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PROTECTING CIVIL LIBERTIES
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**Liberty's Second Reading Briefing on the
Immigration Bill in the House of Lords**

February 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

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
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Introduction

1. Successive administrations, in fraught attempts to look tough on immigration, have preferred endless reams of new legislation to the rather dull task of tackling widely acknowledged delays and inefficiency in the administration. The Immigration Bill continues this trend. It is a deeply irresponsible piece of legislation which, far from encouraging public confidence in the system, would allow the Government to shirk its responsibilities and insulate itself from challenge. The provisions of this Bill add to the layers of painful complexity which have come to characterise our immigration law, meaning that it is scarcely understandable by trained practitioners, never mind those subject to immigration control and the general public.

2. In this briefing we address Parts 1, 2, 3, 4 and Part 6, clause 61 of the Bill. We have produced a separate briefing on Part 6, clause 60 of the Bill which deals with last-minute proposals from the Government to render British citizens stateless. In summary, Part 1 of the Bill reduces protections against bad and unlawful decision-making which may result in an individual being wrongly removed from the UK or placed in immigration detention. It also provides for an open-ended extension of the circumstances in which force can be used to enforce immigration powers. Clause 5 appears to be an attempt to extend the legally dubious practice of in-border immigration spot-checks to allow immigration officials to collect biometric information on the spot. Part 1 also introduces new powers to search individuals and premises which sit uncomfortably within a confusing mass of overlapping existing provision.

3. Part 2 of the Bill addresses appeals against immigration decisions, variously eroding appeal rights, making them practically inaccessible, curtailing judicial discretion and shielding the Home Office from challenge. The latest statistics reveal that 32% of deportation decisions and 50% of entry clearance applications were successfully appealed last year.¹ Depressingly, the Government's response to this high margin of error is not to seek to improve the quality of its decision making, but rather to reduce the opportunities for challenge.

¹ Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2012/13. Available at: <https://www.gov.uk/government/publications/tribunal-statistics-quarterly-and-annual-jan-mar-2013-2012-13>.

4. Part 3 of the Bill introduces in-country immigration checks for those seeking to access private housing, banking and obtain driving licences. This constitutes a massive step-change for the United Kingdom – a country which ultimately rejected ID cards and has consistently resisted in-country immigration policing. It also provides for new ‘healthcare charges’ to be applied to those seeking immigration permission and allows for the introduction of additional healthcare charges for those without a permanent right to remain in the UK. If introduced in its current form, Part 3 would have disastrous implications for race relations in this country and create a system of internal checks which will require British citizens to prove their identity before accessing basic services in the public and the private sphere. Part 3 would also create new layers of complicated bureaucracy for private landlords and estate agents and lead to a corresponding hike in rents for British citizens and those with legal status who rent in the private sector.

5. Part 4 of the Bill introduces sweeping changes to framework governing civil and religious marriage, requiring all proposed unions that involve a non-EEA national to be automatically referred to the Home Secretary for investigation. It brings marriage in the Anglican Church automatically within the Government’s sphere of immigration control for the first time and poses a serious threat to couples who seek to marry or civilly partner in the UK.

6. Rather than outsourcing responsibility for immigration control to priests and landlords, and attacking due process, the Home Office should be turning its attention to the long overdue task of improving its own management systems. Liberty urges parliamentarians to reject this unfair, unworkable and wrong-headed Bill and to focus energies on improving the performance of those formally responsible for immigration policy in the UK.

Part 1 – Removal and Other Powers

Removal directions

7. Clause 1 of the Bill deals with administrative removal of foreign nationals and appears to be an attempt by the Government to speed up the removal process and reduce procedural safeguards designed to ensure that individuals can challenge erroneous decision-making. In its recent report on the Bill, the JCHR argued that a

requirement of written notice for family member liable to removal, notably absent from clause 1, should be included in the Bill.² Liberty further notes that while draft Regulations make provision for written notice to be given to family members, they do not stipulate a notice period, nor do they require an individual to be informed of the avenues available to challenge removal. This is the case notwithstanding the obvious potential vulnerability of the people involved, including children and dependant elderly relatives. Liberty believes that this Bill must make legislative provision for written notice to be served, in a timely manner and to set out the legally available avenues of challenge. This is the absolute minimum that fairness demands.

Reasonable force

8. Schedule 1, paragraph 5 of the Bill extends the power of immigration officers to use reasonable force where necessary, so that it applies to all current and future immigration powers under any of the Immigration Acts, and not simply to specified powers under the 1971 and the 1999 Immigration Acts.

9. The complexity of our immigration legislation makes a comprehensive assessment of all powers where immigration officers would have leave to use reasonable force under the Bill difficult. However an obvious example of the dangers created by this kind of open-ended power is provided in the provisions of the Bill itself. Worrying proposed powers (set out at Clause 5 and discussed below) providing for immigration spot checks to include the collection of biometric information would be automatically backed up by the threat of force if Schedule 1, paragraph 5 becomes law. The sweeping implications of this clause cannot be overstated.

10. Liberty accepts that the use of reasonable force may be necessary and proportionate in relation to some immigration powers (e.g. removal), but we are deeply concerned by a power that would allow force to be permitted across the board without reference to the type of power being exercised and the necessity of force. Tragic incidents involving the death or serious injury of those forcibly removed from the UK highlight the care with which the Government must approach the extension of use of force powers for immigration officers. Liberty believes there are serious gaps in the current training provided for the exercise of force by immigration officers and contractors; and in particular around the use of restraint techniques. Our concerns

² Joint Committee on Human Rights, Legislative Scrutiny: Immigration Bill, para 27.

are exacerbated by the Government's apparent willingness to blithely extend the circumstances in which force can be used, without making its case or establishing additional protections.

