

## **ILPA briefing to amendments tabled for House of Lords Committee Stage of the Immigration Bill: Part Two**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

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### **Clause 13 Offence of leasing premises**

**Amendments 151 and 159** are sunrise clauses, but with different targets. **Amendment 159** in the names of **Baroness Hamwee and Lord Paddick**, inserting **new clause Commencement of penalty notice provisions** would prevent the coming into effect of the residential tenancies provisions of the Immigration Act 2014, due to be extended across the whole of England with effect from 1 February 2016, beyond the current trial area until the Secretary of State publishes and lays before parliament an independent evaluation of the implementation of those sections in the trial area. The amendment specifies that the evaluation must be based on "a representative sample of landlords" and must include an assessment of the risk of discrimination, the impact on the lettings market and wider local community and whether the aims of the provisions have been achieved. The amendment proposes that the evaluation should not be made before 1 December 2019, thus giving a longer trial period. Baroness Hamwee has tabled a prayer against the extension of the 2014 Act residential tenancies provisions beyond the trial area, but this is unlikely to be heard before 1 February 2016. This amendment provides an earlier opportunity to debate the extension of the provisions before they come into force.

The target of the sunrise provisions of **Amendment 151** in the names of **Lord Rosser, Lord Kennedy of Southwark and Baroness Hamwee** are the new offences contained in the current Bill. It would prevent the new offences to be committed by landlords, landladies and their agents from coming into effect until the Secretary of State published an evaluation of the right to rent provisions of the 2014 Act that focused in particular on the effect of the provisions on those with a protected characteristic under the Equality Act 2020 and British citizens who do not have a passport or UK driving licence. The residential tenancies scheme is due to be extended across the whole country from 1 February 2016 having to date been tried in the West Midlands only.

We pause over the restriction of **Amendment 151** to the provisions on offences because we consider that the subsequent clauses on evictions constitute the most dramatic changes effected

by this Act. See briefings to **amendments 152 to 158** below for our comments on those clauses.

The Immigration Act 2014 (Commencement No. 6) Order 2016 (SI 2016/11 (C.2)) and the Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) (Amendment) Order 2016 (SI 2016/9) extend the residential tenancies scheme introduced by the 2014 Act across the country with effect from 1 February 2016. The instruments are subject to the negative procedure and prayers against SI 2016/11 have been tabled in both Houses, by Baroness Hamwee in the Lords and by Tim Farron MP in the Commons.

### **Concerns to be evaluated**

During the passage of the Bill that became the Immigration Act 2014 there was considerable discussion of how the scheme would work in practice. Concerns expressed included<sup>1</sup>:

- That an underground economy of “rogue landlords” would emerge, preying on those who could rent nowhere else;
- That British citizens from black and ethnic minorities, as well as the settled and persons with limited leave to remain in the UK, would face unlawful discrimination in the housing market, including indirect discrimination;
- That British citizens without passports or driving licences, and those leading chaotic lives, would be unable to rent;
- Complexity and the difficulties landlords and landlords would face in establishing whether their prospective tenant had a right to rent;
- Pressure on those types of housing (e.g. hostels) exempt from the scheme.

### **Promises made to the House during the passage of the 2014 Act**

Lord Taylor of Holbeach highlighted concerns about discrimination and about “the vulnerable” accessing accommodation. He observed “I do not want to lay too great a store by the codes, but those codes exist, and I do not want to lay too great a store by racial discrimination legislation, which would clearly apply in such circumstances.”<sup>2</sup> He said

*The Government’s intention is that the provisions relating to landlords and their agents will be subject to a phased implementation on a geographical basis. This will allow a proper evaluation of the scheme to ensure that it delivers its objectives without unintended consequences such as discrimination...*

*We intend to work with bodies such as crisis in conducting the evaluation. It will not be an evaluation in which the Government examine their proposals on their own in isolation. The first phase and evaluation will also enable the Government to develop and deliver suitable support services for landlords and tenants... The Government have agreed that we will initiate the first phase from October 2014; that a formal evaluation will be produced; and that decisions on implementing the scheme more generally will be taken in the next Parliament on the basis of this proper evaluation<sup>3</sup>.*

At Report he said

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<sup>1</sup> 7 November 2013, Col 229-241, 3 Apr 2014 : Column 1081.

<sup>2</sup> 12 March 2014, col 1801.

<sup>3</sup> 10 March 2014, col 1648.

*I understand the desire of noble Lords to ensure that the landlords' scheme is "workable" and that the provisions are tested and carefully evaluated. Indeed, it is our intention to adopt a carefully phased approach to implementation and to ensure that we get the guidance and support services absolutely right before considering wider implementation beyond the first phase. ... one of the reasons why the rollout is important is that we need to check to see if there are any adverse implications in this policy*<sup>4</sup>

Concerns were also voiced that a trial in a rural area would not identify problems that would occur in an urban area<sup>5</sup> and that, in any event, a trial in an area persons could move out of would not test the scheme.

Lord Taylor of Holbeach identified:

*...obvious areas that it would be sensible for any proper valuation to cover including the ease with which landlords and tenants can comply with the new checks and access the necessary guidance and support services... Any decisions on a wider rollout will be taken in the light of the evaluation.*<sup>6</sup>

### **The evaluation**

**Amendment 151** provides an opportunity to debate whether the Government's evaluation and its response to it, deliver on the commitments it gave to both Houses.

