ILPA Briefing to amendments laid for the Immigration Bill (Part 3 Access to Services) House of Lords Committee 10 March 2014 ff

The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups and has provided briefing on immigration Bills to parliamentarians of all parties and none since its inception.

ILPA's briefings to date on this bill can be read at http://www.ilpa.org.uk/pages/immigration-bill-2013.html . All references are to HL Bill 84.

This briefing is prepared before seeing the groupings for the debate. We have sought to group amendments with common themes but these are our groupings and may not reflect those of the order paper.

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PART 3 ACCESS TO SERVICES ETC

Before Clause 15

AMENDMENT 48 The Earl of Listowel NEW CLAUSE Pregnancy Exemption

Purpose
Provides that any bars on access to services contained in Part 3 shall not apply to a woman who is pregnant. The exemption lasts until the woman gives birth. It does not confer rights on any partner or other child. ILPA supports this amendment for the attention it will draw to the range of practical problems suffering and hardship these proposals will cause, not just for persons under immigration control but for British citizens also, although we do not think that it will achieve its aim. Pregnant women, whether British or immigration control, may be denied services if they cannot prove their status. This may put them and their babies at risk of harm.

AMENDMENT 49 Lord Hannay of Chiswick, Lord Tugendhat, Baroness Williams of Crosby, Baroness Warwick of Undercliffe

Purpose
Provide that any bars on access to tenancies, bank accounts driving licences or "other services" (which would appear, without more, to encompass the health charge under Clause 33 and charges levied under the NHS charges regulations mentioned in clause 34) for health

services but may or may not encompass the levy identified) shall not be imposed on those holding a Tier 4 visa as students of universities or those holding a Tier 2 (skilled worker) visa registered in full time postgraduate study at a university. ILPA supports this amendment for the attention it will draw to the range of practical problems, suffering and hardship these proposals will cause, not just for persons under immigration control but for British citizens also, although we do not think that it will achieve its aim.

Briefing

For the reasons set out in our briefing to the first group of amendments below, we do not consider that either of these amendments will achieve its aim of exempting persons in the group specified from the residential tenancies provisions.

The amendments could be effective in exempting students from the health levy set out in clause 33 and similarly for persons pregnant at the time of application. It is possible to exempt students from health charges under the regulations mentioned in Clause 34. It is possible to except pregnant women from these although the deterrent effect of registration must be factored in, as discussed below.

Given that the provisions on bank accounts are targeted only at the moment of opening an account it would be possible to carve out students and pregnant women. With driving licences it would be possible to carve our both groups, although members of both groups would be at risk of losing their licences once they ceased to hold the protected status, given the revocation provisions of clause 42.

Both amendments raise the question of just how unpleasant we are prepared to make life for British citizens, the settled and persons under immigration control in our attempts to run to ground those without lawful status. The Bill is predicated on our being prepared to pay a very high price, which these amendments highlight including:

- the health or life or pregnant women and the children they are carrying, whether British or not;
- race relations;
- the attractiveness of the UK as a destination for study or stay, with the attendant economic benefits, benefits in terms of goodwill and relationships with other countries in future;
- And last, but not least, the triumph of petty bureaucracy.

To get into the Home Office's Lunar House in Croydon for a meeting it is necessary to show a valid passport or State issued photo ID card. A driving licence is accepted. An old (cancelled) passport is not. Nor are most forms of documentation produced by local authorities. No matter for how many years you have been coming to meetings at Lunar House. No matter that everyone in the meeting recognises you. Having presented your documents, complete with picture, you are then separately photographed by those at the desk. Photographing everyone can eat up nearly the first half an hour of a large meeting. In the words of the Home Secretary, which we quote in context below "*It is intrusive and bullying, ineffective and expensive."* It saps every last drop of goodwill. But it appears to be a blueprint for the schemes in this part.

Aneurin Bevan said of access to the National Health Service:

> *However, there are a number of more potent reasons why it would be unwise as well as mean to withhold the free service from the visitor to Britain. How do we*

distinguish a visitor from anybody else? Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified…"[1]

We recall the Home Secretary's introduction of the Identity Documents Bill at second reading:

The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good. [2]

…

We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of

"whatever emanation of the state has demanded that I produce it."

I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government.[3]

It is not the mere fact of a card that produces discomfort or that those carrying out the checks are remote emanations of the State: private citizens checking upon each other. British citizens, EEA nationals and third country nationals alike would be required to produce identity documents at many turns in schemes that would be intrusive, bullying, ineffective and expensive and likely racist and unlawful to boot.

It was but a few short months ago, on 28 March 2013, that the Home Secretary abolished the UK Border Agency. She said[4]

However, the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework, which has led to historical backlogs running into the hundreds of thousands; the number of illegal immigrants removed does not keep up with the number of people who are here illegally; and while the visa operation is internationally competitive, it could and should get better still. The Select Committee on Home Affairs has published many critical reports about UKBA's performance. As I have said to the House before, the agency has been a troubled organisation since it was formed in 2008, and its performance is not good enough.

…. I believe that the agency's problems boil down to four main issues: the first is the sheer size of the agency, which means that it has conflicting cultures and all too often focuses on the crisis in hand at the expense of other important work; the second is its lack of transparency and accountability; the third is its inadequate IT systems; and the fourth is the policy and legal framework within which it has to operate. I want to update the House on the ways in which I propose to address each of those difficulties.

…the third of the agency's problems is its IT. UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry instead of

[1] *In Place of Fear*, Bevan, A., (1952), chapter 5.
[2] HC report 9 Jun 2010: Column 345.
[3] *Op. cit.* Col 350.
[4] Hansard HC Deb 6 Mar 2013 : Column 1500.

automated data collection, and they often involve paper files instead of modem electronic case management. …

The final problem I raised is the policy and legal framework within which UKBA has operated. The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies, which makes it harder to remove people who are here illegally. …

UKBA has been a troubled organisation for so many years. It has poor IT systems, and it operates within a complicated legal framework that often works against it. All those things mean that it will take many years to clear the backlogs and fix the system, …"

ILPA considers all the remarks quoted above to be fair and accurate and concurs that it will take many years to clear the backlogs and fix the system. We do not consider that the Home Office is in a position to take on a challenge of this scale. We urge caution. This project sets the Home Office up to fail. Again.

We have seen the Home Office subcontract to Capita Plc. to text and telephone migrants allegedly with no leave telling them to leave the UK. British citizens, nurses, investors with a million pounds invested in the UK, all have been recipients of these texts. This is no surprise. Capita has been working from the Home Office database which both reflects the complexity of current immigration law and is not up to date[5].

Both the Capita exercise and the Go HOME campaign involving vans have been of questionable legality and the subject of widespread condemnation[6]. Both are object lessons in how difficult it is to produce a workable and efficient system against the backdrop of an enormously complex immigration system and longstanding problems and delays in Home Office immigration casework and record keeping. Both are object lessons in the extent to which there is at best a cavalier attitude to promoting equality or ensuring that the actions of the Home Office do not leave people, be they persons under immigration control or British citizens, vulnerable to abuse and victimisation.

Checks are difficult.

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[5] See further Capita's work for the UK Border Agency, Oral and written evidence 29 January 2013, Paul Pindar, Chief Executive, Andy Parker, Joint Chief Operating Officer, and Alistair MacTaggart, Managing Director, Secure Border solutions, Capita Plc , report of the Home Affairs Select Committee HC 914-I, published on 11 April 2013.and ILPA's August 2013 response to the Home Office consultation Strengthening and simplifying the civil penalty scheme to prevent illegal working.

[6] Examples include:. 'You are required to leave the UK': Border Agency contractor hired to find illegal immigrants sent them TEXTS Daily Mail 11 January 2013, available at http://www.dailymail.co.uk/news/article-2260667/UK-Border-Agency-contractor-hired-illegal-immigrants-send-TEXTS-warning.html#ixzz2bm4JCfg2 (accessed 12 August 2013); ICO to investigate SMS messages sent to immigrants by Capita, Computer World 15 January 2013; Nigel Farage attacks Home Office immigrant spot checks as 'un-British', The Telegraph, 2 August 2013; Vince Cable MP, BBC 28 July 2013, available at http://www.bbc.co.uk/news/uk-politics-23481481 (accessed 12 August 2013), Bishops condemn Home Office 'go home' campaign, Ekklesia, 12 August 2013, available at http://www.ekklesia.co.uk/node/18785 (accessed 12 August 2012), nongovernmental organisations such as Show Racism the Red Card (see http://www.srtrc.org/news/newsand- events?news=4511 accessed 12 August 2013) and Liberty "Go Home" vans, nasty racist and likely unlawful 1 August 2013, see https://www.liberty-human-rights.org.uk/news/2013/go-home-vans-nastyracist-and-likely-unlawful.php

We have experience of the civil penalty system for employers, see further our August 2013 response to Strengthening and simplifying the civil penalty scheme to prevent illegal working[78]. Currently, the page of the Home Office website dealing with Preventing Illegal Working[9] provides links to some eight separate current documents, totalling some 194 pages. List A of acceptable documents[10] goes on for 12 pages and list B for 11[11]. This gives some notion of the difficulties employers face and some idea of the complexity of the online tool that the Home Office will provide, promised by Lord Taylor of Holbeach in his memorandum following second reading[12]. Lord Taylor said

> *"In addition to this, the Home Office will provide a Landlords Enquiry service, which will be able to offer help and advice."*

This suggests that, unlike the employer's helpline, it will not be possible to check the status of individuals. Indeed, this was not unexpected, given the much larger of potential users of the helpline and concerns about data protection. An employer can be required to give details of a business but what checks would ensure that a caller is really a landlord or landlady is checking on a potential tenant, rather than someone being nosy? If safeguards were too onerous, no one would ring. But those landlords who are prepared to rent to persons under immigration control may greatly prefer the security of checking with the Home Office that their tenant is a person to whom they can rent, than carrying out checks themselves. This will make large demands on the helpline.

The notion, in today's frantic rental market, of landlords and landladies sitting down and painstakingly working through an online guide or talking at length to a Home Office helpline is, we suggest, fanciful.

Capita case December 2012

The student has ...only been given until the 1 Jan 2013 to respond… (I'm assuming most institutions will not be operating an Independent Student Advisor service until term starts…).