Bail

11. Clause 3 would impose disturbing new restrictions on applications for immigration bail. The Bill provides that where directions requiring removal within 14 days are in force, an individual may not be granted bail without the consent of the Secretary of State.³ Sub-clause 3(3) requires provision to be made in the Tribunal Procedure Rules requiring the Tribunal to dismiss applications for bail made within 28 days of a previous application which has been dismissed by the Tribunal without a substantive hearing. The Procedure Rules must further specify that applications for release on bail pending appeal are dismissed - without a hearing - when they are made within 28 days of a prior application unless a material change can be demonstrated on the papers.

12. Every year thousands of people are locked up in immigration detention centres. Many are detained for months or years despite guidance suggesting that detention pending removal from the UK should happen when removal is 'imminent'.⁴ Government policy is not to detain survivors of torture or those with serious medical conditions or mental health problems except in the most exceptional circumstances;⁵ however in practice survivors of rape and torture, pregnant women and those with severe mental and physical health problems are often found to be in detention. Liberty believes that immigration detention should only be used as an extreme last resort and for very time-limited periods where it can be independently shown to be necessary. We are concerned that, in reality, it is frequently used for administrative convenience and extends far beyond reasonable time-limits, frequently due to inefficiency or disorganisation in the system. The right to apply for bail and to have that application substantively considered by a judge is an essential protection in this system. The provisions set out in this Bill carve out dangerous exceptions and like so

³ The Immigration Bill, sub-clause 3(2).

⁴ UKBA Enforcement Instructions and Guidance on removals and detention (Chapter 55). Available at

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary>.

⁵ Ibid, section 55.10.

much else in this Bill, seem designed to insulate the Home Office from challenge where it makes poor decisions.

13. The simple fact of directions for removal within 14 days is not sufficient grounds to assume that bail should not be granted. On any common sense analysis there are factors which bluntly challenge that assumption. Those suffering psychological or physical illness, pregnant women, the recently bereaved and those who are primary care givers to young children are obvious examples of individuals who should be able to challenge detention notwithstanding the existence of removal directions. Liberty is further concerned that it will be open to the Home Office to issue rolling removal directions, effectively preventing bail applications on an indefinite basis unless the Home Secretary gives her consent.

14. Proposed new requirements prohibiting repeat applications save where a material change in circumstances is demonstrated are also seriously flawed. Liberty believes that deprivation of liberty for a period of 28 days in circumstances where no offence has been committed is extremely difficult to justify. The very least individuals can expect in these circumstances is a right to challenge their incarceration.

Biometrics

15. Clauses 4 -10 set out new provisions around biometric information in the context of immigration applications. They entail an extension of the situations in which biometric information can be required and recorded. Liberty believes that biometric information should only be collected where strictly necessary to support the proper administration of our immigration system.

16. Of particular concern is clause 5, which extends powers that currently apply to immigration detainees⁶ to individuals who are not in immigration detention. Currently these powers allow immigration officials and other parties authorised by the Home Secretary to *'take all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying'* a person detained under paragraph 16, Schedule 2 of the 1971 Act. Detention under paragraph 16 can occur to allow immigration officers to examine those entering the UK to determine whether they are British citizens or individuals with valid leave to enter and pending a decision

⁶ Currently set out at paragraph 18(2), Schedule 2 of the Immigration Act 1971

on whether to grant leave to remain. The effect of clause 5 is to extend broad and intrusive powers to 'identify' an individual so that they apply not just to those detained but also to those 'liable to be detained' under paragraph 16.

17. The Home Office's interpretation of the 1987 case of *Singh v Hammond* is that Schedule 2, paragraph 2 examinations in relation to those 'who have arrived in the United Kingdom'⁷ can be carried out in-country as well as at the border. At Chapter 31 of the Home Office Enforcement Instructions and Guidance, the Department sets out the grounds on which it believes that reasonable suspicion can be formulated:

*"Reasonable suspicion that an individual may be an immigration offender could arise in numerous ways but an example might be where an individual attempts to avoid passing through or near a group of Immigration Officers (IO) who are clearly visible, wearing branded Home Office clothing, at a location which has been targeted based on intelligence suggesting that there is a high likelihood that immigration offenders will be found there. This behaviour could not necessarily be considered to be linked to, for example, evading payment of the train fare if IOs are wearing vests or other items of work wear which clearly show which agency they belong to. In such circumstances the IO could legitimately stop the individual and ask consensual questions based on a reasonable suspicion that that person is an immigration offender."*⁸

18. It is on the basis of a dubious interpretation and extrapolation of a 1987 judgment that the Home Office first started running divisive in-country spot-check fishing expeditions in ethnically diverse areas of the UK. Liberty believes such operations are ripe for legal challenge. When we objected to the operations in 2012, UKBA suspended them nationwide and reviewed its guidance. The operations were then re-instated - with amended guidance - culminating in the controversial and divisive operations in London in August 2013. Anecdotal evidence suggests that members of ethnic minorities were targeted during these operations which led to public outcry.

19. Instead of reflecting on the climate of fear and damage to race relations that results from speculative in-country immigration enforcement - and its dubious legal authority - the Home Office now seeks new powers that will likely be used, to

⁷ Immigration Act 1971, sub-paragraph 2(1).

⁸ Home Office Enforcement Guidance and Instructions, paragraph 31.19.4.

disastrous effect, alongside those currently claimed. If clause 5 of the Bill is brought into force, Immigration Officers will likely claim the power to not simply stop and question people at tube stations and on streets around the country who they perceive as avoiding their gaze, but to photograph and collect the intimate biometric information of such individuals.

20. The clause also runs counter to earlier reforms by this Government to impose greater safeguards on the taking and retention of biometric information. At present fingerprints and biometric information can only be taken in-country, without consent, following an arrest for a recordable offence.⁹ Clause 5, in conjunction with the Home Office's flawed interpretation of existing immigration powers, will mean that biometric information will be able to be taken in-country, without arrest, from anyone deemed 'liable to be detained'- regardless of whether they are a British citizen or not.