In ILPA's view, it does not. In the Public Bill Committee, the Minister, the Rt Hon James Brokenshire MP, described it as "extensive"<sup>7</sup> but the sample size is tiny. An online survey had 68 responses, 60 of which (c.90%) were from students<sup>8</sup>. Two-thirds of the tenants surveyed in the Home Office evaluation were white, giving a sample size of 23 tenants visibly from ethnic minorities<sup>9</sup>.<sup>[1]</sup> Some questions in the online survey received as few as give responses. Only 62 landlords and landladies surveyed had taken on a new tenant since the implementation of the scheme. The majority of tenants involved in the research had not moved property since the start of the trial. The evaluation document itself acknowledges that the evidence base is not robust because of the small sample size.

Nonetheless, the findings do not appear to lay all concerns to rest. It was found that only 42% of landlords and landladies surveyed had read the code of practice on illegal immigrants and the private rental sector and only 29% had read the code on avoiding discrimination. The old and the new codes are of comparable length<sup>10</sup>. Of the 109 checks undertaken on the online Landlords Checking Service Tool, just 15 resulted in the landlord being informed that the tenant did not have the right to rent. That the other 94 referrals were made evidences the feared confusion. More than half of landlords/landladies were members of landlord/landlady membership bodies. This is not representative as the majority of landlords/landladies in the UK

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<sup>4</sup> 3 April 2014, col 1089.

<sup>5</sup> Col 240.

<sup>6</sup> *Ibid.*, col 1090.

<sup>7</sup> HC Deb 1 December 2015, col 207.

<sup>8</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468955/horr84.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468955/horr84.pdf)

<sup>9</sup> Immigration Bill 2014-2015, Public bill Committee, 29 October 2015, col 253.

<sup>10</sup> See <https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice/code-of-practice-on-illegal-immigrants-and-private-rented-accommodation>

are not members of professional bodies, Almost 60% of landlords/landladies with only one property felt poorly informed or uninformed about the 'right to rent' scheme. Small-scale landlords/landladies make up 78% of landlords as was described in oral evidence to the Public Bill Committee. The evaluation found

*The qualitative research with landlords tended to support the evidence from the survey, with more professional landlords having heard about the scheme, but with many smaller-scale landlords being unaware of it. This was also raised as an issue by other respondent groups in terms of reaching 'hidden landlords' to make them aware of the scheme. This group includes landlords with smaller property portfolios, people with lodgers, landlords who are not members of a landlord association, non-compliant landlords or landlords outside of the pilot area or living overseas. Strategies for reaching these groups might be considered as part of wider roll-out. The mystery shopping research found that informal landlords had some awareness that a scheme had been introduced, but were not always aware of its details<sup>11</sup>.*

The Joint Council for the Welfare of Immigrants in its evaluation<sup>12</sup> found that landlords/landladies found the checks and the Codes confusing and difficult to understand and undertook checks incorrectly.

Less than a third of tenants felt informed and many were unaware of the scheme. Most of those who were aware were students, a group specifically targeted by way of an information campaign during the pilot.

Eight voluntary and charity sector organizations stated that they found evidence of exploitation by landlords/landladies of people without the right to rent as a result of the scheme. Evidence was reported by charities and voluntary organizations of increased homelessness as a result of the scheme (six organizations); difficulties finding accommodation among those with the right to rent but complicated documentation (seven organizations); and discrimination on the basis of nationality (seven organizations). We have not identified changes made to address these concerns.

The Minister, the Rt Hon James Brokenshire MP, suggested that the evaluation found "no hard evidence of discrimination"<sup>13</sup>, but it is unclear what he meant by "hard". The report states that 'verbatim comments... suggest that there were a small number of instances of potentially discriminatory behaviour'. These results are largely based on a mystery shopper exercise which looked only at discrimination 'on the grounds of race'. The evaluation found that the Black and Minority Ethnic "mystery shoppers" were less likely to receive a prompt response, were asked to provide more information and received discriminatory comments even though overall they appeared to secure property. Landlords and landladies, agents and tenants, identified discrimination including a tenant refused when they had time-limited leave; preference for tenants where their 'right to rent' was easy to check; and preference for tenants with local accents or who did not appear to them foreign. The independent evaluation conducted by JCWI found evidence of discrimination due to having a foreign accent or name, or not having a British passport. **Amendment 148 in the names of Baroness Hamwee and Lord Paddick** would amend the 2014 Act to require the Code of Practice on avoiding discrimination

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<sup>11</sup> Home Office, *Evaluation of the Right to Rent Scheme: Full evaluation report of phase one*, October 2015, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468934/horr83.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf), p.17

<sup>12</sup> <http://www.jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99>

<sup>13</sup> *Ibid.*

to address all protected characteristics under the Equality Act 2010 and not just that of race. ILPA supports this amendment. Nationality and ethnic origin are also relevant, but equally documents attesting to immigration status may disclose, for example, that a person is in a civil partnership and thus their sexual orientation.

