect the loss of another citizenship or nationality since 19 March 2009.

18. Section 45 amends section 4C of the BNA 1981 to remove the requirement that an applicant for registration under that section must be born after 7 February 1961. This will enable applicants born before 7 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 section 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").

19. Section 46 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 section to become British citizens.

20. Section 47 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. It also adds a "good character" requirement in the case of an application for registration under section 1(3A), 3(2) or 4D of the BNA 1981.

21. Section 48 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.

22. Section 49 creates various new definitions for the purposes of the BNA 1981 which are relevant to the amendments made to that Act by sections 40 to 43 and 47.

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Part 3 – Immigration

23. Section 50 amends section 3(1)(c) of the Immigration Act 1971 (“IA 1971”) to allow a condition to be imposed on a migrant’s limited leave to enter or remain in the UK restricting his or her studies whilst here.

24. Section 51 extends existing powers to take fingerprints in section 141 of the 1999 Act to include “foreign criminals” subject to the automatic deportation provisions in sections 32 to 38 of the UK Borders Act 2007 (“UKBA 2007”).

25. Section 52 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

26. Section 53 relates to judicial review applications in asylum, immigration and nationality matters, and provides for judicial review cases concerning “fresh claims applications” to be transferred from the High Court, Court of Session or High Court of Northern Ireland to the Upper Tribunal, subject to other conditions.

27. Section 54 widens the definition of exploitation in the offence of human trafficking (for non-sexual purposes) in section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“AITCA 2004”) to ensure that the use of certain categories of person by another to gain a benefit is conduct which is captured by that offence.

28. Section 55 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.

29. Sections 56 to 59 make general provision on repeals, extent, commencement and the short title of the Act. Section 58 in particular sets out certain transitional provisions which must be included in a commencement order giving effect to sections 39 to 41 of the Act (that is the provisions for earned citizenship and amendments to the BNA 1981).

TERRITORIAL EXTENT

30. Subject to the provisions of subsections (2) to (6) of section 57 the Act extends to England, Wales, Scotland and Northern Ireland. Amendments, modifications and repeals made by the Act (other than those amendments mentioned in subsection (4)) have the same extent as the provisions to which they relate. Subject to section 57(6), provisions, other than those of Part 1 or section 53, may be extended to any of the Channel Islands or the Isle of Man by Order in Council.

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31. The consent of the Scottish Parliament was sought on 19 March 2009 for the provisions in the Act that trigger the Sewel Convention. These provisions relate to section 52 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.

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.

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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

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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

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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

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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.

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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).

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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

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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.

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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
- 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.

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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.

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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).

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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

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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.

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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

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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.

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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.

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

Section 38: Interpretation

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

PART 2: CITIZENSHIP

Acquisition of British citizenship by naturalisation

Section 39: Application requirements: general

145. Section 39 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.

146. Section 39(2) replaces 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 had a qualifying immigration status (as defined in new paragraph 2A of Schedule 1 to the BNA 1981 which is inserted by section 39(11)) for the whole of the qualifying period;
- on the date of the application for naturalisation, must have either probationary citizenship leave, permanent residence leave, a qualifying CTA entitlement, 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 section 49(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 section 40(10) as including self-employment); and
- must not, at any time in the qualifying period, have been in the UK in breach of the immigration laws (as defined in section 50A of the BNA 1981 which is inserted by section 48).

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

147. Section 39(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 section 39(9)) to waive certain requirements in respect of applicants who have performed exceptional Crown service under the government of the UK.

148. Section 39(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.

149. Section 39(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 section 49(1). That section already contains a definition of “Crown service under the government of the United Kingdom”.

150. Section 39(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 qualifying CTA entitlement; 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 section 49(3)).

151. 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.

Section 40: Application requirements: family members etc.

152. Section 40 amends the requirements to be met by those applying for naturalisation under section 6(2) of the BNA 1981.

153. Section 40(1) and (2) amend section 6 of the BNA 1981. Section 40(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. Section 40(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 40 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

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person is married to, or the civil partner of, a British citizen or a person with permanent residence leave in the UK. The new 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.

