ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty’s policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. This submission sets out Liberty’s view on the Windrush scandal, some of the factors contributing to it, and the lessons the Home Office should learn as a result. While this submission will focus specifically on the hostile environment and use of data in this context, it should be recognised that, as has been argued by several others, the events contributing to the Windrush scandal have their roots in the policy and social-political context of the preceding decades, rather than months or years.¹

2. The hostile environment is a sprawling web of immigration controls operating far from ports and border controls and in the heart of our public services and communities.² Its effects reverberate well beyond the Government’s stated target group to affect migrants with regular status, and black and minority ethnic (BAME) communities. Requirements on public servants and private citizens to check people’s entitlements to goods and services, as well as the racially discriminatory impacts routinely felt by people who are subjected to such checks, damages the very fabric of the society we live in. Public servants and landlords, employers and bank clerks have come to view people they should support with suspicion - and especially BAME people of all immigration statuses - as measures such as skin colour and ‘foreign-sounding names’ become a crude proxy for immigration status. In turn, trust in essential public services is undermined, undocumented people are made destitute and vulnerable to exploitation, and each of us is conditioned to show ID and have our interactions with the State logged in the course of mundane interactions.

3. The hostile environment is in no way designed specifically to target undocumented people.³ It is designed to target anyone who does not have a British passport or biometric form of identification with which to prove their British citizenship and/or entitlement to goods and services; a group that is not coterminous with undocumented migrants. Indeed, many British citizens do not have passports. It is further important to clarify that a person’s immigration status is not fixed. People

² For further detail on hostile environment policies, see Liberty and others, The Border Controls Dividing Our Communities, April 2018 https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf
³ By undocumented people, we mean people who require leave to enter or remain in the UK but do not have it, or who have it but are unable to demonstrate it.
may move between statuses over time, and their status may not be accurately reflected by the documents that they hold. Liberty therefore rejects the framing of the Windrush scandal as the entanglement of certain people "in measures designed for illegal immigrants," for the reasons set out below.

**FACTORS LEADING TO THE WINDRUSH SCANDAL**

4. The injustice suffered by the Windrush generation exemplifies the human impact of the hostile environment in harrowing detail. These citizens have lost long-term employment, been made destitute, charged tens of thousands of pounds for healthcare, and in some cases exiled from friends, families and homes in which they have lived in the UK for decades, sometimes until the end of their lives.

5. The injustice that theWindrush generation have faced is not, as has been claimed, the result of inadequate documentation or evidence on their part. As early as 2014, the Home Office was warned that this group of Commonwealth citizens were at serious risk of being affected by hostile environment measures. When people furnished evidence demonstrating decades of long residence in the UK, it was in certain cases ignored, while other evidence that would have helped people demonstrate lawful residence in the UK had been destroyed by the Home Office. The Windrush scandal therefore was not the product of inadequate documentation; it was the product of a series of deliberate decisions taken by the Home Office, the effects of which are not confined to this specific group.

6. One crucial factor that must not be overlooked in the production of these devastating consequences is the Home Office’s data processing practice, which is explored extensively in Liberty’s *Care Don’t Share* report.

**BULK DATA-SHARING PRACTICES**

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4 See, for example, question 1 of the Windrush Lessons Learned Review call for evidence https://www.gov.uk/government/publications/windrush-lessons-learned-review/windrush-lessons-learned-review


8 Liberty, *Care Don’t Share*, December 2018 https://www.libertyhumanrights.org.uk/sites/default/files/Care%20Don%27t%20Share%20Report%20-%20December%202018_0.pdf
7. In the context of a hostile environment, many aspects of the lives of undocumented migrants, such as working or driving, or simply being present in the UK without the requisite permission, are criminalised, primarily by sections 24 and 24A of the Immigration Act 1971, as amended by more recent measures such as the Immigration Act 2016. These offences include knowingly entering the UK without leave; overstaying leave; failure to observe reporting conditions; obtaining leave to enter or remain by deception, and avoiding immigration enforcement by deception.