…the student previously had a Tier 1 visa that was due to expire in 2011. … in 2010 the student obtained Tier 4 entry clearance to study a PhD. This leave is valid from 1 May 2010 until August 2014 and was stamped on entry on 10 May 2010. .. the Capita case ID has been logged on the UKBA system against this student but she could not see any record of the student's Tier 4 leave. It therefore looks like the UKBA (and Capita) think that the student has been an overstayer since his Tier 1 leave expired in 2011 – very alarming since as far as X knows the student doesn't in fact have any irregularities on his history to prompt this kind of confusion / action.

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[7] Available at http://www.ilpa.org.uk/resources.php/20798/ilpa-response-to-the-home-office-consultation-tackling-illegal-immigration-in-private-rented-accommo

[8] http://www.ilpa.org.uk/data/resources/19317/13.08.20-ILPA-response-to-strengthening-civil-penaltiespdf.pdf

[9] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/ (accessed 12 August 2013).

[10] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/currentguidanceandcodes/comprehensiveguidancefeb08.pdf?view=Binary (accessed 12 August 2013).

[11] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 26

[12] **Try out the employer document https://www.gov.uk/check-an-employees-right-to-work-documents**

Capita case December 2012

A client of mine received a text message on his phone from Capita Plc. and messages say they need to leave the UK and a phone number to call them on. He has also been getting phone calls from them-quite a few on a daily basis. Needless to say that our client is actually waiting for his application to be reviewed and we have a letter to confirm this, but obviously Capita have not been informed of this and he was extremely concerned.

Capita case December 2012

" one of my clients who informs me that she received the following message: " Message from UK Border Agency. You are required to leave the UK as you no longer have the right to remain. Please contact us on 08443751636 to discuss.
She received the message at 11:08AM yesterday and then, this morning at 09:32AM, received a missed call from the number 08452930035, which is possibly related.
Our client is currently on a Tier 1 (General) visa valid until 02 March 2013

CHAPTER 1 (RESIDENTIAL TENANCIES)

Residential tenancies

Key interpretation

Before Clause 15, Clause 15 and Schedule 3: Residential Tenancy Agreement and Schedule 3

AMENDMENTS 50 and 51 NEW CLAUSE *Pilot of residential housing provisions* Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara, and (amendment 51) Lord Best

Purpose
Amendment 50 simply introduces the new clause. Gives the Secretary of State power to pilot the provisions of Part III Chapter 1 on residential tenancies and provides that the provisions of that Chapter can only come into force after the pilot has been evaluated and both houses of parliament approved a result on it. Such approval would have to take place before the end of the 2014-2015 session of parliament.

AMENDMENTS 52 and 52A Baroness Hamwee Lord Clement Jones

Purpose
Amendment 52 excludes from the scheme agreements between landlords or landladies and applicants for Tier 4 visas holding a certificate of acceptance for studies issued by institutions listed in the Education (Recognised bodies) (England) Order 2013 (SI 2013/2992)[13]. Nearly all those on the list whom are universities although among the exceptions to this rule we spotted the Archbishop of Canterbury. The existing student exclusion from the scheme excludes a type of accommodation whereas the provisions as amended by amendment 52 exclude a type of agreement. For this reason we deal with them in this group.

[13] SI 2013/2992 http://www.legislation.gov.uk/uksi/2013/2992/made

Amendment 52A
Purpose
Excludes from the scheme agreements between landlords or landladies and applicants for or persons holding Tier 4 visas issued by educational institutions funded by local authorities or applicants for student visit visas.

AMENDMENT 54ZA Baroness Hamwee and Lord Clement-Jones

Purpose
Excludes agreements made for the purposes of a holiday let or a letting "for business purposes" (not defined) of less than six months from the scheme.

AMENDMENT 54A Lord Best

Purpose
To exempt from the scheme agreements under which a person is supported by a local authority registered social landlord or a charity or voluntary organisation to prevent or resolve homelessness.

CLAUSE 15 STAND PART Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara

Purpose Treats Clause 15 as a proxy for Chapter 1 and thus provides an opportunity to debate removing all the residential tenancies provisions from the Bill so that there would be no scheme of landlords and landladies checking the status of prospective tenants and tenants

After Clause 29

AMENDMENT 56G Baroness Hamwee and Lord Clement Jones

Purpose
To provide for a report identifying matters to be taken into account in assessing a pilot to be laid before parliament before Chapter 1 comes into force.

Briefing
We understand the clause stand part amendment to treat clause 15 as a proxy for the omission of Chapter 1 and Schedule 3, on residential tenancies, from the Bill We have grouped our briefing to Clause stand part with all amendments trying to remove a particular group from the residential tenancies provisions or those trying to remove agreements with particular persons from the provisions because we consider that only the omission of Part 3 can meet the concerns the amendments seek to address. We deal separately below with amendments seeking to remove particular types of property from the scheme. We deal with the pilot here.

The amendments concerning particular types of person are in respect of very different groups of persons and/or very different types of agreements but have the same aim: to protect members of a particular group from the provisions of Part 3. We support the intention behind all these efforts and therefore support them as probing amendments but we do not consider that the amendments would or could achieve their aims.

In Chapter 1 Residential Tenancies every single person, British citizen, person with a right abode, settled person or person with limited leave, is obliged to prove that they have a right to rent. No one is exempt from this. If you prove you are a British citizen by means of specified evidence, you will have done all that is necessary. Similarly, were **amendment 48** accepted, if you proved, by means no doubt of specified evidence that you were pregnant, similarly, were **amendment 49** accepted, if you proved by means of specified evidence that you were a student or worker of the type specified. Etc. But no exemption will protect you from the requirement to prove that you are British, or pregnant, or a student and it is likely to be before you ever get a chance to do so that you will have problems.

Every one of us will be required to provide evidence of our immigration status before renting private accommodation from each other, be it only for a peppercorn. Private landlords will face fines of up to £3000 if they rent to a person without the requisite status.

The class of persons who will no longer be entitled to rent will be broad. It will include all those unable to prove their status, for example because they have no passport or other required document. Those who live chaotic lives, for example because of mental health problems, will be among those affected. So will those in crisis, for example those who left all documents behind when they fled a violent home. Consider the list of documents that Lord Taylor described as acceptable from British people who do not have a passport and consider whether a person at risk because of grave mental health problems or the person who has fled their home will be able to provide them, not to mention how many landlords and landladies would feel confident checking them.

> *25. Baroness Smith asked what the position would be for those British citizens who do not have a passport. The Home Office has carefully considered how people in this situation could satisfy the checks and landlords or agents will be able to accept any two of the following documents when produced in combination:*

- *A full birth or adoption certificate issued in the UK, the Channel Islands, the Isle of Man or Ireland, which includes the name(s) of at least one of the holder's parents or adoptive parents;*
- *Letter of attestation from a named government or local government official or British passport holder, (giving name, address and passport number) or an employer's reference issued within the last 12 months;*
- *Letter from a UK police force confirming subject is a victim of crime and personal documents have been stolen;*
- *Evidence of previous or current service in HM armed forces;*
- *HM prison discharge papers or probation service letter;*
- *Result of credit reference check showing person has been economically active in the UK for the past 12 months or any year in the past five years;*
- *Letter from a UK further or higher education institution confirming acceptance on a course of studies;*
- *A current UK driving licence (a full or provisional car licence);*
- *Current UK Firearms Certificate;*
- *Disclosure and Barring service certificate;*
- *Benefits paperwork issued by HMRC, a Local Authority or a Job Centre Plus, on behalf of the Department for Work and Pensions, within previous 12 months prior to commencement of a tenancy.*

> On the face of the Bill there is absolutely no penalty for discrimination by a landlord, landlady or other person letting accommodation. See our briefing to Clause 28.

What is proposed is very different to the system for employers. The civil penalty scheme for employers is, in its current incarnation, backed by the sponsor licensing system (whether a particular person subject to immigration control is also sponsored or not) and in practice the two are interlinked. It is not proposed to licence all private landlords and landladies (the government rejected proposals made by the previous government to have such a register) and the costs and bureaucracy involved in so doing would be prohibitive. But this creates enormous challenges even in communicating with them. Landlords and landladies are no longer permitted to hold deposits other than via bond companies, see the Deposit Protection Scheme and the Housing Act 2004 as amended, but not all of them take deposits. As to those that do, case law on tenancy deposit schemes, where the landlord must place the deposit in an authorised scheme and provide information to a tenant, is instructive as an illustration of the practical difficulties in many cases of making landlords and landladies aware of new regulatory obligations and of ensuring compliance with them[14].

According to the Department of Communities and Local Government, in 2010 individual private landlords and landladies had responsibility for 71% of all private rental properties in England[15]. That survey showed that 78% of all landlords and landladies in England had only one rental property.

In 2013 Shelter estimated that some nine million people in England rent[16]. Tenancies are often granted for a short period, typically six to 12 months, and then renewed. Many persons will rent more than one property in the course of a year. Persons with sub-tenancies change perhaps more rapidly.

On 3 July 2013 the Residential Landlords Association issued a news release with the results of a survey showing that 82% of landlords and landladies opposed the plans: *Landlords oppose Government's immigration plans*[17] The Chair of the Association, Alan Ward 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 significant extra burden on landlords making them scapegoats for the UK Border Agency's failings*
> .

The article describes the Home Office as giving assurances that it will take a "light touch" approach to regulation, a phrase repeated by Lord Taylor of Holbeach in the memorandum to

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[14] See for example Boyle v. Musso, 25 October 2010, Bristol County Court; Soens-Hughes v. Lewis 22 December 2010, West London County Court; Green v Sinclair Investments Limited Clerkenwell and Shoreditch County Court, 11 June 2010; Shepley v. Yassen, Tameside County Court, 13 January 2011; Woods v Harrington, Haverfordwest County Court 19 May 2009; Delicata v Sandberg, Central London County Court. 2 June 2009. We have concentrated here on a selection of cases in the lower courts the facts of which illustrate what happens in practice, rather than cases in the higher courts on the correct legal interpretation of the very complex applicable provisions.

[15] Private Landlords Survey 2010, Department of Communities and Local Government, October 2011.

[16] See http://england.shelter.org.uk/campaigns/fixing_private_renting (accessed 12 August 2013).