Part 2 – Appeals

Clause 11 (removal of appeal rights)

21. Clause 11 will act to significantly reduce the kind of cases which attract appeal rights and the grounds on which appeals can be brought. Whilst cases which raise issues of international protection or human rights will remain subject to independent statutory appeal before a Tribunal, in other matters where the lawfulness of Home Office decision making is called into question, claimants will be left with nothing more than a poorly articulated system of administrative review which provides neither the independence nor the procedural protection of judicial oversight.

22. In the face of consistent reports of bad administration, inefficiency and poor-quality decision making,¹⁰ rather than attempting to improve the system, the Government is removing opportunity for effective challenge. The option to raise challenges to unlawful decision making before the High Court in judicial review proceedings will remain and to the extent that this option is practically available, the valuable time of High Court judges will be used up in pointing out basic errors in Home Office decision making. For many, however, and particularly in light of

⁹ Sections 61 and 63 of the Police and Criminal Evidence Act 1984.

¹⁰ See successive HASC reports, most recently, the *Eight Report of Session 2013-14* and the *Fourth Report of Session 2013-2014*, in which the Committee raised concerns at the apparently sudden decision to abolish UKBA and the lack of clarity around the new system. HASC also questioned how another transfer of functions would improve the longstanding failings of immigration administration.

proposed reforms to judicial review and legal aid provision, judicial review will not be practically accessible, leaving individuals without any form of redress and the Home Office with no imperative to improve its processes. The JCHR has also sought to analyse clause 11 in the context of judicial review and legal aid reforms, concluding:

“when viewed in this broader context, limiting rights of appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the justice system to challenge unlawful immigration and asylum decisions.”

23. Liberty further shares concerns expressed by the JCHR that the significant limitation of appeal rights proposed by clause 11 would be incompatible with the common law right of access to the courts to challenge unlawful decision making.¹¹ Administrative review and particularly review by a failing department found to be suffering from ingrained cultural deficiencies is on no interpretation an adequate substitute for accessible judicial oversight.

Clause 12 (non-suspensive appeal rights)

24. Clause 12 of the Bill deals with the location from which an appeal may be brought. It provides that, where an appeal is brought on asylum or humanitarian protection grounds the appeal is to be brought from within the UK unless it is certified as clearly unfounded. Existing provisions allow for certification where an individual would be removed to one of a list of designated ‘safe’ countries or because the Secretary of State determines there is no reason to think that an individual’s human rights would be breached on return, or that an individual can be removed to a country in conformity with the refugee Convention.¹²

25. In so far as claims relate to asylum and humanitarian protection, the Bill introduced no substantive change to the location of the appeal. However if deportation is challenged on human rights grounds, a proposed new certification provision would apply, removing the in-country appeal right wherever the Home Secretary ‘considers’ that removal would not breach human rights protection. This requirement is elaborated as including, in particular, a conclusion that removal would

¹¹ Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill: Eighth Report of Session 2013-2014*, paragraph 39.

¹² The 2002 Act, section 94.

not expose the appellant to ‘a real risk of serious, irreversible harm’.¹³ Thanks to late amendments introduced by the Government at Committee Stage, this clause is now even broader in its reach than was originally proposed, allowing the Home Office to operate a policy of ‘deport now, appeal later’ not just in relation to specified foreign national offenders but in relation to any individual - and her family members – whose presence in the UK is deemed by the Home Secretary not to be conducive to the public good. However the decision on the issue of irreversible harm, which may well be hotly contested by the applicant is left, unilaterally, to the Home Office.

26. The Government argues that this test reflects the test used by the European Court of Human Rights.¹⁴ The obvious difference is that the Court is an independent judicial body, while under the Bill the assessment would be made by the Home Office, without the appellant having an opportunity to challenge its reasoning or conclusions before an Immigration Judge.

27. Whilst the decision to certify a case could be challenged in judicial review proceedings, proposed reforms to judicial review and in particular the removal of legal aid funding for those who cannot meet stringent residence requirements, will mean this option is not practically available to many. To the extent this provision is based on the need to have faith in the decision making of Home Office officials, we should remember that 1 in 3 deportation cases are successfully appealed.¹⁵

28. These concerns are clearly shared by the JCHR, which concluded, following legislative scrutiny of the Bill:

“We are not satisfied with the Government’s reliance on the continued availability of judicial review to challenge the Secretary of State’s certification that a human rights appeal can be heard out of country, having regard to the unavailability of legal aid to bring such a claim and the proposed reforms of judicial review.”¹⁶

¹³ New section 94B(2)-(3) of the 2002 Act, as inserted at sub-clause 12(3).

¹⁴ Home Office Fact Sheet on Appeals:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249102/Factsheet_05_Appeals.pdf

¹⁵ Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2012/13. Available at:
<https://www.gov.uk/government/publications/tribunal-statistics-quarterly-and-annual-jan-mar-2013-2012-13>.

¹⁶ JCHR, *Legislative Scrutiny: Immigration Bill: Eighth Report of Session 2013-14*, paragraph 53.

Clause 14 (Article 8): public interest considerations

29. The Article 8 right to respect for private life protected by the Human Rights Act provides a framework of protection allowing a fact-sensitive balancing exercise to be carried out between the rights of an individual and the wider public interest in issues such as immigration control. Whilst it is legitimate for Parliament to make legislative prescription about the requirements of the public interest, clause 14 goes further than that, with proposed new subsections 117(B)(4)-(5) prescribing the weight to be attached to private life in prescribed circumstances.