8. The Government relies heavily on the existence of these criminal offences coupled with the crime exemption set out at Schedule 2, paragraph 2 of the Data Protection Act 2018 (formerly Section 29 of the Data Protection Act 1998) in conjunction with a mix of statutory and common law data-sharing powers, to operate a series of bulk data-sharing agreements. It has further expressed its intention to use the ‘immigration control' exemption in the Data Protection Act 2018 (discussed below) to further facilitate these practices.9

9. These agreements see confidential personal information collected by essential public services shared with Home Office immigration enforcement teams, all too often without a person having the right to know about this sharing, or to consent or object to it.

10. Known bulk data-sharing schemes currently operate, or have until recently operated, between:

- the Home Office, the Department for Health and Social Care (DHSC) and NHS Digital with respect to patient medical records,10 (withdrawn November 2018);
- the Home Office and the Department for Education (DfE) with respect to children’s school records;11
- the Home Office and Cifas (an anti-fraud agency) with respect to bank accounts;12

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9 Libery, Care Don't Share, ibid., pages 29-30
10 Memorandum of Understanding Between Health and Social Care Information Centre and the Home Office and the Department of Health 27 September 2016
11 Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets 7 October 2016
12 Cifas is a third sector organisation that holds the UK’s largest anti-fraud database. A data-sharing agreement between it and the Home Office is referenced at paragraph 2.6 in Independent Chief Inspector of Borders and Immigration (ICIBI), An inspection of the 'hostile environment' measures relating to driving/licences and bank accounts October 2016
• the Home Office and the DVLA with respect to driving licences;\textsuperscript{13} and
• the Home Office, the Department for Work and Pensions (DWP) and HMRC\textsuperscript{14} with
respect to employment records and welfare benefits, including child maintenance.

11. Bulk data-sharing agreements between the Home Office and other Government
departments are not the only issue. It was revealed in 2017 that the Greater London
Authority (GLA) also shared aggregated, sensitive personal data collected by
homelessness outreach services with the Home Office in the form of a map showing the
location of non-UK rough sleepers, to facilitate immigration enforcement against them.\textsuperscript{15}
The homelessness charity St Mungo’s is also likely to have passed data on individual rough
sleepers to the Home Office for immigration enforcement.\textsuperscript{16}

12. Local authorities employ embedded immigration officers who sit in on interviews with
children and families when they apply for support from the local authority under Section
17 of the Children’s Act; reportedly to “conduct real-time immigration status checks” on
applicants.\textsuperscript{17} And over half of police forces have reported sharing data on victims of crime
with the Home Office.\textsuperscript{18}

13. These agreements and practices have shared features. They operate to facilitate Home
Office demands for personal data from specific agencies, namely up-to-date contact
details – most often addresses – for people who are suspected of committing an offence
under immigration laws which criminalise mundane daily activities.

14. They may also make provision for an agency to check a person’s immigration status with
the Home Office when they attempt to access a good or a service, and provide up-to-
date contact details to the Home Office when informed that a person is not entitled, or

\textsuperscript{13} COBI. An inspection of the ‘hostile environment’ measures relating to driving licences and bank accounts October 2016. ibid.
\textsuperscript{14} Agreements obtained by Liberty and journalists through FOI request, and referenced in Vice Magazine:
Simon Childs, Theresa May’s ‘Anti-Slavery’ Agenda Is About Deporting Migrants 21 September 2017
https://www.vice.com/en_uk/article/8xq0by/theresa-mays-anti-slavery-agenda-is-about-deporting-migrants
\textsuperscript{15} Agreement obtained through FOIA by Liberty and reported on by The Observer:
Mark Townsend, Home Office used charity data map to deport rough sleepers 19 August 2017:
\textsuperscript{16} Diane Taylor, Charity may have shared rough sleepers’ data without consent, watchdog finds
https://www.theguardian.com/society/2018/sep/21/st-mungs-is-likely-to-have-given-home-office-data-on-rough-
sleepers-information-commissioner
\textsuperscript{17} Edward Siddons and Niamh McIntyre, Home Office staff sit in on council interviews with migrant families 28 October 2018
\textsuperscript{18} Catrin Nye, Natalie Bloomer and Samir Jeraj, Victims of serious crime face arrest over immigration status 14 May 2018
https://www.bbc.co.uk/news/uk-44074572
owes a debt to the service; or to notify a service that a specific person should not be able to access it.