[17] Available at http://news.rla.org.uk/landlords-oppose-governments-immigration-plans/ (accessed 12 August 2013). The report defines "recent" as having arrived within the last five years.

peers following second reading[18]. This terminology is familiar to us from the employers' civil penalty and sponsor licensing schemes. In our experience it means different treatment for different employers with no objective basis for this. That is a climate in which discrimination can flourish.

Mistakes are easy.

A "UK passport" does not mean that a person is a British citizen. There are many types of UK passport and some people who hold a UK passport are not exempt from immigration control.

A naturalisation certificate does not prove that a person has British citizenship. The person may have renounced that citizenship subsequently or have had it taken away.

A person with a right of abode certificate is not necessarily a British citizen.

Many EEA nationals and non-EEA nationals who are lawfully present are still reliant on leave to remain that is endorsed in passports, e.g. those who applied for indefinite leave to remain before the end of February 2012 when Biometric Residence Permits were introduced for all.

Those applying for an extension of leave are asked not to do so until a month before their leave is due to expire. The Home Office only very rarely decides that application before leave expires. Where a person has had lawful leave in the UK, as a worker, or student, or spouse and applies to extend that leave, the leave is extended by section 3C of the Immigration Act 1971 until the Home Office has determined the application. The Bill preserves this position. The Bill also makes provision, in Schedule 9, for leave to continue on the same terms and conditions while an administrative review is pending. But the Home Office does not issue a letter immediately upon receipt of an in-time application for leave to remain stating what the person's current leave is and that it continues until the application and appeal rights have ended. Any repeat check at this time will thus suggest to a landlord or landlady examining documents that the person does not have leave.

Even where it is established that an application is with the Home Office waiting for a decision, what is achieved? The leave may end at any time, when a decision is made on the application or when appeal rights are exhausted (see below) . The checking service cannot say whether, when it ends, the person will be granted further leave or not.

Currently once a decision not to extend leave or to revoke leave is made, leave is extended on the same terms and conditions during the period provided for lodging any appeal and then while the appeal is pending. But the Home Office does not issue letters saying that a person has an outstanding appeal. Communications come from the Tribunals. There have been very severe delays at the Tribunals. It can take over two months or even longer to receive a Notice of Hearing.

But matters are much worse under the Bill. The provisions extending leave while an appeal is pending will no longer function because the nomenclature for appeals has changed and the provisions on which they bite are being repealed.

[18] Paragraph 29.

That will mean that the moment a person is refused, before even they can lodge an appeal, their presence will cease to be lawful. An employer will be committing a criminal offence by continuing to employ them. A university will jeopardise its licence by continuing to teach them. And landlords and landladies will be at risk if they rent to the person. ILPA has proposed **amendments to Schedule 9** to correct this. Not only considerable hardship to individuals but also administrative problems will loom if it is not corrected. For example there will be every incentive for a person with an asylum or human rights appeal to apply for administrative review as well, so that their leave continues.

Immigration law keeps changing; keeping up to speed and understanding the implications of changes are a huge challenge. For landlords and landladies, as for smaller employers and those with a low turnover of staff, it is not a case of familiarising themselves once and then being experts; it is more likely to be something they have to re-learn each time they do it. For example there were statements of changes in immigration rules in July 2012 (twice), September, November, December (twice), January, February, March (twice), April and July 2013. These run in total (inclusive of explanatory notes, but exclusive of explanatory memoranda and amended guidance) to some 740 pages. A number were brought in with little or no notice. For example the January changes were published on 30 January and came into force on the 31st. The second December changes were printed on 20 December (the Thursday before the Christmas, with Christmas day falling on the Tuesday) and came into force on New Year's Eve. The first December changes were printed on 12 December and came into force on 13 December amending the rules previously laid which had been due to come into force on that date. The September 2012 changes were printed on 5 September and came into force on 6 September. The second July changes were brought into force "with immediate effect" on 20 July 2013, inter alia amending rules laid on 9 July 2013. Even where a longer lead in time was given, rules did not always appear at once on the Home Office website and only those scouring the parliamentary lists of publications were aware that they existed at all.

Getting in touch with the Home Office enquiry services can be time-consuming. The private rental market is extremely competitive; without an immediate response many landlords and landladies will let to the tenant whose British passport they can see at once. This may be even more the case for letting agents keen to let the property to the first suitable tenant. Some people will only hold a type of document that has to be verified with the Home Office checking service. These people will simply be unable to compete with other prospective tenants for accommodation. It will always be quicker and easier to let to the other tenants.

Home Office lines can and do give different answers at different times. This can be as a result of their understanding of a person's status or because the Home Office database has not been updated, the latter is a problem that can last for considerable periods.

The proposals give rise to a real risk of increased homelessness, including of families, and of exploitation. Provision needs to be made for those without leave. If an employee becomes an overstayer s/he can stop work. The equivalent in this regime is to become homeless. *Inter alia*, we do not consider that making the children of those here without leave homeless is compatible with the duties of the Home Office under section 55 of the Borders, Citizenship and Immigration Act 2009. Nor has any adequate consideration been given to the result burden on local authority social services departments. Even if the local authority or devolved administration has no obligation to provide housing or shelter, it must still process an application for this. Obligations vary across the country; they are different in the devolved

administrations. No adequate account has given as to how the extra cost will be met at a local level.

The Home Office Overarching Impact Assessment for the Immigration Bill[19] sets out to quantify the costs and benefits of the measures proposed in the Bill, arriving at two figures: the "Net Present Value" (measured over the 10 years following the Bill's implementation) and the equivalent annual net cost to business. These figures are essentially guesses: there is no benchmark or equivalent measure from which they can be derived. But even as guesses they are a bit odd.

For the measures affecting the private rented sector, the following estimates are offered (in £millions). They are divided into set-up costs, ongoing costs and benefits, which are offset against the costs to arrive at a "net present value" of -£62.7, i.e. stated cost of almost £63 million over ten years. These are presented as the total costs to everyone: landlords, tenants, the Home Office and the government. However, they are a significant underestimate. There are two reasons for this

- It is very unlikely that landlords/landladies will simply absorb the costs: they will be passed on to tenants in the form of rent increases. This, in itself does not increase the overall costs, just changes who is paying for them. However, rent increases are taken into account in the calculation of local housing allowances, housing benefit for private tenants, so rent increases will inexorably increase the housing benefit bill. This effect is likely to be greater in Scotland, because letting agents cannot charge tenants any fees there. So they will charge any increase in their costs to landlords, and that will fuel further rent increases.
- The method used to calculate the "net" impact of the measures sets presumed costs against presumed benefits. The presumed costs are £105.9 million. The presumed benefits are £43 million. However these presumed benefits actually include "increased turnover for letting agents" of £36.4 million. This "benefit" is simply the charges letting agents are assume to make to landlords and tenants, based on the assumption they do not make a further profit on offering the service. This cannot be described as a benefit to anyone: it is simply a further cost. So the actual "benefits" are only the assumed income from penalties (set at an optimistic £6.8 million over ten years). The net cost is really almost £100 million, ten million pounds. A year.

Detailed workings (all figures taken from the Home Office impact assessment):

Set-up costs

1. Training and familiarisation costs - Home Office	£0.04
2. Home Office Enquiry Service Set up and maintenance	£0.0
3. Home Office IT Set up and maintenance	£0.0
4. Familiarisation costs – Landlords	£22.6
Total Set Up Costs	**£22.6**

So

- the Home Office intend to spend no money whatsoever on setting up the enquiry service that will respond to the potential enquiries on 10,000 new lettings a day.
- They will spend £40,000 on training and familiarisation

[19] https://www.gov.uk/government/publications/immigration-bill-overarching-documents

Ongoing costs

1. Home Office Staff Impacts	£7.5
2. Home Office Cost of Objections	£0.8
3. Home Office Cost of Appeals	£0.3
4. Assisted Voluntary Departures Costs - Home Office	£0.0
5. Cost to Landlords of Processing Checks	£36.5
6. Cost to Landlords of Reporting	£0.0
7. Appeal and Objection Costs for successful landlords	£0.02
8. Additional charges by letting agencies to cover costs	
Charges to Landlords by Letting Agencies	£18.2
Charges to Tenants by Letting Agencies	£18.2
9. Diary Input	£1.7
Total Ongoing Costs	**£83.3**
Total costs	**£105.9**

- But once the enquiry service is running it will cost £7.5 million pounds over 10 years
- It will cost landlords and landladies £36.5 million to process the checks. Presumably these costs are to be found from somewhere, or are landlords to be asked to make a charitable donation of that much to immigration controls. In other words, the costs will be passed on to tenants in the form of higher rents. And, as those rent rises force up the median rents on which Local Housing Allowance is based, will actually add significantly to the housing benefit bill.
- In addition, letting agencies are expected to charge both landlords and tenants for the checks they will carry out. The assessment assumes they will do this "fairly" by splitting it between them both. Of course, that is impossible in Scotland where letting agencies cannot charge tenants, so Scottish rents (and benefit bills) will presumably go up by more.
- The total costs guessed at come to £105.9 million

Benefits

Ongoing Benefits

1. Public sector income from penalties	£6.8
2. Increased turnover for letting agents	**£36.4**
Total benefits	£43

As to **amendment 52A,** a version was laid as amendment 59 in the Public Bill committee by Mr Paul Blomfield MP and Ms Meg Hillier MP[20]. The Minister Mr Norman Baker MP said (col 259) that a student should be treated like any other tenant. But **amendment 52A** looks, inter alia, at the position of students who have not yet travelled to the UK to take up their places, in his memorandum to peers following Second Reading, Lord Taylor of Holbeach addressed the question of international students who need to arrange accommodation in advance of their arrival in the UK. He said that the Government would make regulations

> "*…which will provide for overseas students to be able to arrange accommodation in advance of taking up their studies in the UK, and for such tenancies to be entered into*

[20] See http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131107/pm/131107s01.htm col 256.

conditional on the production of the relevant visa or residence permit when the student arrives and takes up residence."

What student or indeed landlord or landlady will be satisfied with an agreement that will be conditional until the very last minute? The landlord or landlady may fear losing an opportunity to rent at the beginning of the academic year and having property lying empty if the agreement falls through. The student will be conscious that they have no final promise of accommodation and risk being left in the lurch, or vulnerable to being asked to pay surcharges.

