BINGHAM CENTRE FOR THE RULE OF LAW

Nationality and Borders Bill: A Rule of Law Analysis of Clauses 67 to 80

Dr Ronan Cormacain, 7 February 2022

BICL
British Institute of International and Comparative Law

Executive Summary

This Report analyses Clauses 67 to 80 of the Nationality and Borders Bill from a Rule of Law perspective. It follows on from our two previous Reports on the Bill.

Clause 67 provides that anything in the Trafficking Directive which is incompatible with the Bill ceases to be law. However, it does not specify which provisions of the Trafficking Directive this applies to. Either the Government knows what provisions it wants to disapply but is not saying, or it does not know what provisions it wants to disapply. Both options undermine the legal certainty required by the Rule of Law. This Clause should either be dropped, or else accompanied by a full set of consequential amendments and repeals.

Clause 76 undermines the right of effective access to a court by granting a power to immigration tribunals to charge legal representatives for wasted resources as a result of acting improperly, unreasonably or negligently. This will have a chilling effect on the ability of lawyers to vigorously present arguments on behalf of their clients.

Clause 78 introduces powers to help consolidate immigration legislation. This will promote the Rule of Law values of accessibility and intelligibility of legislation and is to be welcomed.

Clause 80 contains a Henry VIII power, allowing the Secretary of State to make regulations which amend or repeal an Act of Parliament. This kind of clause undermines parliamentary sovereignty, legal certainty and the Rule of Law.

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The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. The project is being led by Dr Ronan Cormacain.

We are particularly grateful for the assistance of Raza Husain QC (of Matrix Chambers), Eleanor Mitchell (of Matrix Chambers) and Sarah Dobbie (of 5 Essex Court) for their assistance in the preparation of this Report.

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Introduction

On Tuesday 8 February and Thursday 10 February, the House of Lords will continue with Committee Stage of the Nationalities and Borders Bill.

Our Report of 26 January 2022 considered Clauses 9 and 11 of the Bill.

Our Report of 31 January 2022 considered Clause 29 to 39 of the Bill.

This Report considers Clauses 67, 76, 78 and 80.

Clause 67 declares that provisions of the Trafficking Directive which are incompatible with the Bill cease to be law in the UK.

Clause 76 grants an immigration tribunal the power to charge representatives who have acted improperly, unreasonably, or negligently for wasted costs of the Tribunal.

Clause 78 allows for pre-consolidation amendments of immigration legislation.

Clause 80 allows the Secretary of State to make regulations in consequence of the Bill, including regulations amending or repealing current or future Acts of Parliament.

This Report analyses these Clauses from a Rule of Law perspective and identifies amendments which have been tabled by peers which may remove some Rule of Law deficiencies in the Bill.

Clause 67: The Trafficking Directive as simultaneously law and not law

Clause 67 of the Bill provides that any legal effects derived from the retained EU Trafficking Directive which are incompatible with any provision in or made under the Bill cease to be law. The major Rule of Law problem to which this clause gives rise is that it does not specify which provisions cease to be law. New legislation will invariably interact with old legislation. The standard practice is that the new legislation will specify, by way of a list of consequential amendments or repeals, the precise details of its impact upon that old legislation. But this clause is silent on this crucial point. There is no list of consequential amendments, and no list of repeals. Therefore, no-one can be sure what provisions in the Trafficking Directive are still law, and what legal effects arising out of that Bill are still law. This significant legal uncertainty will continue up until the point that a judge makes an authoritative ruling. The Trafficking Directive is therefore the legislative equivalent of Schrödinger's cat – it is simultaneously law, and not law.[1]

Legislative background

The EU Trafficking Directive of 2011 was enacted to prevent and combat trafficking in human beings and to protect its victims. Prior to Brexit it had vertical direct effect in the UK, meaning that it could be relied upon by an individual against the state.

Clause 67 introduces legal uncertainty. Clause 67 provides that retained EU law derived from the Trafficking Directive ceases to have effect to the extent that it is incompatible with the provisions of, or made under, the Bill. In full, it states:

> Section 4 of the European Union (Withdrawal) Act 2018 (saving for rights etc under section 2(1) of the European Communities Act 1972) ceases to apply to rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Trafficking Directive so far as their continued existence would otherwise be incompatible with provision made by or under this Act.