30. Liberty believes this is a serious and unconstitutional incursion into the judicial function. The JCHR also raised pronounced concerns about these sections following its scrutiny of the Bill, noting:

“we are uneasy about a statutory provision which purports to tell courts and tribunals that “little weight” should be given to a particular consideration in such a judicial balancing exercise. This appears to be a significant legislative trespass into the judicial function. We note that the Government did not provide us with any other examples of such statutory provisions, which suggests that this approach may be unprecedented.”¹⁷

Part 3 - Access to Services

31. Part 3 of the Bill deals with access to services. In summary it introduces in-country immigration checks for those seeking to access private housing, banking and obtain driving licences. It also provides for new ‘healthcare charges’ to be applied to those seeking immigration permission and allows for the introduction of additional healthcare charges for those without a permanent right to remain in the UK.

32. The UK Government has traditionally undertaken immigration control at the point of entry and exit. Contrary to the approach taken elsewhere in Europe, it has not generally been British practice that the authorities or private sector service providers can demand that you prove your identity and legal status away from the border. This Bill proposes an unprecedented shift in this approach.

¹⁷ Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill: Eighth Report of Session 2013-14*, paragraph 60.

33. The Government is yet to acknowledge the full scale of checks that all individuals will now be subject to and the societal shift that will result. While the Bill does not envisage a new national system of identification (such as the identity card scheme and accompanying National Identity Register, repealed in 2010)¹⁸ it does, alongside other concurrent proposals, introduce a new system of routine identity checks for access to essential public and private services. For the first time immigration control will be brought within the private sphere – the home, the bank – and will become a routine feature of access to healthcare. Proposals in Part 4 of the Bill will for the first time bring immigration checks into the Church, requiring those who wish to have an Anglican marriage to first be referred to the Home Secretary. Parallel proposals elsewhere – including a 12 month residency test for access to legal aid - will mean that in a range of ordinary every day encounters people in the UK – foreign nationals and British citizens - will be required to produce identity documents in a manner not seen since the Second World War.¹⁹

Discrimination and Damage to Race Relations

34. While the impact of regular and routine identity checking will affect the civil liberties of all members of the community, it is clear that these policies will be most keenly felt by ethnic minority individuals or those who appear to be from outside the EEC by reason of their name, skin colour or accent. If the Government chooses to continue with this approach it must accept that it will (1) encourage landlords and other service providers to discriminate against minority individuals (2) make it more difficult for minority ethnic and non-EEA individuals to access vital services and (3) cause damage to delicate race relations in the UK.

35. At present, Government appears happy to skate over these implications. The consultation that preceded the new landlord obligations stated simply that “*checks should be performed on a non-discriminatory basis (i.e. without regard to race, religion or other protected characteristics as specified in the Equality Act 2010)*”.²⁰

¹⁸ Identity Documents Act 2010.

¹⁹ ID cards were first introduced in Britain two days after the outbreak of World War II and remained in force until 1952. They were originally issued for three functions only: conscription, rationing and national security. By 1950 this had mushroomed to 39 different functions.

²⁰ *Tackling illegal immigration in the privately rented sector*, Home Office consultation paper, available at

Despite the existence of equalities legislation, outsourcing immigration responsibilities to public and private sector service providers with accompanying penalties will lead to discrimination in practice. It is inevitable that some landlords and letting agents seeking to protect themselves from possible liability will chose not to consider non-white tenants or those with non-European sounding names or accents on the assumption that they are more likely than their white or European counterparts to have irregular immigration status. This is a point acknowledged by industry representatives. During Committee stage consideration of the Bill, the Chair of the National Landlords Association, Carolyn Uphill said in evidence:

“We are concerned that [the Bill] might have an impact on ethnic minorities, irrespective of their immigration status. That is a major concern for us.”²¹

She was joined in these concern by Caroline Kenny of the UK Association of Letting Agents:

“we can envisage a situation where more landlords will ask their agents not to show their properties to people of ethnic minorities. That is what we are extremely worried about.”²²

Unprincipled

36. The stated aim of these policies is to “encourage” those with irregular status to leave the country. While fair and proportionate enforcement of immigration control is the Government’s prerogative, a policy of forced destitution (through the combined effect of homelessness; lack of healthcare etc.) as a tool of immigration control - for those who may already be highly vulnerable and facing exploitation - has obvious grave ethical implications for any society. This was an issue of core concern to the JCHR, which concluded in its report on the Bill:

“We do not feel that we have been provided with sufficient detail of how [the discretion to grant permission to occupy residential premises] will operate in

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/33-landlords/>, paragraph 34.

²¹ Public Bill Committee consideration of the Immigration Bill, Tuesday 29th October 2013 (Afternoon), in answer to question 73.

²² Public Bill Committee consideration of the Immigration Bill, Tuesday 29th October 2013 (Afternoon), in answer to question 98.

practice to be confident that the provisions of the Bill will not give rise to beaches of Article 3 in practice where people who face a genuine barrier to leaving the UK are left effectively homeless...²³

The Committee further considered the impact of Part 3 of the Bill on vulnerable migrant children, emphasising that the Government must do more to satisfy Parliament that children will not be exposed to homelessness or separation from family members.²⁴

Unintended consequences

37. Liberty has further concerns about the unintended consequences of the new regulatory schemes for vulnerable individuals that may have legal status but are unable – for whatever reason – to evidence it. The Bill somewhat naively assumes that all those with legal status to be in the UK will be able to produce timely evidence of this when they seek to rent property in the private sector, open a bank account, obtain a driving licence etc. This ignores the situation of those who may not have documentation readily to hand. For example those with chaotic lives or possibly fleeing domestic abuse. This was a point made strongly by homelessness charity, Crisis, during evidence to the Public Bill Committee:

“People who are homeless are moving around a lot; they lead quite transient lifestyles, which are often quite chaotic. That applies to people who are homeless and, for example, women who are fleeing domestic violence. A lot of the people we work with do not have documents....The provisions of this Bill will make it even more difficult for homeless people to get out of homelessness and into accommodation.”²⁵

38. These proposals will also have obvious implications for all those whose immigration documents have been caught up in the notoriously ill-managed Home Office bureaucracy awaiting an application or appeal decision. These individuals who

²³ JCHR, Legislative Scrutiny: Immigration Bill – Eighth Report of Session 2013-14, paragraph 74.