The proposal for a pilot in **amendments 50 and 51** is in identical terms to one which was laid at Commons Report. We consider it likely that a pilot would give a more favourable picture of the operation of the scheme than would result from the implementation of the scheme across the whole of the UK. This is because those worst affected are likely to move from the area in which the pilot is running.

Will a pilot show that the scheme will not work? Arguably not. If no one takes an interest in whether landlords and landladies are applying the scheme, but simply relies on their fear of the fine and, in some cases, hostility to persons under immigration control, and if no one takes an interest in whether landlords and landladies are discriminating, the scheme will probably function. ILPA suggests that the only way in which this scheme can work is if it not enforced: if landlords and landladies are rarely if ever be penalised for renting to persons who are forbidden from renting because of their immigration status and if everyone turns a blind eye The landlords' associations giving oral evidence to the Committee suggested a mere 10 Home Office staff would be employed to work on the scheme; this sounds all too plausible. It will be insufficient. The scheme appears to us intended to rely upon the misery private citizens will inflict upon each other to create a "hostile environment" rather than be operated by the Home Office at all.

Fines will be opportunistic and therefore arbitrary, discrimination cases few and far between. Will a pilot expose all that?

AMENDMENT 50A Baroness Hamwee and Lord Clement Jones

Purpose
To omit agreements that do not grant an exclusive right of occupation from the scheme. ILPA supports this amendment. Agreements whereby the landlord or landlady shares the accommodation with the tenant are often very informal. Agreements to share accommodation may arise out of a personal relationship but nonetheless involve money changing hands.

AMENDMENT 50B Baroness Hamwee and Lord Clement Jones

Purpose
To remove the power to bring agreements excluded from the scheme, by dint of mention in Schedule 3, back into the scheme. ILPA supports this amendment. Any uncertainty could make landlords and landladies in excluded schemes more reluctant to rent to persons without a right to rent.

Schedule 3 Excluded residential tenancy agreements

AMENDMENTS 51B , 51C 51D Baroness Hamwee, Lord Clement-Jones

Purpose

Amendment 51B excludes premises not operated on a commercial basis the costs of whose operation are covered by a voluntary organisation or a charity from the scheme. ILPA supports this amendment.

Amendment 51C excludes premises owned, as well as those managed by a voluntary organisation or charity, from the scheme. ILPA supports this probing amendment.

Amendment 51D extends the definition of a refuge, excluded by the scheme, to premises used wholly or mainly for those who may be subject or are threatened with domestic violence, thus broadening the definition of a refuge which would otherwise be confined to persons who have been subject to domestic abuse as defined in the clause or to threats of such abuse.

AMENDMENT 53 Baroness Hamwee , Lord Clement Jones

Purpose
Removes conditions relating to the management of the building from the exclusion pertaining to halls of residence for students and thus broadens the definition of halls of residence for students excluded from the scheme. Omits the requirements as to the management of the premises and the provisions requiring that the students living in them be nominated by certain types of educational institution.

AMENDMENT 54 Baroness Hamwee , Lord Clement Jones

Purpose
Changes one of the conditions pertaining to the exclusion of halls of residence for students so that instead of its being about agreements that the majority of those who occupy the building will be students it is concerned with the majority of those who are to occupy the building being students. ILPA supports the amendment insofar as it points up the complexity of the scheme whereby there could be two very similar agreements, one excluded, one included.

Briefing
The notion of excluding certain types of accommodation from the scheme is more likely to provide protection than the idea of excluding certain persons from the scheme, for the reasons set out in briefing to the group of amendments above. But Schedule 3 as it stands, and these proposed amendments to it, serve to highlight the immense bureaucracy of the scheme. It seems likely that landlords and landladies, including social landlords and ladies and organisations and companies providing accommodation will have to invest many hours in determining who is permitted to rent their accommodation, while it is unlikely that there will be any desire to spend the money that would be required to establish whether exclusions and inclusions are cooperating as planned. This is likely to be a self policing scheme.

Schedule 3 illustrates the complexity of the scheme. Insofar as any scheme would make it more difficult for British citizens, persons lawfully present and others to find accommodation

in the private rented sector, these are the types of alternative accommodation likely to be put under pressure.

The raft of Government amendments to Part 3 Chapter 1 at Commons' report bears out warnings as to the complexities of the proposed residential tenancies scheme. Schedule 3 which deals with those excluded from the scheme and thus able to occupy premises without falling foul of its terms has proven inadequate. Details are clearly problematic. For example, amendment 22 at Commons Report redefined a building to include a part of a building. Housing law is already more than complicated enough: Schedule 3 is testimony to this.

The amendments do not provide an exhaustive list of omissions from the schedule. We highlight accommodation in which persons are housed under mental health legislation. And see the briefing to amendment 55A below.

As to **amendment 50A** we anticipate that if agreement granting non-exclusive rights of occupation are included in the scheme, as the Bill proposes, this would lead to a large number of these arrangements going undeclared, being hidden and, if discovered, presented as friendly, non-commercial transactions, with the consequent evasion both of tax and of obligations under legislation designed to protect standards of accommodation.

The prohibition on discrimination under Part IV of the Equality Act 2010 is very much less robust in the case of "small premises" into which category these arrangements appear to us to fall.

Small premises are defined as premises where the person or their relatives reside and intend to continue to reside in another part of the premises and the premises include parts shared with residents who are not members of the first person's household. The premises must include accommodation for at least one other household and be let or available for letting on separate tenancy agreement(s), and not normally sufficient to accommodate more than two other households. The premises are also small if they are not normally sufficient to provide residential accommodation for more than six persons in addition to the first person and their relatives.

The prohibition of discrimination, harassment and victimisation under the Equality Act 2010 applies to the characteristic of race in the let of small premises but otherwise it will be lawful to discriminate in the disposal (etc.) of tenancies in small premises. A visa may reveal other things about a person, for example that they are in a civil partnership and thus their sexual orientation. A landlord or landlady in "small premises" could treat people differently on this ground.

As to discrimination on the grounds of race, this may be very difficult to prove unless advertisements bar particular nationalities as there are a multitude of reasons that an individual can advance for not sharing their home with another person and the burden of proving that it was not one of the these but the lodger's nationality that led to the refusal of a particular lodger or licensee (or tenant) is a heavy one. A claim against a landlord or landlady for discrimination is brought in the county court but no statistics are available to show how often such cases succeed. We suggest the Home Office obtain and publish information on whether there have been any and/or any successful claims against landlords and landladies of small premises under the Equality Act 2010.

Arrangements where an owner occupier takes in a paid lodger are often very informal. The sums of money changing hands can be very low. The arrangements are often at the lower end of the rental market. Lodgers or licensees have less protection from eviction under the Protection from Eviction Act 1977 than those who are sole occupants of property under a formal tenancy. The chances of a landlord or landlady's taking fright and putting lodgers who are ill-placed to find alternative accommodation onto the street, retaining deposits including money deposited against payment of any possible fine under these measures, are high.

How would responsibility for a breach be assigned, and how would it be aligned with having knowledge of, and responsibility for, a person's being in the property?

Amendment 53 points the way to a broader exclusion from the scheme for student issued a Certificate of Acceptance for Studies. Students have been checked by their university. The student who arranges accommodation through the university will thus be checked twice, once by the University for the purposes of the course of study, once by a landlord or landlady. The educational institution sponsoring the student will be complying with all the (onerous –there are currently 104 pages of the ever-changing guidance[21]) requirements of a sponsor licence. They are likely to be a "Highly Trusted Sponsor"[22]. They will check the individual student and the student will go through the visa application process. Therefore why not extend the exclusion to cover all accommodation arranged through the university and not just halls of residence?

Ms Meg Hillier MP said in the Public Bill Committee:

> *The Bill proposes an exemption for halls of residence and buildings where an agreement is in place with the university that the majority of occupants are students, but there is no similar provision for accommodation arranged through the university but which is outside the halls of residence. The Minister Mr Norman Baker MP said (col 259) that a student should be treated like any other tenant. Ms Hillier MP indicated that she would return to the amendment on report*[23].

We recall the evidence of Ms Carolyn Uphill, Chair of the National Landlords Association, to the Public Bill Committee:

> *I notice that the Bill excludes halls of residence, but, in fact, about two thirds of students go out into general housing after their first year.*
> *One part of my portfolio is student properties in Manchester. You will have a number of tenants living there, but students are very peripatetic and it is difficult to have a complete handle over who is staying in the property at any one time. You have an issue with student visas that may come to an end with the academic year, before the end of the tenancy period. The landlord would then end up with a council tax liability and a void that they were not expecting, so landlords could become very wary of taking on student visas.*

Given that a checking system is in place, run by a large institution which is far better placed to handle and store data safely than private individuals, why should it not be relied upon?

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[21] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270492/sponsor-guidancet4.pdf

[22] See http://www.ukba.homeoffice.gov.uk/business-sponsors/education-providers/HTS/

[23] See http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131107/pm/131107s01.htm col 256.

Lord Taylor of Holbeach rejected this in his memorandum following second reading:

> *It would be more administratively complex for landlords to check and retain documentation for certain individuals and not for others, such as those here to study.*

We disagree. We are sure that landlords would be delighted the fewer documents they did not have to check. If they did not have to worry about any tenants arranged through the university that would simplify their lot.

AMENDMENT 51A NEW CLAUSE *Residence permit: domestic violence* Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara

Purpose

To make provision for a three-month residence permit for survivors of domestic violence and their dependants and thus provide them with a period of access to services and benefits.. ILPA supports this amendment. The amendment does not alter the right to apply for Indefinite Leave to Remain (ILR) for spouses or civil partners of British citizens or those settled here, but extends support available to survivors of domestic violence for a period in which to consider any applications they may make, or allow them to leave the UK legally having made appropriate arrangements. ILPA supports the amendment.