[1] A longer version of this point can be found in Ronan Cormacain and Oliver Garner "Schrödinger's Trafficking Directive and the Nationalities and Borders Bill: Simultaneously law and not law" U.K. Const. L. Blog (16th December 2021) (available at https://ukconstitutionallaw.org/))

This creates significant legal uncertainty[2] because, rather than specifying the provisions of the Trafficking Directive which no longer apply from the date the Bill enters into force, there is instead a blanket statement that any provisions may cease to apply at a hypothetical future date at which any incompatibility may be identified. Could this uncertainty be remedied by future delegated legislation which repealed or amended the Directive? Possibly yes, but only if there is power to do so by statutory instrument. And in any event, there is no good reason to dodge this important point in primary legislation by leaving it to a much less scrutinised statutory instrument.

Explainer – the doctrine of implied repeal

The doctrine of implied repeal means that where an old Act is incompatible with a new Act, the old Act is impliedly repealed, to the extent of that incompatibility, by the new Act. It is one outworking of the principle of sovereignty of Parliament – legislation passed by a previous Parliament cannot bind the hands a future Parliament. As such, it functions as a constitutional backstop, guaranteeing that, notwithstanding any failure of Parliament to properly repeal an inconsistent older Act, the newer Act will nevertheless have full effect. According to Bennion on Statutory Interpretation

> In modern times, when standards of legislative drafting are high, the presumption against implied repeal is stronger. Moreover, the more weighty the enactment the stronger the presumption against its implied repeal.[3]

Bennion's point is that good legislative practice is to be express about repeals, and thus there will be no need for implied repeals. The doctrine of implied repeal is a useful backstop if the drafter of a Bill has inadvertently failed to consider a conflicting provision in an older Act. But the disapplication provision in Clause 67 turns this on its head with a default of not directly dealing with any inconsistent earlier provision in the Trafficking Directive.

Clause 67 and the Rule of Law

Clause 67 as currently drafted raises Rule of Law concerns. The Rule of Law requires legal certainty, that is to say we are bound by fixed, clear and certain rules, which are known in advance. We don't know if any provision in the Trafficking Directive, or any legal effect deriving from it, is law until such time as a judge "opens the box" and makes a determination as to whether that retained EU law is compatible with the Nationality and Borders Bill. If affected persons or practitioners were trying to determine a lawful course of conduct under the Trafficking Directive, they will have a difficult task. They would need to read every provision of this Bill, and every provision of the Trafficking Directive and then make a subjective judgement if one conflicts with the other. The difficulty of this task is illustrated by the fact that not even the Government have been able to do it – otherwise they would have done it and listed the results in a schedule of consequential amendments and repeals.

The correct course of action, which is followed in every single other Act of Parliament affecting pre-existing law, is to set out consequential amendments and a repeal schedule stating exactly what has happened to the pre-existing law. For example, when the Fisheries Act 2020 made changes to retained EU law, it included Schedule 11, entitled "Retained Direct EU Legislation: Minor and Consequential Amendments". Schedule 11 contained 12 pages of detailed technical amendments to various pieces of EU legislation. Schedule 11 was a good example of the standard practice, unremarkable because of the ubiquity of a consequential amendments schedule in well-drafted Government Bills.

Professor Xanthaki makes precisely this point in favour of legal certainty, saying that

> General provisions stating that anything in contrast to the new legislative text is amended are unclear and invite for judicial law-making.[4]

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[2] See further, Oliver Garner "Modifying Retained EU law in the UK: Increasing Rule of Law Concerns" (Reconnect Blog, 20 October 2021). Available at https://reconnect-europe.eu/
[3] Bennion on Statutory Interpretation (section 6.10, 7th edition).
[4] Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Bloomsbury, 2014) page 183

There is nothing wrong with Parliament going through the Trafficking Directive and deciding to discard or amend provisions in it. That would be a perfectly proper course of action. But a blanket statement that anything in the Directive which is incompatible with the Bill no longer has effect is bad law-making.