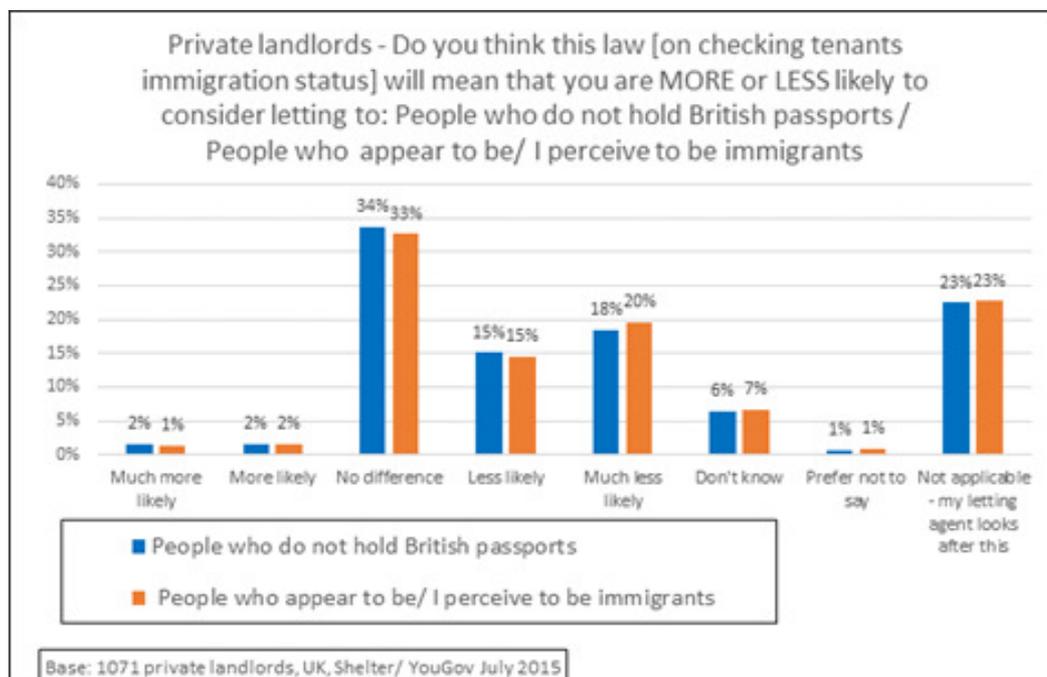
Mrs Emma Lewell-Buck said in the Public Bill Committee

**Mrs Lewell-Buck:** ...Does the Minister not accept the evidence that we heard from David Smith of the Residential Landlords Association? He said that landlords would become risk averse and that, as a result, we would see discrimination against people whom landlords perceive as non-British? Often, there will not be evidence of discrimination, because it is far more subtle than that. People who are discriminated against often do not come forward to say so, and landlords themselves are not going to say, “Yes, we’re being risk averse. We’re discriminating.” Is it worth the risk of introducing this part of the legislation, or is it better not to introduce it at all? <sup>14</sup>

The words of the Association were:

“Whilst the Residential Landlords Association condemns all acts of racism, the threat of sanctions will inevitably lead many landlords to err on the side of caution and not rent to anyone whose nationality cannot be easily proved.”

The evidence on discrimination should be read with the evidence already available. A YouGov poll was conducted for Shelter. This showed



The Chartered Institute of Housing has said

<sup>14</sup> Col 266.

*“Checking immigration status is complicated so landlords may shy away from letting to anyone who appears not to be British, even if they have a legal right to live in the UK—especially if they face a jail sentence for getting it wrong.”*

The Minister conceded “...do there remain issues about discrimination? Yes, and I have already said that<sup>15</sup>.”

The Chartered Institute of Housing on 6 January 2015 published estimates that over 2.6 million checks on adults will be required to be carried out each year and that landlords and landladies are not up to speed with the requirements<sup>16</sup>.

The evaluation does not address whether the aims of the scheme have been met, for example whether those without leave have found it more difficult to obtain accommodation and whether they have left the UK as a result. It states that 109 irregular migrants came to the attention of the Home Office as a direct result of the ‘right to rent’ scheme but this number is made up of referrals provided by internal Home Office teams, external organizations including government departments, police referrals and public allegations and thus seems more to do with normal enforcement activity than with the scheme. Indeed, elsewhere, the report states that just 26 referrals of irregular migrants were specifically related to the scheme. Only five civil penalty notices were issued to landlords/landladies a result of the scheme.

The Minister said in the Public Bill Committee

*..., the offences do not apply retrospectively. The criminal behaviour for which a landlord may be liable to prosecution would be their behaviour in renting to someone disqualified from renting or their failure to notify the Home Office that someone is disqualified from renting after the point when the offence came into force. A landlord can be prosecuted, however, for renting to someone disqualified from renting when the tenancy agreement was entered into before the offence came into force. The burden would be on the prosecution to prove that a landlord knew or had reasonable cause to believe that they were renting to a disqualified person. The amendment would serve to put any rogue landlord who could establish that a tenancy started before the offence came into force beyond the reach of prosecution.<sup>17</sup>*

The notion that these are protective measures is not sustainable. A landlord or landlady renting out overcrowded and insanitary accommodation would be liable for prosecution for this, as would one forcing a tenant to pay an exorbitant rent by threats. If such landlords and landladies are not being prosecuted at the moment that is not for want of offences with which they could be charged.