Briefing

The amendment was first suggested by Rights of Women. There are alternative places in Part 4 where this amendment could be put. The amendment was laid in the Public Bill Committee by Mr David Hanson MP[24]. He said

> *The new clause has been discussed in detail with organisations outside the House and is in response to the Government's own action plan, "A Call to End Violence against Women and Girls", which the Home Secretary has introduced and spoken to. … Currently, if someone is in the UK as a spouse of a student or a points-based system visa holder and their relationship breaks down as a result of domestic violence, the only option for them as a dependent spouse and for their children is an immediate return to their country of origin. That may mean leaving their own employment and taking children out of school and uprooting them. That leaves spouses a potentially very difficult decision: to continue in a violent relationship, to face immediate return or to overstay, with the risk of their spouse informing the Home Office of the relationship breakdown, which will affect any applications that they have. …what I seek from the Minister is whether he will consider providing a period of temporary relief in which a person who has suffered domestic abuse can examine options and potentially make an application to remain in this country in their own right, or effect a dignified and safe return to their country of origin. …Currently, there are arrangements for those who enter on other forms of dependant visa, but not for those who are included as the spouse of a student or points-based system visa holder*
>
> *The previous and current Governments have supported the destitute domestic violence concession, which allows spouses and civil partners of settled and British citizens a three-month period of limited leave to remain, with access to public funds, while*

[24] Col 371-2.

making an application for indefinite leave to remain. When he was Minister for Immigration, the right hon. Member for Ashford (Damian Green) said:

> *"No one should be forced to stay in an abusive relationship and this scheme helps victims in genuine need escape violence and harm and seek the support they deserve."*

Today we are discussing people in other categories, which I have outlined, who fall into similar circumstances… All I ask of the Minister is to consider introducing a three-month respite to allow arrangements to be made, rather than have people falling immediately into illegality.

The then Minister rejected the amendment [25] saying

> *We want to ensure that a victim of domestic violence has the full protection of the criminal and civil law, and of law enforcement agencies, regardless of their immigration status. However, that does not mean that all victims of domestic violence should be able to stay in the UK.*

The amendment does not ask for people to "stay in the UK". It asks for a three month respite.

The then Minister, Mr Mark Harper MP[26] sought to distinguish those who expected to settle permanently in the UK from other survivors of domestic violence. He suggested that this distinction was to be drawn between those with leave as spouses and civil partners and other survivors. However, this is incorrect. Spouses and partners of workers, refugees and others are on a route to settlement.
(From Rights of Women) Following the Call to End Violence against Women and Girls Action Plan 2013 The Government introduced the Destitute Domestic Violence Concession – a three month period of leave to allow spouses and civil partners of those settled or British citizens limited leave with access to public funds while making an application for Indefinite Leave to Remain... In the ministerial foreword, the Home Secretary states:

> "*I am determined to see continued reductions in domestic and sexual violence. But I am also determined to see a society where abuse is no longer tolerated, where all businesses and organisations offer support to those who may be victims, where those affected by domestic or sexual violence feel confident in coming forward to report their experiences and are fully supported for doing so, where female genital mutilation and forced marriage are no longer practiced, and where the criminal justice system rightly punishes those who would abuse and blight the lives of others.*"

At the time, the then immigration minister, Damian Green MP, said

> "*No one should be forced to stay in an abusive relationship and this scheme helps victims in genuine need escape violence and harm and seek the support they deserve*."[27]

Whilst the domestic violence rule and destitute domestic violence concession enables a small group of people to be able to remain in the UK permanently in some circumstances, there is no avenue for protection for those who are unable to benefit for the rule or who seek only temporary support in the UK. The current piecemeal approach means some may benefit from

[25] Col 373
[26] Col 373.
[27] See https://www.gov.uk/government/news/support-for-victims-of-domestic-violence

the domestic violence rule whilst others might secure limited leave to remain if there are ongoing criminal or civil proceedings. If a victim of domestic violence is required to leave the UK immediately, they may be leaving employment, being removed from their support networks and services and uprooting their children.

The aim of the amendment is to simplify the position of victims by guaranteeing them a period of safety with access to services and benefits. It is intended to augment current provisions for victims of domestic violence. It does not alter the right to apply for Indefinite Leave to Remain for spouses or civil partners of British citizens or those settled here, but should act in tandem to extend support available to victims of domestic violence and allow them a period in which to consider any applications they may make, or allow them to leave the UK legally having made appropriate arrangements.

The use of a residence permit is analogous with the language of the Council of Europe Convention of Action against Trafficking in Human Beings (Article 13); and is intended to entitle victims of domestic violence to a period of rest and reflection.

Clause 16 Person disqualified by immigration status or with limited right to rent

AMENDMENT 55 The Earl of Listowel

Purpose
Would ensure that a pregnant woman retained her right to rent for so long as she were pregnant. The right would be lost on giving birth. It would not be conferred on any partner of the woman or any other child.

Amendment 55A Baroness Hamwee, Lord Clement Jones

Purpose
To provide that there will be no prohibition upon renting to persons in the categories specified: asylum-seekers and their dependants, persons accommodated under various provisions of the Children Act, persons supported by local authorities under Schedule 3 to the Nationality Immigration and Asylum Act 2013 to avoid a breach of the European Convention on Human Rights, students at State funded institutions, applicants for student visit visas of over six months duration and those resident overseas, studying English in the UK and accommodated in home stay accommodation. To highlight omissions from Clause 15 and Schedule 3.

Briefing
Clause 16 is not about proving an entitlement to rent property. It is about having or not having any entitlement to rent at all. A landlord or landlady or any type: private individual or State institution, faces a fine of £3000. Insofar as it is considered that these persons should live anywhere at all, they are supposed to live in the accommodation excluded from the scheme under Schedule 3. This is not suitable for all the groups defined in the amendment, or the definitions of the excluded accommodation are so narrow as to limit their choices.

The intention may be that some of these groups depart the UK. Lord Taylor of Holbeach said in his memorandum: "The Bill is designed principally to persuade illegal migrants to depart

or to make it easier for the Home Office to remove them[28]." It is certainly not easier to remove a person who is of no fixed abode – finding them to notify them of an appointment with a legal representative is in many cases impossible, you just have to wait for them to turn up or rely on friends. So the intention must be to persuade them to leave. But will they? No one who heard it will forget the speech of Diane Abbott MP about those denied support under Schedule 3 of the Nationality Immigration and Asylum Act 2002, one of the groups envisaged in this clause. She said:

> *I have heard the Minister for Citizenship and Immigration say, very reasonably, that reasonable, sensible parents, faced with the prospect that their children would be taken into care, would agree to go back whence they fled. They would do the reasonable and sensible thing, take the plane ticket and go back. She clearly has not done what some of my hon. Friends have been doing for 17 years: she has not sat across a table from people whose asylum or immigration case was going nowhere and told them what they have already heard half a dozen times from lawyers, advisers or social workers. She has not had to try to talk to such people only to see complete disbelief and terror in their eyes.*
>
> *Reasonable people, people in the Minister's position, take reasonable decisions. Desperate people—those with whom I and some of my colleagues deal week in and week out—take unreasonable and irrational decisions. Tragically, some parents faced with that choice will take the ticket and go home, but many others will find themselves forced underground, or even more vulnerable and marginalised than they were before.*
>
> *I do not care if most parents take reasonable decisions. If some parents are so frightened of going home to face torture, political persecution and, yes, economic chaos and destitution—something that we in this place cannot really get our heads round—that they are prepared to see their children go into care, that is a situation that no decent Government should bring about. The use of even one child as an instrument to enforce the removal of its parents is one child too many. As a Government, we cannot use the threat of destitution or losing a child as an instrument of asylum policy. There must be better methods than that.*[29]

A woman who is pregnant may quite simply be unable to travel. Or she may be unwilling to do. Creating a system more unpleasant than war, famine pestilence and death is no easy task.

Lord Taylor of Holbeach said in his memorandum to peers following second reading

> *"22. The Government carefully considered responses to the public consultation last summer and decided to exempt many forms of living arrangements from the provisions, including accommodation provided as a consequence of a duty placed on a local authority, and accommodation provided in hospitals, hospices, care homes, hostels and refuges for victims of violence."*

The problem is, as is inevitable with a scheme of this complexity, that some have been forgotten. We take each group in **amendment 55A** in turn.

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[28] Paragraph 4.
[29] 17 Dec 2003 : Column 1645.

Provision is made in Schedule 3 paragraph for accommodation for persons seeking asylum provided by the Secretary of State under section 95 of the Immigration and Asylum Act 1999 to be excluded from the scheme and similarly for accommodation provided for those whose claims have failed and who are accommodated under section 4 of the 1999 Act. No provision is made for asylum seekers who make their own arrangements for accommodation. Unless this is addressed, the State will be forced to provide for those who could otherwise provide for themselves.

While provision is made in paragraph 7 of Schedule 3 for accommodation from or involving local authorities it is drafted in terms of homeless legislation and will not cover other accommodation e.g. that provided under the Children Act 1989.

Schedule 3 to the Nationality, Immigration and Asylum act 2002, the provision about which Diane Abbott MP was talking in the speech above, removes certain persons from the protection of provisions of the National Assistance Act 1948 (c. 29) (local authority: accommodation and welfare),the Health Services and Public Health Act 1968 (c. 46) (local authority: welfare of elderly), the Social Work (Scotland) Act 1968 (c. 49) (social welfare services),; the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)) (prevention of illness, social welfare, &c.); the National Health Service Act 2006, the National Health Service (Wales) Act 2006 (social services), the Housing (Scotland) Act 1987 (c. 26) (interim duty to accommodate in case of apparent priority need where review of a local authority decision has been requested), the Children Act 1989 (c. 41) (welfare and other powers which can be exercised in relation to adults), the Children (Northern Ireland) Order 1995 (S.I. 1995/755 (N.I. 2)) (welfare and other powers which can be exercised in relation to adults),Children (Scotland) Act 1995 (c. 36) (provisions analogous to those of the Children Act 1989 from which exclusions are made); the Housing Act 1996 (c. 52) (accommodation pending review or appeal), the Local Government Act 2000 (c. 22) (promotion of well-being), and various immigration legislation. It is a schedule that has caused considerable suffering. Those excluded from assistance are adults with refugee status in another country, EEA nationals, and those whose claims for asylum have failed. While children cannot be denied support under the Schedule, their parents can. But there is a residual duty to support them if not to do so would breach their human rights and it is these cases that are the subject of the proposed amendment.

The provisions pertaining to students replicate those set out in **amendment 52A**.