The Explanatory Notes give no additional information and only repeat the wording of the Clause. As the Joint Committee on Human Rights observed in its Report,

> The explanatory notes in relation to clause 67 provide no real further elucidation as to what this clause means in practice (or in law). It is consequently not possible to assess what human rights (such as those protected under Article 4 ECHR or ECAT) may be affected by this clause.[5]

Clause 67 and good lawmaking practice

Clause 67 also detracts from the Rule of Law requirement to have sound law-making practice, as it allows the Government to hide the effect of the Bill behind a bland statement on incompatibility in the Bill. There is no doubting the right of the Government to introduce legislation to repeal the Trafficking Directive, nor the power of Parliament to repeal it. These are matters of political discussion and persuasion in a functioning legislative assembly. However, with this clause, parliamentarians do not know what they are voting for. The Government does not have to pay a political price for doing something as potentially unpopular as repealing parts of a law designed to protect victims of human trafficking. Parliamentary sovereignty does mean that Parliament can of course enact unpalatable laws, but it requires a clear statement in that legislation to that effect. For example, it could say that Article 11 of the Trafficking Directive (assistance and support for victims of trafficking) is repealed. Simply saying that "anything incompatible is repealed" dodges the political price of that repeal. Furthermore, it pushes this important political question onto the courts, and forces them to decide important policy matters which they may well feel are better decided in the political sphere.

Clause 67 and legal certainty

The most basic test for any legislative provision is – does it set out the law? Clause 67 does not pass that test, because it does not set out the law. The reader has no effective way of knowing if the Trafficking Directive is law or not law as the Bill fails to give a fixed, clear and certain answer. The correct approach is that set out in virtually every other Bill enacted by Parliament – a specification of what it does to the pre-existing law.

The Joint Committee on Human Rights are of a similar opinion, reporting that

> We are concerned that clause 67 NBB, as read with section 4 EUWA, lacks sufficient clarity and accessibility to be compatible with the rule of law and moreover does not allow the Committee to know the extent to which human rights, for example the rights of victims of slavery or human trafficking, might be negatively affected by this clause.[6]

This lack of legal certainty is particularly worrisome considering that the Trafficking Directive is about protecting some very vulnerable people.

Either the Government knows what provisions of the Trafficking Directive it wants to disapply but is not saying, or it does not know what provisions of the Trafficking Directive it wants to disapply. Both options undermine legal certainty and democratic legitimacy. Clause 67 should either be removed from the Bill, or a proper set of consequential amendments and repeals included.

There is no amendment currently tabled that Clause 67 ought not stand part of the Bill.

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[5] Joint Committee on Human Rights "Legislative Scrutiny: Nationality and Borders Bill (Part 5- Modern Slavery) (11th Report of Session 2021-22) HC 964, HL Paper 135, pparagraph 105.
[6] *Ibid*, paragraph 109.

Clause 76: Right of access to a court

Clause 76 introduces a new power to charge legal representatives conducting cases in immigration tribunals, where the tribunal considers that tribunal resources have been wasted. This is a new power which is distinct from existing powers where a tribunal may order one party to pay the "wasted costs" of another party, as set out in section 29 of the Tribunals, Courts and Enforcement Act 2007. A tribunal may charge the representative if they find that the representative has "acted improperly, unreasonably or negligently". The details of how a wasted resource order may be made are to be left to the rule of procedure of the tribunals. One point of detail is set out in clause 76, which is that

> (4) A person may be found to have acted improperly, unreasonably or negligently for the purposes of subsection (1) by reason of having failed to act in a particular way.