154. Section 40(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 relevant family association for the whole of the qualifying period, as well as a qualifying immigration status for the whole of the qualifying period; and that the applicant must have either probationary citizenship leave or permanent residence leave based on a relevant family association, or a qualifying CTA entitlement, or a Commonwealth right of abode, on the date they apply for naturalisation.

155. 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.

156. New paragraph 3(5)(a) introduces a new requirement that, where an applicant is applying on the basis of being the partner of a British citizen or someone with permanent residence leave, the applicant must have been the partner of the same person throughout the qualifying period in order to meet the requirement in paragraph 3(2)(c)(i) to have a relevant family association for the whole of the qualifying period. In addition, paragraph 3(5)(b) provides that, where the applicant's qualifying immigration status is qualifying temporary residence leave, probationary citizenship leave or permanent residence leave, the applicant must have had leave granted on the basis of that partnership (and not granted on the basis of some other relevant family association with the British citizen or permanent resident) in order to meet the requirement in paragraph 3(2)(c)(ii) to have had a qualifying immigration status for the whole of the qualifying period. The additional requirement in paragraph 3(5)(b) does not apply where the applicant's qualifying immigration status is a qualifying CTA entitlement or a Commonwealth right of abode.

157. New paragraph 3(7) provides that, for the purposes of paragraph 3(5), the relationship between the applicant and the applicant's partner need not be of the same description throughout the qualifying period. So, an applicant could have started their qualifying period as the unmarried partner of a British citizen, then married that same British citizen, and still meet the requirement to have been the partner of a British citizen throughout the qualifying period.

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158. Section 40(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. Section 40(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.

159. Section 40(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 a similar way as for applicants applying under section 6(1), except that it provides that where the qualifying immigration status is qualifying temporary residence leave, probationary citizenship leave or permanent residence leave, that leave must have been granted on the basis of the applicant having a relevant family association; and the list of qualifying immigration statuses does not include temporary or permanent EEA entitlements.

160. New paragraph 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 been the same person's partner and, if necessary, had leave granted on that basis, throughout the qualifying period), need they have had the same relevant family association throughout the qualifying period. New paragraph 4A(4) provides that where an applicant under section 6(2) of the BNA 1981 counts more than one grant of qualifying temporary residence leave, probationary citizenship leave, or permanent residence leave towards the qualifying period, the grants of leave need not (subject to paragraph 3(5)) be based on the same relevant family association. In cases where paragraph 3(5) does apply (because an applicant is applying as the partner of a British citizen or person with permanent residence leave), the grants of leave need not be based on the same description of relationship as partners. This would cover, for example, an applicant who started their qualifying period with qualifying temporary residence leave as the unmarried partner of a British citizen 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) allows the applicant to count both periods of leave towards the qualifying period despite the nature of the relationship changing (although the applicant has had leave on the basis of the same partnership throughout).

Section 41: The qualifying period

161. Section 41 sets out the qualifying period for naturalisation as a British citizen.

162. Section 41(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 eight years. For applicants applying under section 6(2) of the BNA 1981, the default qualifying period is five years. These periods can be reduced to six years or three

years respectively if the applicant meets the activity condition. The activity condition is further defined in paragraph 4B(5).

163. 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. This means that a person cannot aggregate two periods of qualifying immigration status where they are separated by a period where the person did not hold such a status. Not all temporary leave falls under the definition of ‘qualifying temporary residence leave’ as set out in section 49(3) and so will not count towards the qualifying period. This definition is dependant upon the description of types of leave which can result in a grant of probationary citizenship leave which will be set out in the Immigration Rules. It is currently intended that a person who holds temporary residence leave as a worker for 2 years will have qualifying temporary residence leave. However, if that person chooses to become a full-time student (which will not be a form of qualifying temporary residence leave) and then returns to work , it is not possible to count the earlier period of 2 years during which they were working towards the overall qualifying period in a subsequent application for naturalisation. This person would start their qualifying period for naturalisation from the date they resumed working, that is when they hold a qualifying form of temporary residence leave.

164. Subsections (2) to (5) of section 42 amend section 41 of the BNA 1981, which relates to the Secretary of State’s regulation-making powers:

- Section 41(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).
- Section 41(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 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 section (new section 41(1C)(a)). For example, regulations might provide for activities carried out prior to commencement of this section 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.
- Section 41(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

Section 42: Children born in UK etc. to members of the armed forces

165. Section 42 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 section 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 section 47).