Finally, language students are often accomodated by families as part of their visit to provide an element of cultural exchange and an opportunity to practice their English. Payment is made to these families. Under the scheme these arrangements could not be made; host families would be liable to the £3000 penalty.

Clause 17 Persons disqualified by immigration status not to be leased premises

AMENDMENT 55B, 55D, 55E Lord Best

Purpose
Amendment 55D would ensure that there no contravention if a residential tenancy agreement is entered into that grants a right to occupy premises to do a person not named in the

agreement, rather than as per the face of Bill, only if reasonable enquiries had failed to detect the likely occupation. Amendment 55B is consequential. **Amendment 55E** defines a relevant occupier as one named in the tenancy agreement.

AMENDMENT 55C Baroness Hamwee, Lord Clement Jones

Purpose
This amendment would mean that there would be no contravention of the section in cases where, subsequent to the tenancy agreement having been entered into, the tenant becomes a person who is disqualified because of their immigration status. It thus obviates the need for repeat checks.

Clause 19 Excuses available to landlords

AMENDMENT 55F Baroness Hamwee and Lord Clement Jones

Purpose
Converts the "defences" that a landlord or landlady complied with all prescribed requirements or that an agent was responsible for the contravention from defences to paying the fine, to defences to the contravention itself.

AMENDMENT 55G Baroness Hamwee and Lord Clement Jones

Purpose
Changes the definition of a landlord's having notified the Secretary of State of a contravention as soon as reasonably practicable from either complying with the prescribed requirements or notifying the Secretary of State without delay on its becoming apparent that a contravention has occurred, rather than both.

AMENDMENT 55H Lord Best

Purpose
Enlarges the provision that an agent not be fined if they notify the Secretary of State and landlord of contravention as soon as reasonably practicable or the eligibility period (as per clause 27 the longer of one year, the period for which a person has been granted leave or for which a document (e.g. an EU residence document) issued to them is valid) so that the person is fined only if one of these applies at the time when the tenancy agreement is renewed.

Briefing

We are struggling to understand who is intended by the subparagraph that **amendment 55B** would omit. If not named in the agreement, how do the premises grant a right to occupy? We can only imagine this being done by function, e.g. "any servant of his" "such children of hers". We equally struggle to see what reasonable enquiries might have detected the person.

As to **amendment 55C**, repeat checks were the subject of particular criticism by those landlords' associations who gave oral evidence to the Public Bill Committee[30]

> ***Carolyn Uphill:***. We certainly fully oppose the idea of periodic checks, because we believe those can lead to very dangerous and unintended consequences… (col 43)
> *If we require a landlord to make a periodic check, you must be under no illusion that you are putting the landlord in an extremely difficult position. A comparison has been made with the employment checks. An employer is in a totally different position. It has an ongoing day-to-day relationship with their employee. …*
> *If an employer has to ask the employee to leave because they are no longer entitled to work in the country, it can do so. …e landlord simply cannot walk into the property and require the tenant to speak to them or communicate with them; if a landlord turns up unannounced, that can be harassment and a criminal offence. If the landlord says, "Can I come round to check the documentation?" when they get there, the tenant may have disappeared and then the immigration services have lost them. The tenant will not have paid any bills.*
> *Conversely, the tenant may refuse to give the landlord admission, which then bars the landlord from doing maintenance checks and even the gas safety test, and that is very dangerous for the property. In the worst scenario, the tenant, possibly feeling themselves under threat because they might be sent out of the country, perhaps back to a war zone of which they are frightened, could become aggressive with the landlord.*
> *You only need one incident, where the landlord and the tenant get into some sort of physical situation, for that publicity to put all landlords off even considering taking on anybody on a temporary visa. Then you have all those people as vulnerable tenants forced into the underclass of rogue operators…*(cols 44-45)
> …
> ***Q 95 Mr Harper: …****We do not require the landlord to evict the tenant—we did think about that, and we decided not to do it for the reasons you set out—nor does the contract become unlawful. All we require is that the landlord notifies the Home Office, and then, quite properly, our immigration enforcement officers will use our legal powers to take action against the tenant. We do not require the landlord to do anything other than notify the Home Office.*
> ***Carolyn Uphill:*** *… Please let us remember that the landlord letting the property has the overheads of the property—probably a mortgage, and certainly gas checks, licensing, electric checks, maintenance fees—to pay. They need the income from the tenant. If they perceive that there is a risk in letting to somebody who is here only on a visa, they are simply not going to take the business risk. You will force those people into the hands of rogue operators, who will be delighted.* (col 52)

As to **amendments 55G and 55H** there will be every incentive to engage in precautionary notification and we question whether the Home Office has the capacity to deal with the volume of notifications that might ensue. We do not consider that the threat of notification should be there at all; it is a threat that a landlord may hold over a tenant and a tool for exploitation.

We do not consider that it is acceptable simply to let a person off a fine rather than acknowledge that they are not "guilty" of a contravention. To try to put strict liability offences into such a complex area is simply to shift all risk from Home Office to landlord or

[30] On 29 October 2010, see http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm

landlady, to err on the side of rendering the innocent guilty and then expect them to be grateful when they are not fined.

The three proposed excuses are: notifying the Home Office of the contravention as soon as possible; where an agent is responsible, and where "the eligibility period in relation to the limited right occupier whose occupation caused the contravention has not expired". The latter translates roughly as the landlord last having checked the documents less than a year ago or within the currency of the tenant's leave. It is more complicated than that, but because the whole scheme is very complicated.

As to the first excuse, landlords worried that they may in breach may be very quick to reach for notification as a shield. This could soon lead to the Home Office staff working on these cases becoming overwhelmed. It could lead to tenants lawfully present, including persons with a right of abode or indefinite leave in the UK, being investigated because their landlord has not understood their documents.

As to the second excuse, the question of establishing whether landlord or agent was responsible does not appear straightforward. Nothing suggests that this is a reference to letting agents working in the course of a business; the more general notion of agency appears to be at play. The arrangement between landlord and agent may be informal and there could be protracted disputes about liability, about whose fault the contravention is, and where responsibility lies as a matter of the agreement between them.

As to the third excuse, it requires landlords and landladies to understand the period for which an immigration document is valid, or for how long a person has been granted leave. This is not straightforward. If you want to extend your leave you send your passport, with visa stamp in it, and application form to the Home Office no more than a month before your leave expires. Your leave continues on the same terms and conditions until the Home Office makes its decision, but you are unlikely to have any documents to prove this. If refused, your leave then continues on the same terms and conditions for the period in which you can lodge an appeal. If you appeal, your leave continues on the same terms and conditions until your appeal, and any onward appeals, are finally determined. All that time you will have no passport, no visa and probably nothing but a letter from your lawyer if you have one. If during the anniversary of your landlord or landlady having checked your documents falls during this period, they will need to check them again. There is a risk that they will conclude that you have no right to rent, or that the risk of a fine is too great for them to take the chance.

Clause 21 Excuses available to agents

AMENDMENT 55J Baroness Hamwee, Lord Clement Jones
Converts the "defences" that an agent complied with all prescribed requirements from defences to paying the fine, to defences to the contravention itself.

AMENDMENT 55K Baroness Hamwee, Lord Clement Jones
Changes the definition of an agent's notified the Secretary of State of a contravention as soon as reasonably practicable from either complying with the prescribed requirements or notifying the Secretary of State without delay on its becoming apparent that a contravention has occurred, rather than both.

Briefing

As with landlords (see amendment 55F we do not consider it acceptable merely to let a person off a fine when they have done all that could be expected of them. As with landlords, there will be every incentive to engage in precautionary notification and we question whether the Home Office has the capacity to deal with the volume of notifications that might ensue. We do not consider that the threat of notification should be there at all; it is a threat that an agent may hold over a tenant.

Clause 226 Eligibility period

AMENDMENT 55L Baroness Hamwee Lord Clement Jones

Purpose
Omits reference to a document produced as evidence of an EEA national's having a right to reside being of a prescribed description.

AMENDMENT 55M Baroness Hamwee Lord Clement Jones

Purpose
Permits a certified copy of a document to be provided.

Briefing
Family members of EEA nationals are not required to obtain EEA family member residence cards, etc. The introduction of these checks risks forcing such family members to obtain documents if they wish to rent accommodation and raises questions under European Union law. Documents should be accepted if they evidence a right to reside, failure to do so, even if the documents are not prescribed, is arguably unlawful under EU law. The Home Office guidance says (and correctly) that what is required for, in this instance, an "other" family member is

> *"…enough documentary evidence such as birth certificates or other evidence which confirms how they are related to their EEA national family member who is exercising free movement rights in the UK… In making a decision, you must consider each case on its own merits. "*[31]

The current application form asks for

> *3.16 Evidence of relationship: birth certificate/marriage certificate/civil partnership certificate/evidence of durable relationship/other evidence of relationship (please circle to indicate).*

European nationals who are for example working or studying in the UK, or are self-sufficient, may bring family members with them, including persons from outside the European Union. Those persons have a right to be in the UK. They are under no obligation whatsoever to possess a document issued by the Home Office evidencing that right. However, if they want one, they can apply to the Home Office for one and the Home Office must provide it as soon as reasonably practical and in any event within six months.

[31] **Home Office Modernised Guidance EEA Family Permits Volume 7**
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283657/EEA_family_permits_v7_0EXT.pdf

As to **amendment 55M** the UK has repeatedly had periods of failing to keep to the six month target. Many cases, not just the wholly exceptional, take the full six months. We are also familiar with hearing nothing for five months then seeing the application returned as invalid, including when it is valid. The Home Office has put in place system whereby EEA nationals can ask for their passports back so they can travel and this could presumably be extended to cases of renting property, but a system of allowing certified copies to be used would make the system simpler for all concerned.

The Home Office has really struggled to meet this target. Since being warned by the European Commission that it was breaching European law to keep people waiting more than six months it has made efforts to meet the target, some helpful, others not, such as keeping people waiting five and a half months then writing to say a document is missing from the application and it is being treated as invalid. The Home Office will be overwhelmed if all third country national family members with rights under European law apply for a document. But what is to happen during the period when an application is pending or if they do not apply? What is the Home Office going to permit landlords to accept as proof? A marriage certificate (which could potentially be from any country in the world)? In combination with what? The third country national's passport? We can think of no simple check way to check eligibility. Simple combinations of documents have the potential to yield the wrong answer.