The Rule of Law requires that individuals have "effective access to courts".[7] Article 6 of the European Convention on Human Rights requires the right to a fair trial. Clause 76 has the potential to undermine the Rule of Law by making it harder for lawyers to represent their clients in immigration tribunals. The Law Society have stated that this provision could drive a wedge between solicitors and their clients. One example Law Society President I Stephanie Boyce gives is:

> Solicitors are fundamentally obliged to act in their clients' best interests, which may involve adjourning a case due to a change in circumstances which they are not at liberty to disclose.[8]

The Law Society of Scotland are of the view that "this clause is unnecessary".[9]

Immigration barrister Adrian Berry gives a practical flavour of the difficulties in acting in immigration tribunals:

> immigration lawyers operate with clients who may lack funds and legal aid entitlements; whose documents may be incomplete, missing, or badly translated; and whose statements as to their past experiences may be hard to secure on account of the ill-treatment they have suffered in their home country.[10]

The possibility of being charged for wasting the resources of the tribunal could have a chilling effect on a representative acting in these circumstances. Their obligation to advance the interests of their client, even with what might be perceived as a weak case or in the face of delays or difficulties they can do little to control, could be hindered by the fear that, if their conduct is thought to fall within a particular (as yet unknown) category, they will be taken to be acting unreasonably unless they can prove otherwise and could face a financial penalty. All cases, even the difficult ones, deserve a chance to be heard in a tribunal. Many a legal representative has had such a case which could annoy a judge. Exposing the representative to personal risks in these circumstances weakens the right of effective access to a court of their client.

Furthermore, there are elements of procedural unfairness about this proposed power. Firstly, the power can be applied in a way which reverses the burden of proof. So, a person could be charged by reason of "having failed to act in a particular way". This implies that a representative has things that they ought to have done, and if they haven't done those things, they will be assumed to have been acting improperly. This worry is reinforced by clause 77 which states that tribunal rules "must prescribe conduct that, in the absence of evidence to the contrary, is to be treated as improper, unreasonable or negligent".

Secondly, it would appear that the power to charge, try and levy a penalty falls upon the tribunal, rather than having separate structures in place for each of these elements. The normal approach in the UK courts is that one person makes an allegation, and then it is a separate person who weighs up the allegation and makes a judgement. Under clause 76, the tribunal will essentially be making the allegation that a representative has wasted its resources, and then the same tribunal will make a

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[7] Venice Commission on the Rule of Law Checklist, Benchmark E2a.
[8] Monidipa Fouzder "Borders bill 'risks driving wedge' between solicitor and client" Law Society Gazette (19 July 2021)
[9] Law Society of Scotland "Second Reading Briefing, Nationality and Borders Bill" (July 2021), page 16, available at https://www.lawscot.org.uk/media/371323/1572021-second-reading-briefing-on-nationality-and-borders-bill.pdf
[10] Adrian Berry "Lawyers under Pressure: Costs orders and charge orders in the Nationality and Borders Bill (Cosmopolis blog, 21 September 2021) (Available at https://cosmopolismigration.com/

judgement against that person. The tribunal will be the victim of wasted resources, the person who prosecutes this waste, and the judge who decides if there was waste.

As Adrian Berry points out, the immigration tribunals already have considerable case management powers under Part 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. These allow tribunals to require parties to do certain things for the purposes of regulating its own procedure and ensure cases are run effectively.

Tribunals also have the power to make "wasted costs orders" under the Tribunals, Courts and Enforcement Act 2007. This allows a tribunal to order the legal representative to pay wasted costs of the other parties if that representative acts improperly, unreasonably or negligently. The Tribunal Rules of Procedure specifically set out the process for a wasted costs order.[11]

If a legal representative is acting in an unprofessional way, there exists a separate regulatory framework to hold them to account. For example, in the case of a solicitor, complaints can be made to the Solicitors Regulation Authority who can take action in respect of a serious breach of standards. Sanctions include fines, rebukes and reprimands.[12] As the Law Society of Scotland point out

> There are existing statutory and common law powers to deal with such issues as matters of professional discipline by the appropriate regulators following existing complaints procedures.[13]

The House of Lords Constitution Committee have raised similar concerns about this clause, arguing that

> There is at least the potential that these new rules could discourage legal representatives and immigration advisers regulated by the office of the Immigration Services Commissioner, as well as applicants, from raising or engaging in legitimate proceedings.[14]

Where a representative in an immigration tribunal advances an argument that loses, there is a possibility that the tribunal will find that argument unreasonable. That is the nature of an adversarial system – the sound argument wins, and the unsound argument loses. But there is a rather large jump from ruling against an unsound argument, to charging the lawyer who advances it for wasting the resources of the tribunal. To establish a presumption of financial consequences for representatives, and hence dramatically to widen the scope of the wasted costs order regime, will have a seriously deleterious effect on the ability of lawyers to zealously advocate on behalf of their client.