²⁴ JCHR, Legislative Scrutiny: Immigration Bill – Eighth Report of Session 2013-14, paragraph 77.

²⁵ Public Bill Committee consideration of the Immigration Bill, Tuesday 29th October 2013 (Afternoon), in answer to question 114.

for whatever reason do not have access to documentation proving their right to be in the UK would not be able to access vital services until they have retrieved documents from past abusers or negotiated administrative hurdles to obtain new documents. In the meantime they may well find themselves homeless, further exacerbating existing vulnerability.

39. The landlord consultation paper accepted “*a marginal risk that the policy may impact people seeking to quickly move accommodation because of domestic violence where availability of necessary identity documents may be an issue*”.²⁶ To deal with this, the paper suggests Guidance and Codes of Practice “*to take account of the need to provide for compassionate circumstances and flexibility in some exceptional cases*” and that the exemption of women’s refuges will plug the remaining hole. This suggested approach reveals in equal measure a disturbing disregard for the needs of those fleeing abuse and a puzzling ignorance of the practical realities of the rental market. It is highly unlikely that those without documents will be prioritised for accommodation when competing with those whose documents are readily to hand. The consultation paper also proposes a helpline for landlords allowing them to check the immigration status of prospective tenants’ whose documents are in the immigration system. Given the chaotic administration and record keeping of the Home Office and UKBA, the idea that the helpline will be able to provide prospective landlords with timely information about the immigration status of all migrants whose decisions are pending is fanciful.

Chapter 1 - Residential tenancies

40. Clause 17 sets out the prohibition that “*a landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status*”. Breach of this restriction may occur in two different ways. Either by entering an agreement which allows a “disqualified” person to occupy a property or by entering an agreement allowing occupation by someone with limited immigration status whose status later lapses while they remain in occupation.

²⁶ *Tackling illegal immigration in the privately rented sector*, Home Office consultation paper, paragraph 95.

41. In addition to race relations and other principled objections to this policy, there are many more practical objections. First, it will impose a heavy new regulatory burden on landlords, businesses and tenants while not necessarily helping to identify those with irregular status. Presumably in anticipation of landlord concerns the Home Office is quick to describe the landlord duty as a “light-touch” and “proportionate” regime.²⁷ It is also keen to stress perceived similarities with the employer duties already in operation – “*The duty to check the status of new employees is now a well-established procedure, which is well understood by employers (including small businesses operating on a scale comparable to small private landlords)*”.²⁸ However it is misleading to suggest that the small businesses required to undertake employment checks are operating on a scale comparable to private landlords. In England, 78% of landlords in the private rented sector own just one rental property.²⁹ It is clear then that the regulatory burden will predominantly be felt by those who seek to bring in income by owning one extra property; generally a much smaller and more informal endeavour than those who run a small business.

42. Myriad complications and difficulties underpin the effective discharge of the duties and the enforcement of a new and vast administrative scheme. Given the complexity of immigration law, there are a vast number of documents that landlords will need to recognise and understand in order to discharge their duties. In the words of Richard Jones, Policy Director at the Residential Landlord’s Association, landlords will be “*bewildered by the complexity of it*”.³⁰ It is also difficult to imagine how the Home Office plans to prove (and how a landlord can therefore disprove) that someone has been living in a property when it comes to enforce the duty. Home Office experience in trying to enforce the employer’s duty to check immigration status is instructive. In August 2013 a Freedom of Information request found that the Home Office has so far issued £80 million in fines but collected just £25 million.³¹

43. Liberty is puzzled as to why the Government has not yet produced a costed analysis of this radical proposal. The consultation document accepts that there will be costs to landlords and small business associated with the checks and foresees that

²⁷ *Tackling illegal immigration in the privately rented sector*, Home Office consultation paper, paragraph 17.

²⁸ *Tackling illegal immigration in the privately rented sector*, Home Office consultation paper, paragraph 10.

²⁹ DCLG - Private Landlords Survey 2010.

³⁰ Public Bill Committee consideration of the Immigration Bill, Tuesday 29th October 2013 (Afternoon), in answer to question 88.

³¹ *Ibid* at footnote 19.

these will be passed on to private tenants, but makes no attempt to calculate the extent or impact of the cost.

44. The Home Office has produced no convincing evidence that the policy will affect numbers of those present in the UK with irregular status. In fact, the net impact of the policy may well be to push those with irregular status further under the radar, increasing vulnerability and exploitation by creating another black market in private rented property. Notably, this is also a risk to which the Home Affairs Select Committee sought to draw attention in its most recent report on the work of the UKBA:

“The proposed new housing measures in the Immigration Bill must not produce a bonanza for unscrupulous landlords who already operate outside the law, driving more people into the twilight world of beds-in-sheds and overcrowded houses in multiple occupation.”³²

45. At best, it's not hard to imagine how those with irregular status could join friends and family in rented accommodation after the initial check has been undertaken. At worst, the policy could create another black market in the immigration sphere whereby landlords or individuals seek to profit from providing or facilitating accommodation to those without legal status. In short, the Bill proposes another layer of expensive bureaucracy for immigration enforcement with little or no guarantee of its effectiveness.

46. The glaring problems with this proposal have been widely acknowledged in the landlord and letting industry. The vast majority of landlords don't support the proposals to compel them to carry out immigration checks – 82% according to a survey by the Residential Landlords Association. The Chairman of the Residential Landlords Association, Alan Ward, has said –

“The private rented sector is already creaking under the weight of red tape so it is little wonder that landlords are so clearly opposed to this flagship Government measure. Whilst the RLA fully supports measures to ensure everyone in the UK is legally allowed to be here, this proposal smacks of political posturing rather than a seriously thought through policy. For a Government committed to reducing the burden of regulation it is ironic that they are now seeking to impose a

³² HASC, *The work of the UK Border Agency (January-March 2013) – Eighth Report of Session 2013-14*, paragraph 25.