Community preference is a matter of EU law. EEA nationals should as a matter of law be treated as well as any third country national. Nationals of a country should not be worse off after joining the EU than they were before. Yet it seems that they will be, for their third country family members are going to find it harder to prove their entitlement to be in the UK than those from a family composed entirely of non-EEA citizens who have visas.

CLAUSE 23 Penalty notices general

AMENDMENTS 55N AND 55P Baroness Hamwee, Lord Clement Jones

Purpose
Remove the express provision that the Secretary if State may give a penalty notice to a landlord or landlady (55N) or to an agent (55P) without having first established whether they are excused from paying the penalty.

Briefing
As described in briefing to the clauses above, it is already the case that careful landlords and ladies and agents will only be let off paying a fine rather than found "not guilty" of a contravention. To add insult to injury, they may receive the penalty notice before their situation is established. This is not so much "light touch" as insouciant regulation, putting landlords and landladies to considerable stress and inconvenience because the Home Office has not been bothered to check its facts.

CLAUSE 24 Objection

AMENDMENT 55Q Baroness Hamwee, Lord Clement Jones

Purpose

Restricts the circumstances in which the Secretary of State can increase the penalty in response to a notice of objective to those where new facts have come to light.
Briefing
Without this safeguard there is a risk that those with a perfectly good defence will be deterred from contesting the penalty. The Home Office must be required to take responsibility for its decisions.

Clause 25 Appeals

AMENDMENT 55R Lord Best

Purpose
Gives the court discretion to permit an appeal out of time (time being 28 days).

Briefing
We highlight that the clause envisages a person's being forced to appeal when they have heard nothing from the Secretary of State (clause 24(5)9c)). Experience of the Home Office to date, and all that we know about the enormity of the task it is taking on under this scheme, lead us to be believe this will be the rule, rather than the exception. Why should a person be put to the trouble and expense of preparing for court until they have a case to meet?

The approach may contribute to disputes between landlords and superior landlords, agents and principals, head tenants and landlords as disputes about liability spring up even before it is established that there is a defence. The intention seems to be a scheme on the cheap rather than one in which there is careful consideration of whether it is appropriate to accuse a private citizen of having broken the law before making any effort to investigate the circumstances.

Clause 26 Enforcement

AMENDMENT 55S Baroness Hamwee Lord Clement Jones

Purpose
Reinstates the stage of proceedings whereby the Secretary of State would have to seek a civil judgment that a debt is owing before moving to the post-making of the liability order stage, where all that remains is for the debt to be enforced as if under a court order (i.e. as though the court had ordered payment.

Briefing
The starting point for assessing the lawfulness of such schemes is *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 the challenge to the carrier's liability scheme as it affected lorry drivers.

In other cases where debts accrue under a statutory scheme, such as child support or council tax debts, there is a prior stage where a liability order is made.

Here, efforts are being made to avoid such a stage. This puts extra power in the hands of the Secretary of State and reduces the rights of the landlord or landlady.

Section 18 of the Immigration and Asylum Act 2006 in respect of employers, which clause 40 of this Bill amends to make it look more like clause 23, is in similar terms to the a clause as it is proposed to amend it.

Parliament has a choice between that which is cheaper and simpler for the Home Office and that which provides greater protection to landlords and landladies.

In the event of an appeal, where the Respondent concedes the Appellant is right (e.g. because a penalty was wrongly imposed), an order has to be drawn up that addresses costs. The Civil Procedure Rules Practice Direction 52 and Costs Practice Direction are in point. The former provides that where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court for the application or appeal to be dismissed by consent. If the request is granted the application or appeal will be dismissed. Where the Home Secretary has conceded the issue, she has no basis to resist a costs order. When the appeal is settled so that it is withdrawn as the underlying decision is accepted to be wrong, the default position, that costs follow the event, applies.

CLAUSE 27 General Matters

AMENDMENT 27 Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara

Purpose
Provides for the Code of Practice that the Secretary of State will use to set the penalty to be subject to the affirmative procedure in parliament and for approval to be given before the Scheme can come into force**.**

Briefing
Gives effect to a recommendation of the Delegated Powers Committee. The Committee said

> *Clause 27 requires the Secretary of State to issue a code of practice … Under subsection (2) the code is required to specify the matters which the Secretary of State must take into account when determining the amount of a penalty. The code may also contain guidance about other matters…*
> *6. Under clause 27(6) the Secretary of State must lay the code of practice before Parliament, but apart from that there is no provision for parliamentary scrutiny. The memorandum explains the lack of any further scrutiny on the basis that the parameters for the code will have been set out in the primary and other secondary legislation. However, we note the approach adopted here is inconsistent with that adopted for the employment provisions of the Immigration, Asylum and Nationality Act 2006. That Act contains a similar regime for the payment of penalties, in that case by employers who employ persons who do not have a valid leave to enter or remain in the UK. Section 19 of the 2006 Act requires the Secretary of State to publish a code which sets out the factors which the Secretary of State will consider in determining the amount of the penalty. However, in that case the code is required to be laid in draft before Parliament and to be brought into force by an order subject to the negative procedure.*
> *7. The Home Office does not explain in the memorandum why a lower level of parliamentary scrutiny applies to the code under clause 27. In both cases, the*

provisions of the code will affect the level of the penalty that the Secretary of State will impose in particular cases. In relation to the code of practice under clause 27, its contents are also likely in practice to affect the circumstances in which a person is liable to pay a penalty; for example, the code is likely to set out the reasonable enquiries that a landlord must make in order to avoid liability for occupiers not named in the residential tenancy agreement. ***In the absence of any explanation from the Home Office for the difference in treatment, we recommend that the level of parliamentary scrutiny applied to the code of practice under clause 27 should be no less than that applied to the equivalent code under section 19 of the Immigration, Asylum and Nationality Act 2006****. Further, given that the role played by the code of practice under clause 27 is wider than that of the code under section 19 and is liable to affect the circumstances in which a person is held liable to a penalty,* ***we recommend that the order bringing into force the first code under clause 27 should be subject to the affirmative procedure.*** [32]

CLAUSE 28 Discrimination

AMENDMENT 56 Lord Mackay of Drumadoon, Lord Hope of Craighead

Purpose
Requires that the Scottish Human Rights Commission be consulted in the making of a code of practice or revised code of practice under this section. May be designed to probe whether the Commission is instead to produce its own code and, if so, what procedures will apply to it

AMENDMENT 56A Baroness Smith of Basildon, Lord Rosser, Lord Stephenson of Balmacara and AMENDMENT 56B Baroness Hamwee, Lord Clement Jones

Purpose
Both amendments address the procedure for bringing into force the Code of Practice on discrimination that is to be made under Clause 28. Amendment 56A requires the negative resolution procedure and is to be preferred to Amendment 56B which merely requires that the Code be laid before parliament and thus fails to address the recommendation of the Delegated Powers Committee. However, Amendment 56 could be complemented with amendments to Clause 66 that would make a code made under it subject to the affirmative or negative procedure and has features that could usefully be incorporated into an affirmative procedure: that all revisions of the Code be subject to the same procedure and that the Code must be reviewed at the conclusion of any pilot.

AMENDMENT 56C Baroness Smith of Basildon, Lord Rosser, Lord Stephenson of Balmacara and AMENDMENT 56D Baroness Hamwee, Lord Clement Jones

Purpose
Both amendments place the Secretary of State under a duty to bring the Code to the attention of landlords and ladies and those acting on their behalf and thus to probe how they are to made aware of the Code of Practice, let alone forced to comply with its terms. The sole difference is that Amendment 56D requires the Code also to be brought to the attention of tenants.

[32] 22nd Report: Six Bills considered, Delegated Powers and Regulatory Reform Committee.

CLAUSE 68 COMMENCEMENT

AMENDMENT 89 Baroness Hamwee, Lord Clement Jones

Purpose
Provides that Part II cannot come into force until a code of practice on discrimination under Clause 28 has issued.

AMENDMENT
Briefing
Under clause 28, there must be two stages of consultation on the Code of Practice, one with the Equality and Human Rights Commission, with the Equality Commission for Northern Ireland and with representatives of landlords and landladies and of tenants and then a consultation on a published draft code. No pilot should take place without the Code being in place.

The Committee on Delegated Powers said

> *8. Clause 28 requires the Secretary of State to issue a code of practice setting out what a landlord or landlord's agent should or should not do to ensure that, while avoiding the liability to pay a penalty, they do not contravene equality legislation so far as it relates to race. The code must be laid before Parliament but otherwise there is no parliamentary scrutiny. Again, this contrasts with the position under the employment provisions in the Immigration, Asylum and Nationality Act 2006, where the equivalent code under section 23 of that Act must be laid in draft and the order bringing it into force is subject to the negative procedure.*
> *9. The Home Office explains in its memorandum that laying the code before Parliament is considered sufficient because of the stringent consultation requirements that apply. For our part, we do not accept that consultation is an alternative to parliamentary scrutiny. In any event we note that similar consultation requirements apply to the code under section 23 of the Immigration, Asylum and Nationality Act 2006. The fact that a breach of the code under clause 28 is a matter that a court or tribunal may take into account suggests that the code is liable to affect the circumstances in which a landlord or agent will be found to have infringed equality legislation.* ***This in our view makes the negative procedure more appropriate, and accordingly we recommend that the same procedure should apply to the code under clause 28 as applies to the equivalent code under section 23 of the Immigration, Asylum and Nationality Act 2006.***

We recommend that parliament be vigilant as to whether matters emerge during the debate that cause it to conclude, as we have, that an affirmative procedure is more appropriate, given that the code is the sole attempt to ensure that British citizens and persons under immigration control do not face discrimination because of this clause.

On the face of the Bill there is absolutely no penalty for discrimination by a landlord, landlady or other person letting accommodation. Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is possible to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the Equality Act 2010. Under the Equality Act s.136, in the county court the burden of proof shifts from the claimant to the defendant once the claimant has established a *prima facie* case that discrimination has taken place. Giving the code publicity

will assist tenants in establishing this prima facie case, although we still consider that they will struggle. The Government consultation paper stated:

> *34. Many landlords will meet a number of prospective tenants. There is no requirement to check the immigration status of all of them – only the people with whom the landlord actually proceeds. 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 201020) on all adults who will be living at the property.*

This paragraph perfectly encapsulates the risk that racial profiling will take place before a tenancy is offered.