15. Some of these practices have been curtailed or suspended. In May 2018 the health data-sharing agreement relating to addresses was suspended in the face of a parliamentary rebellion and ongoing legal action, following a concerted campaign from civil society and the Chair of the Health Committee to end it.\footnote{Margot James, \textit{Data Protection Bill Report Stage debate}\textit{Hansard} col.756 \url{https://hansard.parliament.uk/commons/2018-05-09/debates/CE43B0ED-87D3-4F63-B8A4-2A6864790C2/DataProtectionBill(Lords)}\footnote{Correspondence between the Home Secretary and chair of the Home Affairs Select Committee 10 July 2018 \url{https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/Windrush-Home-Office-update-10-July-2018.pdf}} NHS Digital subsequently withdrew from it entirely in November 2018 in response to a legal challenge brought by the Migrants’ Rights Network, represented by Liberty.

16. In July 2018 the Home Secretary Sajid Javid further confirmed that he would pause some of the data-sharing agreements in the wake of the Windrush scandal – but only for a limited time period and, even then, only in relation to people aged over 30.\footnote{Correspondence between the Home Secretary and chair of the Home Affairs Select Committee 10 July 2018 \url{https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/Windrush-Home-Office-update-10-July-2018.pdf}}

\textbf{HOME OFFICE PROPENSITY TO ERROR}

17. There is already evidence to suggest that hostile environment measures in general, and existing data-sharing schemes administered by the Home Office specifically, involve a rate of error which, given the adversity of the consequences for affected individuals, who may well have leave to remain in the UK, should be considered significant. As the Home Affairs Select Committee recently remarked, the hostile environment as a policy “is unclear, and, in some instances, too open to interpretation and inadvertent error.”\footnote{Correspondence between the Home Secretary and chair of the Home Affairs Select Committee 10 July 2018 \url{https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/Windrush-Home-Office-update-10-July-2018.pdf}}\footnote{Home Affairs Select Committee, \textit{Immigration policy: basis for building consensus}, January 2018 \url{https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/500/500.pdf} paragraph 57} The Committee further acknowledged that “these errors [can be] deeply damaging and distressing to those involved.”\footnote{Home Affairs Select Committee, ibid.}

18. Consider, for example, the rates of error in the Home Office’s scheme to prevent undocumented people from accessing bank accounts. The Immigration Act 2014 prohibits banks from opening current accounts for undocumented individuals, and requires them to use a third-party database to check individuals’ eligibility. A 2016 investigation by the Chief Inspector of Borders and Immigration found that of a sample of 169 refusals to open
bank accounts, 10% of refusals had been made in error.\textsuperscript{23} One of those refusals involved a Jamaican national with leave to remain in the UK, who had been lawfully present in the country for over a decade. It is entirely possible that this person was a member of the Windrush generation.

19. These errors are not confined to entitlement checks for current accounts. \textit{The Guardian} recently reported\textsuperscript{24} on the case of Dr Mohsen Danaie, an Iranian-Canadian research scientist working for the UK’s Diamond Light Source. Dr Danaie holds a valid work visa, due to run out in September 2019. In September this year, he received a letter from Home Office Immigration Enforcement telling him that he had “no lawful basis to be in the UK”, that his driving licence would be revoked, and that he would be subject to forcible removal if he did not leave the UK voluntarily. The wrongful notification clearly was the result of inaccurate records being held either by the Home Office or the DVLA, and shared between the two agencies without Dr Danaie’s knowledge.

20. In autumn 2012 the Home Office contracted a private company, Capita, to contact individuals suspected of being in the UK without the requisite leave.\textsuperscript{25} Approximately 39,000 texts were sent advising those individuals that they were believed to be in the UK unlawfully. Some of them were advised to make plans to leave, causing them significant distress.\textsuperscript{26} The data provided to Capita by the Home Office was clearly of poor quality, as it resulted in several individuals with outstanding applications or leave to remain in the UK being contacted, including veteran anti-racism campaigner Suresh Grover. Hundreds of complaints were filed.\textsuperscript{27}

\textbf{IMPACT ON THE WINDRUSH GENERATION}

21. It is highly likely that members of the Windrush generation were traced by Home Office immigration enforcement, and/or had their ability to access essential goods and services curtailed, as a result of the data sharing agreements listed above, and on some occasions