*significant extra burden on landlords making them scapegoats for the UK Border Agency's failings.*³³

The Royal Institution of Chartered Surveyors has said –

*“The Government has stubbornly refused to look at introducing better laws to protect both landlords and tenants – it is unacceptable that it expects the property industry to deliver its immigration policy.”*³⁴

Lettings agents have also questioned the appropriateness and ability of landlords to accurately check immigration status and acknowledged the likelihood that landlords will attempt to protect against liability by discriminating against prospective tenants. Head of lettings at Sequence has said -

*“If it's to be the responsibility of all landlords to check passports and visas of foreign tenants, that will lead to questions about how equipped an amateur landlord is at carrying out and verifying these checks. These proposals are just passing off the onus of implementation of the Immigration Act on to landlords.”*³⁵

Part 2 – Other Services

Healthcare

47. Clauses 33 and 34 construct the framework for the Government's new policy of charging categories of migrant for healthcare. The substance of the policy is to be set out in secondary legislation which may provide for charges to be imposed in relation to immigration applications which will entitle an individual to access healthcare. The Secretary of State may specify, by order, the level of the charge, the means by which it is to be paid, the consequences of failure to pay and make provision for exemptions, reductions and waiver of any charge. Liberty responded to

³³ See, Landlords Oppose Government's Immigration Plans, 3rd July 2013, RLA newshub available at - <http://news.rla.org.uk/landlords-oppose-governments-immigration-plans/>

³⁴ Stephen Thornton, director of external affairs for RICS available at http://www.lettingagenttoday.co.uk/news_features/Landlords-as-border-control-officers-plans-under-fire.

³⁵ Stephen Nation, head of lettings at Sequence, available at http://www.lettingagenttoday.co.uk/news_features/Landlords-as-border-control-officers-plans-under-fire.

the Government's detailed policy proposals which were set out in parallel Department of Health and Home Office consultation documents during the summer.³⁶

48. Our principled concerns about proposals which introduce or expand exceptions to service provision and threaten the integrity of a system of free, universal healthcare remain. Whilst proposals to introduce a levy are preferable to moves to extend direct charging for individuals, Liberty is particularly concerned at indications that the levy will not cover certain types of treatment, amongst them healthcare for pre-existing pregnancies (women who were pregnant on arrival) and organ transplantation. Unfortunately the framework powers set out in the Bill are so skeletal, that we cannot even have confidence that the Government would implement this scheme in a limited way. Sweeping order-making powers mean that the categories of individual subject to a new levy can be changed without proper parliamentary scrutiny, charges could be raised to sky-high levels, exemptions and waivers designed to accommodate vulnerable groups could be removed. Such moves would place healthcare beyond the reach of those who need it and would have obvious implications for public health.

49. New clause 34 lays the groundwork for another aspect of the Government's plans and is designed to expand the range of individuals who may become subject to charges including direct charges for healthcare services. Legislation currently provides for migrants who are not ordinarily resident in the UK to face such charges where prescribed in legislation. The Government's consultation proposals indicate a current intention to charge visitors and those without status directly for a range of services. Our concerns about these proposals are set out in detail in Liberty's response to the Government's consultation exercise.³⁷ Imposing charges on more individuals for health care services will mean that vulnerable people are unable to access the provision they need and will lead to the spread of communicable illness to the detriment of all in society. Furthermore, the provisions of the Bill do not limit the Government to its stated policy objective. If implemented, the Bill would allow for direct charges to be placed on any migrant without a permanent right of residence.

³⁶ Liberty's response is available here: <http://www.liberty-human-rights.org.uk/pdfs/policy13/Liberty%27s-response-to-the-Home-Office-and-Department-of-Health-Consultations-on-access-to-NHS-services-August-2013.pdf>.

³⁷ Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy13/Liberty%27s-response-to-the-Home-Office-and-Department-of-Health-Consultations-on-access-to-NHS-services-August-2013.pdf>.

Bank Accounts

50. Clause 35 is another in the barrage of measures designed to bring immigration control away from our borders and comes complete with troubling new provision for data sharing. Clause 35 provides that in relation to any person who is attempting to open a bank or building society account in the UK who does not have the required leave to remain in the UK, banks and building societies must carry out 'status checks' before opening accounts to ascertain that their customer has not been disqualified from opening a bank account by the Secretary of State. A status check involves checking with a specified anti-fraud organisation or data matching authority.

Employers

51. Clause 39 introduces changes to appeal rights against penalties imposed in relation to those employers who are found to have employed immigrants without valid leave. It requires employers to exercise their right to object to the Secretary of State against a penalty before they can appeal. Clause 40 alters the recovery regime for the penalties incurred by employers in this regard by ensuring debts can be enforced straight away as if there were a court order in place, as opposed to the current system where the Secretary of State must issue a claim for a sum and the employer has an opportunity to raise a defence. Whilst this may appear to be a discreet and minor change, it is problematic because it will make it harder to employers to defend themselves against erroneous charges.

Driving licences

52. Clause 41 imposes a residency requirement which must be satisfied before individuals can get a driving licence. Clause 42 provides for a driving licence to be revoked where the Secretary of State considers that somebody does not satisfy residence requirements. Somebody who fails to surrender a licence revoked in this way will face criminal sanction. Appeal against the decision to revoke a driving licence will be to the Magistrates Court. Magistrates will not be permitted to consider whether an individual has been erroneously refused leave by the Home Office when considering whether a driving licence has been properly revoked, nor will Magistrates be able to take account of the fact that leave has been granted to the individual in question since her driving licence was revoked.

53. Like so much of this Bill, clause 42 appears to be partly designed to protect the Government from effective challenge against erroneous immigration decisions. If the Bill is passed in its current form, the Home Office will be able to rely on mistakes in immigration decision making to revoke an individual's licence. The individual will only be able to challenge such mistakes through judicial review, or by launching an immigration challenge and hoping the Home Office reconsiders revocation if their immigration status is corrected by the Courts.