The Minister’s attention was drawn to the comments of the Residential Landlords’ Association as to what was likely to happen on the date when the provisions came into effect

*“...all law-abiding landlords will want to carry out checks for themselves on date X, when it comes into force. It then spells out the implications of that. First, the provision will place a huge*

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<sup>15</sup> Col 268.

<sup>16</sup> Press release *More than 2.6 million people could be subject to immigration checks to rent a home* see [http://www.cih.org/news-article/display/vpathDCR/templatedata/cih/news-article/data/More\\_than\\_2.5\\_million\\_people\\_a\\_year\\_could\\_be\\_subject\\_to\\_new\\_immigration\\_checks\\_to\\_rent\\_a\\_home](http://www.cih.org/news-article/display/vpathDCR/templatedata/cih/news-article/data/More_than_2.5_million_people_a_year_could_be_subject_to_new_immigration_checks_to_rent_a_home)

<sup>17</sup> Cols 247-248.

burden on landlords—particularly those with multiple properties, who will have to contact each and every tenant to carry out the check. Secondly, it is concerned that “the structures in place to provide support to landlords, unless properly resourced, will not cope.”

It references a response to a written question tabled by the hon. Member for Paisley and Renfrewshire North. It says that the Minister

“indicated that there are just 2 full time equivalent members of staff handling incoming calls to the landlord helpline.”

It then points out the potential for chaos. It cites the 2011 census figures, which show that “16.5% of tenants in private rented housing do not hold any passport

...It also points out that many landlords, having done the checks, will feel compelled to report to the Home Office anybody they feel is of concern to them, which could be many thousands of individuals. It asks for two things—first, a simple, readily identifiable document that it can use; and, secondly, for the Government to outline what plans they have to increase the resources available.”<sup>18</sup>

His response was to point out<sup>19</sup> that landlords and landladies were not obliged to make checks when the provisions come into effect. But the Residential Landlords Association’s point is about what landlords and landladies will want to do, to protect themselves from the threat of prosecution.

The Minister undertook to write to the Residential Landlords Association<sup>20</sup>.

### ***The evaluation does not factor in the effect of this Bill***

It is stated in the Explanatory Memorandum to the statutory instrument revising the scheme that:

“The changes brought about through this order will reduce the regulatory burden of the scheme further by making it easier to conduct a Right to Rent check, as well as to make reports to the Home Office.”

This wholly ignores the effect of the 2015-2016 Act and the introduction of new criminal offences and new powers to evict. The Bill moves the scheme onto a new footing: one backed by criminal sanctions. Clause 13 would create four new criminal offences, two that can be committed by landlords and landladies, and two that can be committed by their agents, when the landlord, landlady or agent knows or has reasonable cause to believe that a person does not have a right to rent. The offences carry a maximum five year prison sentence.

Under the 2014 Act it sufficed for a landlord or landlady to conduct periodic checks on a tenant’s immigration status. They were then protected from a civil penalty until the next check was due, even if the tenant’s status changed. Now it is proposed that if the Secretary of State gives notice in writing to the landlord or landlady that the person has no right to rent the

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<sup>18</sup> Col 270 -271.

<sup>19</sup> Col 272.

<sup>20</sup> Public Bill Committee, col 272.

landlord or landlady will face the criminal penalty if they continue to rent to the tenant even though the next check is not yet due and can be required to evict the tenant

These offences mean that the landlord/landlady is not being asked to perform a tick-box exercise of identifying a prescribed document and thus having a defence to a civil penalty, but must also consider the substantive question of whether the tenant does have a right to rent. This is also clear from the revised code of practice. The revised code<sup>21</sup> is not simple. Two extracts, among the many that could have been chosen, will serve to illustrate how the Code directs landlords and landladies to have an understanding of immigration control to giving them “reasonable cause to believe” that the tenant does not have a right to rent.

### **1.5 References in this Code of Practice**

*In this Code, references to:*

- *‘EEA or Swiss national’ refers to citizens of EEA countries or Switzerland. The EEA countries are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.*
- *‘Illegal immigrants’ means people who seek to evade immigration controls and enter and/or remain in the UK without the legal right to do so.*
- *‘Landlord’ means a person who lets accommodation for use by one or more adults as their only or main home. This includes people who take in lodgers and tenants who are sub-letting. References to ‘landlord’ also include agents who have accepted responsibility for complying with the Scheme on behalf of landlords, except for when agents are specifically and separately referred to.*
- *‘Leave to enter or remain in the UK’ means that a person has permission from the Home Office to be in the UK. Permission may be time-limited or indefinite.*
- *‘Non-EEA nationals’ means the nationals of countries outside the EEA.*
- *‘Occupier’ means a person who is, or who will be, authorised to occupy the property under the residential tenancy agreement, whether or not they are named on that agreement.*
- *‘Residential tenancy agreement’ includes any tenancy, lease, licence, sub-lease or sub-tenancy which grants a right of occupation for premises for residential use, provides for the payment of rent, and is not an excluded agreement. See section 3 for further information about ‘residential tenancy agreements’ and excluded agreements.*
- *‘Right to rent’ means allowed to occupy privately rented residential accommodation in the UK by virtue of qualifying immigration status.*
- *‘Statutory excuse’ means the steps a landlord can take to avoid liability for a civil penalty.*
- *‘Tenant’ means the person or persons to whom the residential tenancy agreement is granted.*