In a legal opinion obtained by Freedom from Torture, it is stated that:

> Legal representatives who act for appellants in the Tribunals – particularly on a publicly funded basis – already face a difficult, and often financially precarious, task. The risk of being exposed to personal liability for the costs of the Secretary of State, and potentially the Tribunal, in any but exceptional circumstances is liable to operate as a significant disincentive to taking on work of this kind.[15]

The power to charge the legal representative of an immigrant for acting improperly, unreasonably or negligently is unnecessary given the range of powers currently available. It will have a chilling effect on the ability and willingness of representatives to present cases on behalf of their clients, and will thus undermine effective access to the courts and the Rule of Law.

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[11] Rule 9, Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
[12] Fuller details available on the website of the Solicitors Regulation Authority at https://www.sra.org.uk/consumers/solicitor-check/sanctions/
[13] Law Society of Scotland "Second Reading Briefing, Nationality and Borders Bill" (July 2021), page 16, available at https://www.lawscot.org.uk/media/371323/1572021-second-reading-briefing-on-nationality-and-borders-bill.pdf page16.
[14] House of Lords Constitution Committee "Nationality and Borders Bill" (11th Report of Session 2021-22) (21 January 2021) HL Paper 149, paragraph 94.
[15] Freedom From Torture, Opinion on the Nationality and Borders Bill, paragraph 235, available at https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf

Members concerned about the Rule of Law issues of this Clause should support the amendment tabled by Baroness McIntosh and Lord Paddick that Clause 76 not stand part of the Bill.

Clause 78: Pre-consolidation amendments of immigration law

Clause 78 grants the Secretary of State the power to make regulations amending immigration law, as a precursor for a general consolidation of immigration legislation. Consolidation is a technical exercise, not involving any substantive policy change, simply placing all the existing law into a single new law.

This is a power that is potentially beneficial from a Rule of Law perspective. Immigration legislation is extremely complex, amended on a continual basis and contained in a wide range of statutory sources. This makes it inaccessible and unintelligible to most users. Consolidation of all these different sources of law will promote Rule of Law values such as accessibility, clarity and legal certainty. The Law Commission for England and Wales made this a central recommendation in its report "Simplification of the Immigration Rules" in 2020.[16]

Pre-consolidation amendments, including those with a Henry VIII power to amend primary legislation are a standard way to help prepare the statute book for a major consolidation. For example, section 76 of the Charities Act 2006 contains a similar power framed in the same way as this Clause.

Regulations made under this Clause do not come into force until an Act of Parliament is passed consolidating immigration legislation. Provided that the consolidation Act sets out sufficient detail on immigration law, this provides an appropriate degree of parliamentary scrutiny.

As well as consolidation of immigration legislation, there is also a need for simplification of it. This means less complexity, less variation, fewer different categories and a system which is much easier to understand for immigrants, officials and immigration lawyers and tribunals. The House of Lords Constitution Committee have welcomed Clause 78 but also argued that it needs to go further, stating

> But this does not get to the root of the problem, which is that the law in this area needs to be simplified and made more intelligible. We urge the Government to prioritise simplification, in addition to consolidation.[17]

Consolidation of immigration law will promote the Rule of Law and will allow for greater accessibility and intelligibility of immigration legislation.

Amendments tabled by Baronesses Hamwee and McIntosh, and Lord Paddick supplement this power to consolidate immigration legislation. A requirement to consult before making regulations is a helpful improvement to this power as is a requirement that this exercise be completed by 31 December 2025.

Clause 80(2): Henry VIII powers to rewrite Acts of Parliament

Clause 80(2) contains an extremely significant and important power. It states:

> (2) The Secretary of State may by regulations make such provision as the Secretary of State considers appropriate in consequence of this Act.