Part 4 – Marriage and Civil Partnership

54. The Bill makes sweeping changes to the framework governing civil and religious marriage. First, it extends the marriage/civil partnership notice period for all couples from 15 to 28 days.³⁸ This will cover British citizen couples as well as couples where one partner is a non-EEA national. To give an idea of the number of couples this will affect, in 2011, 292 200 marriages and civil partnerships were registered in the UK.³⁹ The Bill then introduces a new system whereby all civil and Anglican marriages that involve a non-EEA national (that is not exempt)⁴⁰ will be referred to the Secretary of State.⁴¹ The Secretary of State will then choose which of these proposed marital and partnership unions she wishes to investigate further.⁴²

55. The new regime will, for the first time, bring Anglican marriage within the Government's sphere of immigration control. Those seeking an Anglican marriage, where one or both partners is not a British citizen, EEA or Swiss national, will need to be referred to the Home Office before they are permitted to be married by the Church. Specifically clause 52 amends the Marriage Act 1949 so that where such a couple want to get married in the Anglican Church, the banns process and common licence process will not be available to them. They will instead have to obtain superintendent registrar's certificates subject to the Home Office referral and investigation scheme. Similarly, under clause 53, those seeking to civilly marry or partner will be automatically referred to the Home Office.

³⁸ Schedule 4, Paragraph 10 amends the notice period in section 31 of the Marriage Act 1949.

³⁹ Home Office, Tackling Sham Marriage, Impact Assessment, 11 September 2013.

⁴⁰ Clause 44.

⁴¹ Clause 47 and Schedule 4.

⁴² Clause 43(2).

56. Under clause 43(5), once a proposed marriage or civil partnership has been referred to the Secretary of State, she can carry out an investigation if she has reasonable grounds for suspecting the proposed marriage or civil partnership is a sham. It is unclear how the Home Office will determine which proposed marriages and civil partnerships will be subject to investigation. While the legislative requirement is that there is reasonable grounds to suspect a sham, the Impact Assessment uses much looser language that appears to pave the way for racial and nationality profiling “*A Home Office unit would assess the referrals against intelligence based risk profiles...*”⁴³ Previous Home Office guidance in this area under the now defunct Certificate of Approval scheme suggests that the guidance will be blunt and arbitrary (for example targeting individuals on the basis of their immigration status – such as those with short periods of leave remaining). Nationality/racial profiling combined with blunt guidance will not yield intelligence-based investigations and will therefore be unlikely to produce accurate results as to sham marriages.

57. Oddly there is also nothing in the legislation about the consequences of a Home Office decision that a proposed union is a “sham”. However the proposed draconian sanction in these circumstances is clearly laid out in the accompanying Impact Statement –

*All couples subject to the 70 day notice period, provided they complied with the Home Office investigation, would then be issued with the certificates/Schedule enabling them to marry or enter into a CP, even where the Home Office considered that the marriage/CP was a sham. However, in such a case the Home Office could use the evidence established by the investigation – that the relationship was not genuine and the marriage/CP was a sham – as the basis of an enforcement decision under existing immigration powers, against the non EEA national involved eg. curtailment of any extant leave and removal of an overstayer or illegal entrant. The Home Office could also use that evidence as the basis for refusing a subsequent immigration application based on the sham marriage/CP, subject to a fresh assessment at that stage of the couple’s genuineness.”*⁴⁴

⁴³ Home Office, Tackling Sham Marriage, Impact Assessment, page 10.

⁴⁴ Home Office, Tackling Sham Marriage, Impact Assessment, page 10.

The Impact Statement further claims that 2,500 removals from the UK will be generated in the first year alone.

58. Looking at all relationships between British residents/citizens and non-EAA nationals through a prism of mistrust sends a dangerous message about mixed (inter-racial and inter-national) relationships in a diverse and multi-ethnic society. Laying down targets for the number of mixed relationships that the Government seeks to disrupt and the number of couples it plans to separate (2,500) is offensive and will cause untold stress, pain and hurt to many genuine couples.

59. Worse still, seeking to remove people that have been granted immigration status on the basis of their proposed marriage is grossly heavy handed. It will discourage couples from marrying for fear that initiating the marriage process could lead to removal of the non-EEA partner. It will also undoubtedly mean that the Government seeks to remove and separate engaged couples whose marital plans are sincere. Even for those that don't face removal from the country at the end of the investigation process, it will likely still be incredibly stressful. Even after a successful appeal against a removal decision, the strain, stress, delay and huge expense will cause untold misery to thousands of people in the UK.

60. Parliamentarians should also be conscious of the record of the immigration service in decision-making. In 2011/12, 45% of immigration appeals were successful in the First Tier Tribunal. Applying this statistic to this proposed policy, we should expect that nearly half of the engaged couples the Home Office seeks to separate or remove will successfully overturn the decision at appeal. Others, including genuine couples, may not. An engagement should be a happy time in any person's life; if this policy is pursued it will be turned into a nightmare - leading to potential separation - for thousands of couples.

Article 12 of the European Convention on Human Rights (Right to Marry)

61. Article 12 of the European Convention on Human Rights⁴⁵ provides protection for the right to marry. While not absolute, strong protection has been afforded to this right in the European Court of Human Rights in Strasbourg⁴⁶ and by our domestic

⁴⁵ As incorporated into domestic law by the *Human Rights Act 1998*.

⁴⁶ *Hamer v UK*.

courts.⁴⁷ Heavy handed Home Office policy in the area of marriage and family reunion is not new. Nor does it enjoy a successful track record in the Courts when tested against the right to private and family life (Article 8) and the right to marry (Article 12).