### **2.2 Those with a time-limited right to rent**

*Those who are not British citizens, EEA or Swiss nationals or do not fall into ii above will have a time-limited right to rent if:*

- *they have valid leave to enter or remain in the UK for a limited period of time; or*

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<sup>21</sup> <https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice/code-of-practice-on-illegal-immigrants-and-private-rented-accommodation>

- *they are entitled to enter or remain in the UK as a result of an enforceable right under European Union law or any provision made under section 2(2) of the European Communities Act 1972. For instance, qualifying family members of EEA nationals under the Immigration (European Economic Area) Regulations 2006 and those who derive their right to reside in the UK directly from the EU Treaties. These people have a right to reside in the UK as a matter of fact and will be able to obtain documentary evidence to demonstrate this. A landlord will not be liable for a civil penalty if they let accommodation for occupation by someone with a time-limited right to rent, but to maintain an excuse against a penalty a landlord will need to conduct follow-up checks (as detailed in section 5.2). British citizens, EEA and Swiss nationals are “relevant nationals” as defined in s21(5) of the Immigration Act, and so cannot be disqualified from occupying premises under a residential tenancy agreement under s21(1)*

### **Changes as a result of the evaluation**

Few changes have been made to the scheme following the evaluation. Providing that a report to the Home Office under the scheme must be made via the Gov.uk website or by telephone, as opposed to in writing and removing the requirement for a report to be accompanied by a copy of any documents relating to the occupier retained by the landlord or agent are very minor changes. Allowing expired biometric residence documents and immigration status documents as part of Right to Rent checks is a small, if sensible, change. The Home Office refuses to do this for entry to its own buildings, and ILPA has repeatedly complained about this unnecessary bureaucracy. Permitting letters from a local authority or government department; a British citizen; an employer; the police or probation services to be used as evidence of a right to rent does not look set to reduce complexity, because these must be in a specified form. Whose letters will the landlord/landlady doubt? Whose trust? Reliance on letters has the potential to assist landlords and landladies but may increase discrimination.

Taken as a whole, these changes do not appear to constitute a substantive response to the concerns identified in the evaluation.

There is reason to be concerned. Local authorities do not appear to be ready to deal with the scheme. In Barking & Dagenham for example a Homelessness Draft Strategy and Equality Impact assessment laid just after Christmas do not take any account of the landlord checks. The strategy was discussed at the statutory community safety partnership meeting and when asked why the borough had failed to address the impact of the landlord checks the response was that they were unaware. The City of London, Havering and Waltham Forest similarly do not yet appear to have a plan. The Memorandum accompanying the statutory impact revising the scheme states “10.2 The impact on the public sector is minimal.” It refers to training of the Home office team only. It says nothing about the impact on local authorities. The evaluation does not probe concerns such as

- Any increase in homelessness applications, or demands on social services, including from persons with a right to rent but unable to evidence this in the required fashion or requests for referrals and nominations from the local authority where these would bring the tenant into a category exempt from the checks.
- Impact on local authority advice services (for landlord and/or tenant) or other direct services (for example the local authority being asked to provide letters or support a person discriminated against/take action against a discriminating local authority landlord)
- Responsibilities for checking, including the position of housing associations.

It does not calculate the costs of training and familiarisation for local authorities.

The Minister said in the Public Bill Committee

*I underline that the focus of the Bill's measures on landlords is on the minority of rogue landlords who repeatedly flout the law and are repeatedly found to be renting to illegal immigrants. It is possible that a landlord and tenant may avoid a need to take eviction action where they agree between themselves to bring the tenancy to an end or where the illegal immigrant decides to leave the property of their own volition<sup>22</sup>.*

The provisions of the Bill are not, however, in any way limited to repeat offenders as the Conservative MP Ms Chloe Smith pointed out

**Chloe Smith (Norwich North) (Con):** ... On page 6 of the explanatory notes, paragraph 13 states that the intention is

*“to target those rogue landlords and agents who deliberately and repeatedly fail to comply with the right to rent scheme or fail to evict individuals who they know or have reasonable cause to believe are disqualified from renting as a result of their immigration status.”*

*Will the Minister explain how the nature of a repeated misdemeanour comes through in the Bill? ...”<sup>23</sup>*

ILPA draws attention to a particular problem not addressed in the response to the evaluation, although it was raised by Lord Avebury in the debates on the Bill that became the 2014 Act, and although ILPA has raised it repeatedly in formal responses and at meetings with the Home Office ever since. Lord Avebury explained the problem succinctly in 2014:

**Lord Avebury (LD):** .. *Can my noble friend elucidate what provisions are being made for documents to be produced by those who are occupying rooms in private houses because they are not covered by the provisions of Schedule 3, to which he has referred? They deal only with the accommodation that is provided to most asylum seekers under the 1999 Act when they cannot afford to pay for accommodation of their own. However, there is still an important residual group of people who find space in private houses. They will need documentary proof that they are allowed to live in those houses and thus ensure that landlords are not breaching the conditions by taking them in.<sup>24</sup>*

The problem arises because the definitions in the Act work on the basis of having leave, whereas persons seeking asylum are on temporary admission. If the Bill is enacted, these persons would be classed as being on 'immigration bail'. They do not have leave to stay in the UK. Without leave, they would not have the 'right to rent'.