Clause 80(3) continues:

> (3) The provision that may be made by regulations under subsection (2) includes provision amending, repealing or revoking any enactment.

Enactment is defined in clause 80(4) to include any Act of Parliament, and any primary legislation of a devolved legislature in Scotland, Wales or Northern Ireland. This definition means it applies to Acts of Parliament already made as well as any Acts of Parliament to be made in the future. If regulations

[16] Law Commission "Simplification of the Immigration Rules: Report" (January 2020) Law Com No 388.
[17] House of Lords Constitution Committee "Nationality and Borders Bill" (11th Report of Session 2021-22) (21 January 2021) HL Paper 149, paragraph 99.

made under clause 80(2) amend any primary legislation, clause 80(5) provides that they are subject to the affirmative resolution procedure.

Explainer – Henry VIII clauses

A Henry VIII clause is a power given to a Minister to amend an Act of Parliament by means of secondary legislation. The Delegated Powers and Regulatory Reform Committee of the House of Lords was extremely critical of these powers in its November 2021 Report entitled "Democracy Denied? The urgent need to rebalance power between Parliament and the Executive":

> Henry VIII powers have long attracted particularly strong criticism. This is because they are powers conferred by primary legislation which enable a minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament. The objection to Henry VIII powers rests in principle on the fact that primary legislation, in contrast to delegated legislation, is subject to relatively substantial parliamentary scrutiny … delegated legislation is unamendable and, if debated at all, is debated once in either or both Houses.[18]

The Democracy Denied report is merely the latest in a long line of reports, from multiple sources, condemning the regular and repeated use of Henry VIII clauses. Put simply, Ministers should not be given the power to over-ride Acts of Parliament.

The Rule of Law and clause 80(2)

The Henry VIII power in clause 80(2) undermine the Rule of Law.

Firstly, it does not respect the primacy of the legislature. Benchmark A4 of the Venice Commission Checklist requires the supremacy of the legislature to be guaranteed. This clause allows the executive to overturn the legislature. Not only could this power be used to repeal Acts of Parliament already in force, but it could be used to repeal a future Act of Parliament. This means that if a future Parliament, in full knowledge of the impact of this Bill, decides to pass a law, that a future Secretary of State could repeal that law.

Secondly, the only criterion is that it is that the Secretary of State considers it "appropriate in consequence of this Act". To include this power is writing the Government a blank cheque on immigration rights. The safeguards against arbitrary exercise of this discretion are weak in a number of ways. It is not that further provision is necessary in consequence of the changes made by this Bill, instead only that it is appropriate. Furthermore, this is not an objective test of it being appropriate, merely that the Secretary of State considers it appropriate. The House of Lords Constitution Committee's objection to this is framed in the following terms:

> The power in clause 80(2) should not be exercisable by way of a subjective "appropriateness" test, but rather by an objective test such as necessity. In an area of law, notable for its obscurity, an "appropriateness" test sets the bar far too low.[19]

Thirdly, this provision undermines legal certainty. The Constitution Committee said that "its potential application is far-reaching and largely unforeseeable".[20] The public are entitled to know what the effect of an Act of Parliament is, and Parliamentarians are entitled to know what they are voting for. This clause does not provide that legal certainty. If there are consequential amendments necessary for the proper working of the Bill, they should be included in the Bill. The Government should not have a broadly worded power to add on extras that occur to them later on.

This Henry VIII power undermines parliamentary control of the executive, legal certainty and the Rule of Law.

Members concerned about the Rule of Law implications of this provision should support the amendment tabled by Baroness McIntosh to Clause 80 which replaces "appropriate" with "necessary"

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[18] Delegated Powers and Regulatory Reform Committee, 12th Report of Session 2021-22 "Democracy Denied? The urgent need to rebalance power between Parliament and the Executive" (November 2021) HL Paper 106.
[19] House of Lords Constitution Committee "Nationality and Borders Bill" (11th Report of Session 2021-22) (21 January 2021) HL Paper 149, paragraph 101.
[20] *Ibid*, paragraph 101.

There is no amendment currently tabled which would leave out all of Clause 80(2), nor one which would leave out the Henry VIII power in Clause 80(3).

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