Dear Harriet,

The British Nationality Act 1981 (Remedial) Order 2019

I am writing further to my letter of 4 May 2018 when I undertook to provide you with a more detailed response to some of the wider issues about the British Nationality Act 1981 (BNA) raised in your letter of 18 April. I am very sorry that this letter is later than I promised. These are complex and highly technical issues requiring detailed consideration, much of which has also been relevant to consideration of Windrush cases.

You were concerned that in addition to the matters addressed by the Remedial Order, the BNA may contain other potentially unlawful discrimination and asked for an assessment as to whether such discrimination does persist. A detailed explanation responding to the individual points is set out below.

I welcome the publication of the Committee's report on the British Nationality Act 1981 (Remedial) Order and agreement that the use of a Remedial Order through the non-urgent procedure is appropriate.

A revised draft Remedial Order has been laid in Parliament today. The Government's response to the recommendations in the Committee's report of 31 May is included in the summary of representations published with the draft Remedial Order. I intend to give further consideration to the Committee's recommendation about the application fee for those persons reapplying under section 4F and will provide a response to the Committee before the end of the 60-day scrutiny period.
Certain references in the Act seem to assume that a person’s parents must be (or must at some point have been) in a marriage or civil partnership, therefore potentially introducing discrimination based on the marital status of that person’s parents and creating potential difficulties for single parent households. See section 3(6) and section 17(6) of the Act. Similarly, other provisions requiring the consent of both parents (unless one has died) do not seem to adequately accommodate the situation of single parent families – section 4G(3) of the Act is one such example. The same would seem to be the case for paragraph 6 of Schedule 2 to the British Nationality (General) Regulations 2003.

The references to “father” and “mother” in sections 3(6) and 17(6) should be read in conjunction with section 50(9) and 50(9A) of the BNA. This means that consent is required from a person who meets the definition of ‘father’ or ‘mother’. In terms of a ‘father’ this can be the mother’s husband at the time of the birth, a person who is the child’s father for Human Fertilisation and Embryology legislation purposes, or, in other cases, a person who can demonstrate paternity. Thus the parents do not have to have been married or in a civil partnership. The wording of these sections also allows the requirement for a parent’s consent to be waived in certain circumstances, including where one of the parents has died. Additional criteria include where a marriage or civil partnership has ended, but do not include situations where a non-formalised relationship has ended. However, in situations where a person has not been able to obtain consent within the requirements of this provision, an application can be considered at the Home Secretary’s discretion under section 3(1).

Section 4G(3) specifically provides for the registration of children whose parents were not married. Section 4G(5) allows for consent to be waived, and published guidance1 sets out when this might be appropriate, including, for example, where the child has no contact with the parent who has not consented. This accommodates the situation of single parent families.

Certain provisions provide that the relevant “qualifying connection” with the UK (or a British overseas territory) needs to be with the person’s father or his father’s father. Similarly, other provisions refer to descent in “the male line”. Such provisions therefore introduce discrimination as between those who have a British father (or paternal grandfather) and those who have a British mother (or grandmother or maternal grandfather). Such provisions include section 10(4), section 11(3), section 22(4), section 23(3)(b) and 23(5), and Schedule 8, paragraph 3(1)(b) of the Act.

A number of provisions in the BNA provide for the status of those born before 1981 when citizenship was transferred only through the male line. The provisions cited above relate to people who had originally acquired citizenship of the United Kingdom and Colonies through male British descendants. Amending those sections would not result in equal treatment as they only apply to those who already had status before 1983, and could not have the effect of retrospectively conferring citizenship on children of British mothers or grandmothers. The issue of female transmission was addressed by introducing new provisions for the registration of children of British mothers in Section 4C.

Similarly, there is a lack of clarity as to the reading of section 4C of the Act, when read with section 5(1) of the 1948 British Nationality Act. Can section 5(1) of the 1948 Act be read to substitute “mother” for “father” in that section, and therefore to remove discrimination between those whose maternal grandmothers were born in the UK and those whose maternal grandfathers were born in the UK? Or is there persisting discrimination in this respect?

Section 4C(3) of the Act allows for a person to be registered as a British citizen where they would have become a British citizen under section 5 of the 1948 Act and acquired a right of abode in the UK, had British mothers been able to transmit their citizenship in the same way as British fathers.

However, the Act was not worded in such a way as to provide for a person to acquire citizenship on the basis of a British grandmother. When section 4C was introduced by the Nationality, Immigration and Asylum Act 2002, it was clearly linked to a commitment made in 1979 to register the children of British-born women.

When the 2002 Act was passed there were statements made in Parliament that the Government could only "go so far to right the wrongs of history". The view held at that time was that to go back further in time, or to broaden the terms of the concession so as to cater for the foreign-born grandchildren and great-grandchildren of British women, would mean that the number of "what ifs" to be taken into account would become unmanageable.

The Act does not therefore allow a person to register on the basis of a British grandmother, even though, in certain limited circumstances, female transmission before 1983 would have allowed some grandchildren of British women to acquire citizenship of the United Kingdom and Colonies under section 5 of the British Nationality Act 1948.

**Some provisions only apply to people whose mothers were British (e.g. section 11(2) of the Act).**

Section 11(2) provides a small exception to the general rule that all citizens of the UK and Colonies who had the right of abode became British citizens. It covered children who would otherwise be stateless whose mothers were citizens of the UK and Colonies, and who were entitled to registration under section 1(1) of the British Nationality (No 2) Act 1964. In those cases a right of abode could be acquired by a person with no link with the UK (for example where the mother acquired her citizenship through a colony). It therefore seemed illogical to give a child British citizenship where the mother would not have qualified.

As this is a specific provision for people who could only have registered as a citizen of the UK and Colonies on the basis of a British mother, it is not relevant to people with British fathers.
Certain provisions only apply to a “wife” of a British citizen and would therefore seem to discriminate against husbands of British nationals. For example, section 14(1)(b)(iii) and (iv) and 14(1)(e), section 23(1)(c), section 25(1)(e) and 25(1)(f) and section 30(b) of the Act. It would also be helpful to have confirmation from the Home Secretary that the Act does not contain discrimination as between those who are married and those who are in civil partnerships.

These sections again relate to people born before 1983 who acquired status under the 1948 Act. Sections 14 and 25 set out whether a person acquired citizenship “by descent” or “otherwise than by descent”; sections 23 and 30 refer to people who became British dependent territories citizens or British subjects. Under previous legislation, it was possible for a woman to acquire citizenship on the basis of her marriage to a British husband. These provisions therefore determine what the status of those women is under the current legislation, but do not create new discriminatory categories. Under the current legislation, registration and naturalisation provisions allow husbands, wives and civil partners to acquire nationality on an equal basis.

Certain provisions only apply to people whose fathers (and not mothers) were serving in the armed forces, Crown service or in an EU institution. For example, section 14(2) or section 25(2) of the Act.

These sections also relate to people born before 1983 who acquired status under the 1948 Act. Sections 14(2) and 25(2) set out that a person born before 1983 acquired citizenship “otherwise than by descent” if their father was in Crown service. As women could not pass on citizenship before 1983, this could not apply to children of British mothers.

Rt Hon Caroline Nokes MP
Minister of State for Immigration