The Minister's reply in 2014 evidences that he did not understand the question, for he refers to “failed asylum seekers”, not the cohort under discussion. He went on to say “the Home Office will provide the necessary documentation to show that they have a right to accommodation.<sup>25</sup>”

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<sup>22</sup> Col 225.

<sup>23</sup> Col 271 to 272.

<sup>24</sup> 12 March 2015, col 1800.

<sup>25</sup> *Ibid.*

But subsequently the Home Office declined to do this, citing concerns about the potential for fraud. Instead, it requires landlords and landladies to telephone a helpline. But why should they do this? Discrimination is likely to occur at an earlier stage; you will not be offered the property at all. If I do not turn up with my British citizen passport (and photocopies of same) in my hand, there is a strong chance I shall not get offered the property. But even if I overcome this, why should the landlady/landlord pick up the helpline when all the available evidence is not ambiguous but points clearly to my not having a right to rent?

The all clear from the helpline, without a clear rationale to back it up being explained to the landlord/landlady and at odds with what is said in the guidance (which will all point to the person's not having a right to rent) is unlikely to reassure a landlord/landlady. The duration of the right to rent for example will be unclear, there will be worries that the reply is an error; in short it will look too risky to take the person on as a tenant.

There is a danger that landlords and landladies will seek to extrapolate from what the helpline has told them, assuming that because person X has a right to rent, so does person Y.

If a person cannot find a landlord/landlady prepared to rent to him/her, even though in theory this should be possible, s/he is likely to satisfy the definition of destitution under the Immigration and Asylum Act 1999 Act and thus become the responsibility of the Home Office, an outcome the Home Office is unlikely to desire both in itself and for the precedent it sets.

**Amendment 149 in the names of Lord Rosser, Lord Kennedy of Southwark and Baroness Hamwee** is designed to protect a landlord/landlady from prosecution for renting to a person without a right to rent during the period for which they are prohibited from evicting the tenant (under section 33D(4)).

**Amendment 150 in the names of the Earl of Cathcart and Lord Howard of Rising** is more general in its terms. It would protect a landlord or landlady for the whole of the period where they are proceedings diligently to evict. We suggest that this would inevitably encompass the 28 day period since they cannot evict during this period.

Under the 2014 Act it sufficed for a landlord or landlady to conduct periodic checks on a tenant's immigration status. They were then protected from a civil penalty until the next check was due, even if the tenant's status changed. An existing tenant might never have had leave, or the tenant's leave might have come to an end years ago, in circumstances where the landlord or landlady had no reasonable grounds to know this. Or the landlord or landlady might be presented with and check a forged document in circumstances in which they could not reasonably have been expected to have detected the forgery.

Now it is proposed that if the Secretary of State gives notice in writing to the landlord or landlady that the person has no right to rent the landlord or landlady will face the criminal penalty if they continue to rent to the tenant even though the next check is not yet due. Once a landlord/landlady receives such a notice, s/he is committing a criminal offence although under the terms of the Bill s/he cannot evict the tenant for 28 days. The Government has so far resisted amendments that would address this<sup>26</sup>. It is proposed that these measures be applied to existing tenancies. Landlords/landladies are thus ill-placed to protect themselves from receiving a notice.

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<sup>26</sup> See debates on amendment 22 at Common's Report stage.

The Minister said at Commons Report:

*These offences are not designed to catch out a landlord who has made a genuine mistake, and it is difficult to foresee a situation in which it would be in the public interest to pursue a prosecution against a landlord making reasonable efforts to remove illegal migrants from their property.<sup>27</sup>*

Thus protection for landlords and landladies appears to rely on prosecutorial discretion. Sir Keir Starmer, a former Director of Public Prosecutions, summed up one problem with this approach:

*I think he said that it was not the intention to prosecute landlords who took reasonable steps to take adequate action. As he well knows, in the end that is a matter for those who prosecute...<sup>28</sup>*

But perhaps the greater problem is what the landlord /landlady will do? Evict summarily, to avoid committing a crime, but thus violate 33D(4)? Wait 28 days to evict losing sleep and fearful of prosecution? It may be said that the Crown Prosecution Service would not prosecute in these circumstances. That is, however, unlikely to provide any comfort to those caught by the provisions. The provisions in the Bill simply do not fit together. This is likely only to encourage them to try to protect themselves by selecting tenants whom they perceive to be unlikely to be “foreign.”

### **Clause 14 Eviction and Clause 15 Order for Possession of a dwelling-house**

ILPA considers that these clauses, introducing what Scottish National Party MP Stuart Macdonald MP described at Commons Committee as “Dickensian eviction processes”<sup>29</sup> should not stand part of the Bill. Sir Keir Starmer MP said at Commons Report

*Some 30 or 40 years ago, the House set its face against summary evictions for a very good reason: there were too many examples of locks being changed and families literally being put out on to the street to sleep on the pavements. Everybody agreed that there should be due process before individuals and families, particularly families with children, were evicted. The Bill cuts through that protection for no good reason. In this country in the 21st century no group of individuals should—for whatever reason, and whether renting lawfully or not—be subject to summary eviction proceedings that, as I said, we turned our back on a long time ago.<sup>30</sup>*

ILPA concurs. The Minister confirmed:

*In some circumstances, as with eviction for other reasons under housing legislation, that will mean that children are evicted along with adults in family groups<sup>31</sup>.*

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<sup>27</sup> HC Deb, 1 December 2015, col 208.