\textsuperscript{23} ICIBI, op. cit.
\textsuperscript{26} “Diary: A text from Theresa May’s Border Agency. Get out of the country. LOL”, \textit{The Guardian}, 14/10/2013, available here: https://www.theguardian.com/politics/2013/oct/14/hugh-muir-diary-border-agency-may
\textsuperscript{27} “Home Office ‘go home’ texts sent to people with right to remain”, \textit{The Telegraph}, 18/10/2013, available here: http://www.telegraph.co.uk/news/uknews/immigration/10387058/Home-Office-go-home-texts-sent-to-people-with-right-to-remain.html
in conjunction with errors flowing from the Home Office’s poor data management practices. It is crucial to note, moreover, the difference in consequence between being wrongly identified as undocumented in 2012, and the escalation in those consequences following the imposition of a hostile environment. While receiving a text in error is distressing and inappropriate, it pales in insignificance to being barred from lawful work, housing, banking and free NHS care. The hostile environment effectively enables State-sanctioned destitution and ill-health, with significant and unacceptable consequences for the human rights of both its ostensible targets, as well as those with regular immigration status.

22. A National Audit Office report published in December 2018 sets out that:

“The Department is also seeking to identify people who have been subject to a ‘proactive’ compliant environment sanction and who may have been in the country before 1973. To do this, it applied the same criteria on nationality and age from its first review to different data covering around 114,000 potential data matches with other bodies. From this, it identified around 2,000 individuals born before 1 January 1973 from the same 12 Caribbean nations. The Department has not yet completed its review of these cases and so we could not examine these case summaries. Based on early work the Department considers that at least 25 cases of sanctions were wrongfully applied. This equates to around 1.3% of cases reviewed.

This review includes sanctions issued as a result of direct activity by the Department’s Interventions and Sanctions Directorate. It does not include measures enforced by employers and landlords on people’s eligibility to work or rent a home. The Department does not collect data to allow it to identify all the decisions taken under these schemes.²²

23. That report further sets out that:

“Both we and the Inspectorate have raised concerns several times since 2014 about the quality of the data and controls underpinning this system. The Department declined to cleanse its database as recommended by the Inspectorate in its review of compliant environment measures on driving licences and bank accounts in 2016.”²³

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²² National Audit Office, Handling of the Windrush situation, December 2018, paras 2.8 and 2.9  

²³ National Audit Office, Ibid., paragraph 3
24. More generally, the removal in 2012 and 2014 of vital safeguards in the immigration system that allow people to hold Home Office power to account contributed to the injustice that the Windrush generation and many others have and continue to face, including but not limited to in-country appeal rights, and legal aid.

RECOMMENDATIONS FOR THE FUTURE

25. At the time that public opprobrium at the Government’s treatment of the Windrush generation was at its peak, Government pushed through legislative measures that are highly likely to reduce immigration claimants’ ability to hold the Home Office to account, and to de-incentivise any improvement in its data processing practices. The immigration control exemption in the Data Protection Act 2018 allows data processors to set aside a person’s data protection rights when they are processing information for the purposes of immigration control, or the investigation or detection of activities that would undermine it.\(^{30}\) At a minimum, that Act should be amended to remove the exemption, and better still, the crime exemption should be narrowed to exclude immigration crimes, as set out in the attached briefing.

26. Although this submission has made only brief reference to other contributing factors, Liberty would further recommend that the Government reinstates legal aid for immigration claims, reinstates in-country appeal rights, and reduces fees for immigration and nationality applications to cost or below, with meaningful waivers for people who are unable to pay.

27. We would further recommend that the Government implements the full set of recommendations set out in our Care Don’t Share report.

CONCLUSION

28. It is clear from the Immigration White Paper\(^{31}\) that the Government remains committed to the hostile environment. However, the harm caused by that inhumane set of policies, and indeed the Home Office’s policies and practices in the decades preceding it extends well beyond the Windrush generation. If the

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\(^{30}\) Liberty, Care Don’t Share, op. cit. pages 70-73

\(^{31}\) HM Government, The UK’s future skills-based immigration system, December 2018, chapter 12

Government is to learn any lesson that comes close to remedying the injustice experienced by the Windrush generation, it must be this: that people’s fundamental human rights, whatever their immigration status, should not be subject to an overriding priority to carry out immigration enforcement no matter the cost.

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