62. Unfortunately, by way of Part 4 of the present Bill, the Home Office looks set to repeat past public policy mistakes. The awkward legislative scheme envisaged leaves a huge amount to secondary legislation and enforcement. It appears that the Government is seeking to avoid breaching human rights law by setting the scheme up in this way. Nonetheless the legislative scheme as proposed represents a substantial interference with Article 8 and Article 12 rights and also engages Article 14. The lack of guidance in primary legislation exacerbates these interferences as it will leave couples uncertain as to the consequences of an investigation. A system of enforced removals on the basis of Part 4 investigations will likely breach human rights.

63. In addition to the problems of principle, conflict with human rights law, and punitive impact it is unclear whether the scale of the blanket scheme proposed and its associated costs are justified. The Home Office estimates that 35,000 marriages and civil partnerships a year in the UK involve a non EEA national and so proposes that all of these proposed unions are now referred.⁴⁸ In 2012, 1891 section 24 “suspicious marriage” reports were made by registrars.⁴⁹ The Home Office Impact Statement attempts to present these figures as high and growing. This conveniently ignores the fact that in 2004 there were around 3500 such reports and numbers have fluctuated over several years. The Impact Statement also acknowledges that the number of reports made is not a reliable indicator as to level of the problem – “*not all of these referrals can be assumed to involve a sham marriage*” - but in no way tries to provide better statistical evidence. Taking the figure at its highest, it represents 5.4% of marriages and civil partnerships that involved a non-EEA national and a fraction of the total number of migrants to the UK. We are further told that in January to June 2013, UKBA conducted 460 sham marriage operations and made 212 arrests. No information is provided as to how these arrests were related to, how they were ultimately disposed of and whether a sham marriage was uncovered.

⁴⁷ R (Baiai) v Secretary of State for the Home Department [2008] UKHL 53.

⁴⁸ Home Office, Tackling Sham Marriage, Impact Assessment, page 3. There is currently no record of how many non-EEA nationals marry or enter into a CP in England and Wales, Scotland and Northern Ireland.

⁴⁹ Ibid at page 4.

Nonetheless these figures demonstrate the disparity between immigration service suspicions and results yielded. The Home Office then goes on to estimate that 4000 - 10,000 applications a year may be based on a sham marriage. The statistical basis for these estimates is extremely unclear.⁵⁰

64. A costs analysis is provided in the Impact Statement and the costs include set up, Home Office staff time, increased appeal costs etc. as well as a reduction of income for the Anglican Church. The costs are significant and estimated at between £72 million – £81 million over ten years. The financial benefits calculated are highly speculative and seem to rest most on deterrence and reduced pressure on public services.

Part 6, clause 61 - Embarkation checks

65. Clause 61 and Schedule 8 make provision for a system of embarkation checks of those leaving the country to be undertaken by “designated persons”. Powers of examination, and to require information and documents, are currently exercised by immigration officials (under the 1971 Act) when people arrive in the UK. Under clause 61 these intrusive examination powers are to be introduced for those the Secretary of State chooses to designate. Wide discretion is left to the Secretary of State as to who shall exercise such powers⁵¹ but it is understood that the Government intends these powers to be principally exercised by carrier and port employees. The powers of examination will apply to people embarking or seeking to embark in order to leave the UK. Examined persons will be required to provide all information in his or her possession for the purposes of the functions under this section.⁵² Powers extend to examining and detaining a passport or other document produced during an examination and requiring a passenger to provide biometric information, including fingerprints or features of the iris or any other part of the eye.⁵³

66. Paragraph 4 further amends the 1971 Act to enable the Secretary of State to by order require passengers embarking in the UK to produce embarkation cards. As there is no existing system of embarkation checks, it is unclear what will be contained on such a card. While the Bill does not extend powers of detention to designated persons it envisages additional powers for immigration officers, including the power

⁵⁰ Ibid at footnote 2.

⁵¹ Schedule 8, paragraph 5.

⁵² Schedule 8, paragraph 3(2).

⁵³ Schedule 8, paragraph 3, subparagraphs (6) and (7).

to detain an individual in circumstances where a designated person has commenced an examination and to examine and detain a passport or other document, found in the course of an examination by a designated person.

67. Schedule 8 also contains a power to compel carrier and port operator staff and others to carry out these checks. The Secretary of State may direct an owner or manager of a port to make arrangements for designated persons to conduct embarkation checks including at specific ports at specific times and dates and in relation to a description of persons by reference to the destination to which they are travelling, the route they are travelling or the date and time of travel. Failure to comply without reasonable excuse is a criminal offence.

68. Liberty understands that these powers are driven by the Government's desire to implement 'exit checks' by 2015 and for carrier and port operator staff to carry out this function. Details are currently scant but the Immigration Minister has said *"this will help improve our already robust security at the border, while causing as little disruption to passengers as possible. Our aim is to make it harder for offenders to flee British justice and to better identify those who are in the UK illegally."*

69. Liberty is extremely concerned about proposals to extend sensitive examination powers traditionally reserved for the immigration service and intended to regulate admission to the United Kingdom to carriers and their employees. Liberty does not believe that airport staff engaged in the business of facilitating travel should be required to undertake immigration or police functions nor required to exercise intrusive and coercive powers. Liberty does not see the justification for exit checks. Entry checks are undertaken for the purposes of immigration control. It is difficult to see how exit checks for everyone leaving the UK will contribute to this aim nor how it is a proportionate way of pursuing the legitimate aim of preventing and detecting crime. By the same token, exit checks applied to certain routes and destinations will discriminate against certain passengers and likely disproportionately affect certain nationalities and minority groups. Further, alongside broad and vague enabling powers there is insufficient detail set out on the face of the Bill as to how this system would operate in practice. This is another inappropriate piecemeal extension of police-like powers for an unclear purpose. It confuses commercial air travel departure arrangements with immigration control and with the detection of crime. It also places unjustified and onerous obligations on carrier and port operator staff, at risk of criminal penalty.

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