<sup>28</sup> HC Report 1 December 2015, col 538

<sup>29</sup> HC Report 1 December 2015, col 180.

<sup>30</sup> *Ibid.*, col 186.

<sup>31</sup> *Ibid.*, Col 278.

The parallel with housing legislation is apt to mislead, as the provisions as to summary eviction that are contained in this Bill are novel, or at least require one to look back some 40 years, as described above.

The eviction of children and families under these provisions is also likely to have a significant impact on children's social services, housing and homelessness departments. Local authorities will bear the responsibility of supporting and housing families where they are evicted by landlords who are not required to follow the normal eviction processes with the safeguards that these include. The point was raised by Mrs Emma Lewell Buck in the Public Bill Committee

***Mrs Emma Lewell-Buck** (South Shields) (Lab): I wonder whether the Minister can clear up something that I am a bit curious about. My hon. and learned Friend touched on a local authority's duties under the Children Act 1989. If a family are evicted, will they be entitled to local authority help under homelessness legislation as well?*<sup>32</sup>

**Clause 14** creates two new routes by which a landlord can recover possession. The first is new s.33D, being inserted into the Immigration Act 2014. The Secretary of State will serve notice on the landlord/landlady, informing him/her that a person without a "right to rent" lives in the property (new s.33D(2)). The landlord/landlady is then given power to terminate the tenancy by giving at least 28 days written notice to the tenants. The notice will be enforceable "as if it were an order of the High Court". There will be no need to obtain an order for possession. By inserting a new section 33E(4) into the Immigration Act 2014, the Clause excludes the residential tenancy agreement from the safeguards of the Protection from Eviction Act 1977.

**Amendment 152** in the names of **Lord Rosser, Lord Kennedy of Southwark and Baroness Hamwee** would remove section 33D *Termination of an agreement where all owners disqualified* which is to be inserted into the Immigration Act 2014. The section would allow a tenancy to be terminated on receipt of a notice from the Secretary of State that the tenants had no right to rent and for the landlord/landlady's notice so terminating the tenancy to be enforced as though it were an order of the High Court.

It is unprecedented in housing law that a landlord or landlady's notice to quit can be enforced as though it were an order of the High Court and our sister organization, the Housing Law Practitioners' Association, has prepared an excellent briefing on this point<sup>33</sup>. In many civil penalty schemes, including the right to rent scheme, provision is made for a fine to be enforced as if it were a debt due under a court order. But there is an enormous difference between having a fine enforced as though it were a debt due under a court order (which is already innovative), which means the sum cannot be disputed at this stage, and having a notice to quit so enforced; between having a payment due under a statutory scheme and a notice given by a private individual so enforced.

Under **Clause 14**, a landlord/landlady can use "self-help" to recover possession, i.e. personally turn up and throw occupiers onto the street or call on (and pay) a High Court Enforcement Officer (previously called a High Court Sheriff) to do so. There are clear risks in self-help, of potential violence and damage to property, for both landlord/landlady and tenant. The

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<sup>32</sup> Cols 262-263.

<sup>33</sup> Available on ILPA's website at <http://www.ilpa.org.uk/resources.php/31491/immigration-bill-house-of-commons-committee-stage-briefing-from-the-housing-law-practitioners-associ>

Minister was pressed on these matters and identified the safeguards that exist at Commons Report:

*...safeguards already exist. The Secretary of State will serve notices only where she is satisfied that the migrant is here unlawfully and only after taking the migrant's circumstances into consideration. Should there be recognised barriers to illegal migrants leaving the UK that are not of their own making, these will be taken into account.*<sup>34</sup>

Once again, the reliance on the Home Office getting it right every time.

In the Evaluation of the Right to Rent scheme prepared in response to the pilot scheme in the West Midlands, 109 'illegal migrants' were identified. Of this number, four had an outstanding judicial review, one had made further representations that were being considered, fifteen were being progressed as family cases, twenty eight had outstanding cases, including asylum claims and nine were subsequently granted leave to remain in the UK. This represents 57 of the 109 'illegal migrants' which is 52% of the total. This is a significant figure. These people are not subject to removal during this period and many may, and indeed some did, obtain the right to remain. Yet they could face summary eviction under these provisions.

Under the administrative review provisions introduced by the 2014 Act, a person's leave extended under section 3C of the Immigration Act 1971 automatically ends where an administrative review is rejected. Those who had sought a review find themselves immediately without leave to enter or remain and could face summary eviction under these provisions.

**Government amendment 153** in the name of **Lord Bates** will require the landlord/landlady's notice to the tenant to be in a prescribed form. It is assumed that this is designed to deal with very informal communications being treated as the trigger for a summary eviction. Where, however, is whether the notice is in the prescribed form to be tested if the notice is enforceable as it were an order of the High Court? If a landlord/landlady turns up to evict the tenants, relying on the notice, what scope is there for the tenants to begin to dispute the notice?

The second effect of **Clause 14** is to introduce a new mandatory ground for possession in both the Housing Act 1988 and the Rent Act 1977, again, triggered by a notice to the landlord/landlady from the Secretary of State. It would be an implied term of a residential tenancy agreement that a landlord or landlady could terminate a tenancy if adult occupying the premises do not have a right to rent. Under **Clause 15** Courts will be obliged to issue an Order for Possession and will have no discretion in the matter.