Acquisition of British citizenship etc. by registration

Section 43: Minors

166. Section 43 amends section 3(2) of the BNA 1981 to remove the requirement that an application for the registration of a child under that subsection must be made within twelve months of the child's birth. This will enable an application to be made at any time before the child's 18th birthday.

167. Section 43(3) removes section 3(4) of the BNA 1981, which gave the Secretary of State discretion to extend the 12 month period to six years after the child's birth, as this is no longer necessary.

168. 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 section 47).

Section 44: British Nationals (Overseas) without other citizenship

169. Section 44 amends section 4B of the BNA 1981. This adds British Nationals (Overseas) to those who are eligible to apply for registration under this section, which currently includes British Overseas citizens, British subjects and British protected persons. The amendment will allow British Nationals (Overseas) to be registered as British citizens if they do not hold any other citizenship or nationality, and have not done anything to effect the loss of another citizenship or nationality since 19 March 2009 (which is the date this change was announced).

170. Section 44(3) and (4) replace the current requirement that a person should not have lost any other citizenship or nationality after 4 July 2002, as a result of renunciation, voluntarily relinquishment, action or inaction. This is replaced with a requirement not to have done so after the "relevant day". For British Nationals (Overseas) the "relevant day" will be 19 March 2009, for the other types of nationals covered by section 4B it will remain as 4 July 2002. These dates correspond with the dates the relevant changes were announced.

Section 45: Descent through the female line

171. Section 45 amends section 4C of the BNA 1981 to allow applicants born before 7 February 1961 to be able to register as British citizens, provided they meet the other requirements in section 4C. The amendments made by the section 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.

172. Section 4C, as inserted by section 13 of the NIAA 2002, conferred an entitlement to registration as a British citizen on persons born between 7 February 1961 and 1 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.

173. Section 45(2) removes the 7 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 1 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.

174. Section 45(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 section; 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).

175. 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)).

176. 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.

177. 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.

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178. 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 (that is, 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 (that is, the applicant's father) who becomes a CUKC under those same provisions.

Section 46: Children born outside UK etc. to members of the armed forces

179. Section 46 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 section to a father or mother who is a member of the armed forces who is serving outside the UK and the qualifying territories.

180. 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.

181. 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 section 47).

182. 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.

Section 47: Good character requirement

183. Section 47 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.

184. 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.

185. 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

Section 48: Meaning of references to being in breach of immigration laws

186. Section 48 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, section 48 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. Section 48 also adds a new limb to the list of persons who are not considered to be in breach of the immigration laws to cover those with a qualifying CTA entitlement. New section 50A(5) defines when a person is considered to have a qualifying CTA entitlement for these purposes.

187. 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 section is commenced. In relation to persons born before commencement, or specified applications made before commencement but not decided until after commencement, section 48(3) provides that section 11 of the NIAA 2002 shall continue to apply.

188. Furthermore section 48(3)(d) and (4) provide that for the purposes of determining whether a person was in breach of the immigration laws prior to 7 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.

189. Section 48(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.

Section 49: Other interpretation etc.

190. Section 49 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.

191. Section 49(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).

192. Section 49(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 qualifying CTA entitlement; 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

Section 50: Restriction on studies

193. Section 50 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 or her studies whilst here. It will not apply to migrants who are, or have been, granted indefinite leave to enter or remain.

194. 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.

Section 51: Fingerprinting of foreign criminals liable to automatic deportation

195. Section 51 amends section 141 of the 1999 Act 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.

196. 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 1999 Act to include the foreign criminal as described in the above paragraph. The provisions of sections 141 to 146 of the 1999 Act which apply in relation to a category C person will apply accordingly.

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

Section 52: Extension of sections 1 to 4 of the UK Borders Act 2007 to Scotland

198. Section 52(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".

199. 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 section makes provision for the sentences for those offences in Scotland.

200. 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

Section 53: Transfer of certain immigration judicial review applications

201. Section 19 of the Tribunals, Courts and Enforcement Act 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. Section 20 of the Tribunals, Courts and Enforcement Act 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.