A fine of three thousand pounds for letting to a person with no right to rent is a considerable sum and will cover the cost of many properties standing empty for months. It will cover a considerable amount of repair.

In other words, a landlord or landlady would have an incentive not to accept a person who otherwise appears to be a model tenant if there is any risk of having to pay the fine. Any stereotype or prejudice might weigh with a person with multiple offers on the property, not because they feared having a particular individual as a tenant, but because they feared a fine, making the assumption that that person was more likely to be a person under immigration control whose documents would be complicated to check. When will a landlord perceive a risk of a fine? When will a landlady start worrying that a person's passport is false or otherwise unsatisfactory?

All too often this is likely to depend on what people look like, what they sound like, what their names are and how those names are spelt, and what place of birth is identified in their passports. Ms Caroline Kenny of the UK Association of Letting Agents, giving oral evidence to Public Bill Committee [33] made clear that the major concerns of her association about the provisions were concerns about the effect on ethnic minorities. She said (col 54):

> ***"Caroline Kenny:** It is illegal and abhorrent, but we can envisage a stage 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…"*

Richard Jones of the Residential Landlord Association said in his evidence:

> ***Richard Jones**: …Landlords will shy away from individuals who are here perfectly lawfully to start with, and they will effectively discriminate against them. If you are faced with two tenants, one of whom has full status and one of whom is of limited status, you will not let to the one who has the limited status. It may well be that they have limited leave to remain, and that leave may well be extended without any difficulty, but the landlord will shy away from that potential tenant for that reason.*

In all these circumstances we are under no illusion whatsoever that a Code of Practice will resolve the problem of discrimination to which this clause will give rise. However, for the lucky few who are able to bring a challenge, a clear, accurate Code of Practice targeted specifically at landlords and landladies and their obligations under the Immigration Act might encourage country court judges, who must sit with lay assessors who are knowledgeable

[33] http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm

about race discrimination, at least in some cases, to consider awarding aggravated damages as well as compensation for loss and injury to feelings.

CLAUSE 29 Orders

AMENDMENT 56E Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara

Purpose
To remove the power to treat the Bill as though it were not hybrid Bill, should it turn out to be one.

Briefing
The Committee on Delegated Powers said:

> ***Clause 29 (2) - "De-hybridising" provision***
> *10. Clause 29(2) provides that, where the draft of an instrument containing an order under or in connection with Chapter 1 of Part 3 would be a hybrid instrument under the standing orders of either House, it is to proceed in that House as if it were not a hybrid instrument. It is not immediately clear which particular affirmative order making power this is intended to apply to, and nothing is said in the memorandum to indicate the reasons for its inclusion.* ***It is the usual practice of this Committee to draw de-hybridising provisions to the attention of the House so that it can satisfy itself that other mechanisms are available to protect the private interests that would otherwise be protected by the hybrid instrument procedure. In this particular case we also recommend that the Minister be asked to explain why a de-hybridising provision is considered necessary.*** *There is no obvious reason for its inclusion and we do not consider it is appropriate for such a provision to be included unless the powers to which it relates can reasonably be expected to be exercised in a way that would trigger the hybrid instruments procedure.*

The inadequacy of reasoning may be one reason why the Committee said in that report:

> *In a number of respects the quality of the memorandum fell short of the standard the Committee expects. We repeat, therefore, the hope that we expressed in our 12th Report (HL Paper 72) that, in future, the Government will devote greater care to the preparation of these important explanatory documents.*

AMENDMENT 56F LORD Best

Purpose
Makes provision for an order prescribing requirements with which a landlord landlady or agent must comply to enjoy a "defence" against a fine in a case where a person they thought a child turns out to be an adult.

CLAUSE 32

AMENDMENT 56J Baroness Hamwee Lord Clement Jones

Purpose

The amendment appears flawed. It would make a person reasonably believed not to be 18 an adult for the purposes of the chapter (only adults are caught by the provisions of the Chapter). It is probably intended to do the reverse.

Briefing

Checks must be carried out on adults, but in its consultation on these proposals the Home Office stated[34] in paragraph 99 of the consultation paper that while landlords and landladies need not check children they may have "to satisfy themselves that the people concerned are children." It is a complicated matter, with potentially grave consequences, to have professional social workers call into question a child's age, as is set out in ILPA's *When is a child not a child Asylum, age disputes and the process of age assessment*[35]. To set up a scheme where private landlords and landladies are doing so can only run counter to the Home Office's duties under section 55 of the Borders Citizenship and Immigration Act 2009 to safeguard and promote the best interests of a child. Age assessment is not an exact science. Efforts to make it so, such as by exposing children to irradiating radiation, have been discredited and are in any event unlawful. A "reasonable belief" approach is very much to be preferred. This amendment serves to highlight a considerable flaw in the scheme as a whole.

AFTER CLAUSE 30

AMENDMENT 56h Lord Best

Purpose
Makes provision for approved bodies to carry checks on behalf of a landlord.

Briefing
Any separate system of regulation would add considerably to the bureaucracy of the scheme, but since those accredited to give immigration advice will need to be involved, the role will fall to such persons. In the case of employers, approved bodies already do assist with the checks: solicitors, barristers and those registered with the Office of the Immigration Services Commissioner. We consider that there will be a need for letting agents to instruct or employ solicitors to instruct or register with the Office of the Immigration Services Commissioner.

If landlords and landladies do not check the status themselves but contract with an agent to do this on their behalf then that agent will need to ensure that the checks are being done by a solicitor, barrister, legal executive or person registered with the Office of the Immigration Services Commissioner because advice on a person's status will fall within the definition of immigration advice under Part V of the Immigration and Asylum Act 1999. For all save regulated or exempt persons to give such advice is a criminal offence[36].

That the advice is given to the landlord or landlady rather than the person under immigration control matters not for the purposes of the Act; it is given in respect of a particular individual[37]. Even if an exemption is given, we recall the matters aired in the discussions on whether social workers should be given an exemption to advise separated children (which

[34] Paragraph 99 of the Consultation paper.
[35] Heaven Crawley for ILPA, May 2007.
[36] Immigration and Asylum Act 1999 s 84 read with s 91.
[37] Immigration and Asylum Act 1999 s 82(1).

ended in consensus that they should not – the Home Office, the Ministry of Justice, the Local Government Association, ILPA and the Office of the immigration Services Commissioner were among those involved in the discussions). Even if an exemption is given in the form of a Ministerial Order under s.84 (4)(d) of the Immigration and Asylum Act 1999, under Schedule. 5 paragraph 3 (3) of the Act, they still have to comply with the Commissioner's Code of Standards. The requirements of the Code include:

- Professional Indemnity Insurance
- Continuous Professional Development
- Acting in the best interests of the client
- Not acting where there is a potential conflict of interests[38].

Landlords and landladies do retain liabilities when they instruct a letting agent. Under the Equality Act 2010, section 109 the principal is vicariously liable for the prohibited conduct of their agent. Thus the landlord is liable if the letting agent refuses to let to a particular prospective tenant because of race, sex, sexual orientation, etc. or treats a prospective tenant less favourably, regardless of whether the landlord instructed the letting agent to discriminate or knew that the agent was discriminating. Section 110 of the Act makes the agent liable if they do something which would be prohibited conduct if done by the principal. As to "social housing " (Schedule 3, paragraph 1) , what would happen if it turned out that as a matter of law no duty was owed to the person under the homelessness legislation? Would the landlord be liable for having failed to carry out the check? What happens where the duty is discharged and the person continues to be a tenant of that same accommodation? Has consideration been given to the subtle and various ways in which s 193(5)-(12) of the Housing Act 1996 regulates the cessation of duties owed to homeless persons?

Whoever takes on the task of verifying documents, whether landlord, landlady, agent or lawyer, will have l obligations under the Data Protection Act 1998 including:

- to register with the Information Commissioner's Office (ICO) as a data controller;
- to implement appropriate technical and organisational security measures against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and
- not to keep personal data for longer than is necessary for the purpose for which it was originally collected.

While the proposals will not add any new obligations that do not already exist, the proposals will increase the amount of personal data that landlords and landladies hold about their tenants meaning that it is more likely that a breach will occur. Although there is not currently a mandatory notification obligation under the Data Protection Act 1998, the Information Commissioners' Office recommends that serious breaches should be notified to it. This might affect landlords and landladies who hold personal data of a large number of tenants or in some circumstances smaller landlords and landladies. Under the proposals for a European Data Protection Framework, notification of breaches to the Information Commissioners' Office and in some cases to the data subject will be mandatory. This would affect private landlords and landladies as well as companies.

[38] This was discussed at length in the context of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the specific context of whether social workers could be given an exemption under the Act. See the letter of 5 October 2012 from Clyde James, Office of the Immigration Services Commissioner to Rebecca Handler of the Legal Strategy Team in the Immigration and Border Policy Directorate of the Home Office.

In the experience of ILPA members also practising in housing law and their colleagues, keep records" is a rather grandiose term for what often happens in practice. A tenancy agreement may be kept while the tenancy is current; it may not always be easy to locate. In the case of lodgers and tenants there may be nothing in writing at all. How long it is retained will very often depend simply on when an individual landlord or landlady is motivated to sort out papers and thinks "I do not need that any more". As a consequence tenants face a greater risk of identity theft and fraud and landlords and landladies of breaching their statutory obligations under the Data Protection Act 1998 and any contractual obligations under the tenancy agreement.

If landlords and landladies retain personal data any longer than the specified 12 months the tenant would be entitled to complain to the Information Commissioner's Office that their personal data had been held for longer than is reasonably necessary and legally allowed.

As to destruction, what guarantee is there that the landlord or landlady will dispose of documents safely in a way that does not put the tenant at risk of identity fraud?

CLAUSE 32 Interpretation

AMENDMENTS 56k, 56l Baroness Hamwee, Lord Clement Jones

Purpose
Confine the Secretary of States order making powers to describing when an agreement is not to be treated as entered into for the purposes of this Chapter rather than when it is (Amendment 56J) and when a person is not to be treated a occupying premises as an only or main residence.

Briefing
Will ensure that the Secretary of State cannot legislate in a way that manufactures persons in contravention of the scheme.

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