202. Subsection (1) of section 53 allows immigration and asylum judicial review applications to be transferred from the High Court to the Upper Tribunal, provided that they call into question a decision by the Secretary of State not to treat submissions as an asylum or human rights claim within the meaning of part 5 of the NIAA 2002 wholly or partly on the basis that they are not significantly different from material that has been previously considered. Certain other conditions must also be met. These types of cases are commonly referred to as “fresh claims” cases. Subsections (2) and (3) make equivalent provision for Northern Ireland and Scotland.

Section 54: Trafficking people for exploitation

203. Section 54 expands the definition of exploitation in the offence of trafficking in section 4 of the AITCA 2004. This is to cover use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship. This section substitutes the existing definition in section 4(4)(d) of that Act, which provides that a person who is “requested or induced” to undertake any activity is exploited. The effect of this amendment is to ensure the offence of trafficking captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.

204. Section 54 does not extend to Scotland (see section 57(4)).

Section 55: Duty regarding the welfare of children

205. Section 55 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.

206. 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

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by 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.

207. 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).

208. 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.

209. 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).

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

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

212. 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.

Section 56: Repeals

213. Section 56 introduces the Schedule which sets out the extent to which current legislation is repealed by the provisions of the Act.

Section 57: Extent

214. Subject to certain exceptions set out in subsections (2) to (4), section 57 provides that the Act extends to England, Wales, Scotland and Northern Ireland and amendments, modifications and repeals effected by the Act have the same extent as the provisions to which they relate. Provisions, other than those of Part 1 (border functions) or section 53 (transfer of certain immigration judicial review applications), may be extended to any of the Channel Islands or the Isle of Man by Order in Council.

Section 58: Commencement

215. Section 58 contains provisions relating to the coming into force of the Act. Subsections (2), (3)(a) and (4)(b) provide for specified provisions to come into force on such days as the Secretary of State by order appoints. Subsection (4)(a) provides for section 53 (transfer of certain immigration judicial review applications) to come into force on such day as the Lord Chancellor by order appoints. All other provisions come into force on the passing of the Act. Subsection (16) provides that before commencing section 52 (detention at ports in Scotland) the Secretary of State will consult the Scottish Ministers

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

216. Section 58(9) requires that the commencement order bringing into effect sections 39 to 41 will contain certain transitional provisions. These provisions are to ensure that people who apply for British citizenship before the earned citizenship provisions are commenced will be treated under the current law in respect of the outstanding application.

217. Section 58(9)(b) in conjunction with section 58(10) and (11) requires the order also to include transitional provisions for citizenship applications made by those with indefinite leave to remain on the date of commencement and those who – on that date - have submitted an application which is subsequently successful. The provisions must ensure that for a period of two years beginning with the date of commencement such persons can apply for British citizenship under the current law.

218. Section 58(12) distinguishes the commencement order to which (9) applies from an order commencing the regulation making provisions in sections 39 to 41 so that such an order can be made prior to the principal commencement order (which must include these transitional provisions).

219. Subsection (15) of section 58 provides that no order may commence section 53 (transfer of certain judicial review applications) unless the functions of the Asylum and Immigration Tribunal have been transferred under the Tribunals, Courts and Enforcement Act 2007.

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

HANSARD REFERENCES

Stage	Date	Hansard Reference
House of Lords (session 2008-09)		
Introduction	14 January 2009	Vol 706; Col 1224
Second Reading	11 February 2009	Vol 707; Cols 1128-1213
Committee	25 February 2009; 2 March 2009; 4 March 2009; 10 March 2009	Vol 708; Cols 205-304; Cols 508-610; Cols 734-836; Cols 1137-1164
Report	25 March 2009; 1 April 2009	Vol 709; Cols 661-754; Cols 1081-1152
Third Reading	22 April 2009	Vol 709; Cols 1535-1543
House of Commons (session 2008-09)		
Introduction	23 April 2009	
Second Reading	2 June 2009	Vol 493; Cols 169-241
Committee	8 sittings: 9 June 2009; 11 June 2009; 16 June 2009; 18 June 2009	Hansard Public Bill Committee
Report and Third Reading	14 July 2009	Vol 496; Cols 177-257
House of Lords (session 2008-09)		
Lords Consideration of Commons Amendments	20 July 2009	Vol 712; Cols 1386-1397
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