The effect of **amendment 154** in the names of **Lord Rosser, Lord Kennedy of Southwark and Baroness Hamwee** is to move the provisions in this Bill on Order for possession of a dwelling house from that part of Schedule 2 to the Housing Act 1988 dealing with the grounds on which a court 'must' order possession (Part 1) to the grounds on which a court 'may' order possession (Part 2). **Amendment 155** is consequential. The effect of the amendments is to give a court considering the circumstances of the individual case power to determine whether or not it should order possession of a dwelling house. **Amendments 156 and 157** in the names of **Lord Rosser and Lord Kennedy of Southwark** change proposed grounds 7A and 7B to new grounds 17 and 18 in Schedule 1 to the Housing Act 1988. We do not identify that they have substantive effect and are therefore uncertain as to the purpose of the amendments.

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<sup>34</sup> HC Deb, 1 December 2015, col 208.

The Minister gave as the rationale for the provisions

*“The mandatory ground for possession recognises that the Home Office notice is a clear statement of immigration status; it is not necessary or helpful for a court to enter into its own additional assessment of the reasonableness of making a possession order, which would be the effect of making this a discretionary ground.”<sup>35</sup>*

This is only half the story. The court may be satisfied of the immigration status of the person facing eviction but conclude that because of the person’s circumstances, for example a baby or children in the family, pregnancy, old age, disability or infirmity, that eviction is not appropriate. The Minister suggested<sup>36</sup> that the safeguard would be the Home Office’s not serving a notice in cases where eviction would not be appropriate, but once given the powers to set in motion the eviction process, what will guarantee that these will not be used?

### **Clause 16 Extension to Wales Scotland and Northern Ireland**

The right to rent provisions of the 2014 Act can be made subject to geographical limitations so there is no difficulty in restricting the “extent” section of the 2014 Act at this time.

The provisions in the current Bill do not extend beyond England but there is power for the Secretary of State to extend them by secondary legislation. The advantage of this is that insofar as they are incompatible with human rights they could be struck down, rather than just declared incompatible, but the disadvantage is that they are not subject to the same detailed scrutiny by parliament as the provisions for England and Wales. The way the provisions have been written is perhaps the sign of a rushed Bill. The Explanatory Note records the view that a legislative consent motion would not be required for any extension.

If, contrary to ILPA’s view, it is desired to extend these provisions this should be done on the face of primary legislation.

Anne McLaughlin MP of the Scottish National Party explained that

*...the Minister refused a meeting with the Scottish Government Minister for Housing and Welfare, who has significant concerns not just at a policy level but at an implementation level.”<sup>37</sup>*

Although immigration is a reserved matter the right to rent scheme impacts upon areas within the competence of the devolved administrations including matters pertaining to housing, town and country planning and economic development. It is therefore desirable that the devolved administrations can control the extension of the right to rent scheme, in its entirety, to their areas.

ILPA supports **amendment 158** in the names of **Baroness Hamwee and Lord Paddick**. The subsection this would delete provides that regulations extending the provisions to Wales,

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<sup>35</sup> Public Bill Committee, 29 October 2015, Col 263.

<sup>36</sup> Public Bill Committee col 278, 29 October 2016.

<sup>37</sup> Public Bill Committee, col 301.

Scotland or Northern Ireland or making similar provision may “(b) confer functions on any person”. This is an untrammelled power. That it has been felt necessary to include it supports the view, expressed above, that the legislation has been drafted in haste and that careful thought has not been given to what the extension of the provisions to Wales, Scotland and Northern Ireland will mean, which in its turn suggests that insufficient thought has been given to the provisions in their entirety.

### **Driving licences**

Clause 17 Powers to carry out searches relating to driving licences. ILPA supports Baroness Lawrence of Clarendon, Baroness Hamwee and Lord Paddick in their opposition to Clause 17's standing part of the Bill.

Powers that would enable police, immigration officers and other persons (unspecified) authorised by the Secretary of State to enter premises to search for and seize driving licenses and to search persons for these would sit as well in the enforcement section of the Bill. The test is one of reasonable grounds for believing, rather than knowledge that a person is in possession of a driving licence and that the person is not lawfully resident in the UK. Premises owned or occupied by the person could be searched, but so could the premises in which they were encountered, either without prior authorisation from a senior officer. The authorised person could seize and retain driving licences. There is an obligation to return them only where it is decided not to revoke the licence or the person wins their appeal against revocation of the licence. Normal powers to have access to and copy seized material do not apply. The Explanatory Note states that this is so that a person cannot make use of a photocopy to secure goods and services, but there are also questions about whether there can be a fair appeal when a person cannot examine the evidence held against them.

The case for the extension of the provisions as to driving licences has not been made out.

**Amendment 160** in the names of **Baroness Hamwee and Lord Paddick** would limit the ability of an authorised officer other than a constable to enter and search, without warrant, premises occupied or controlled by the person accused of possessing a driving licence without being lawfully resident in the UK, or on which that person was found, without authorisation from a senior officer in writing. The limitation imposed would be that the authorised officer has reasonable grounds to believe the power should be exercised urgently. Even without consideration of n the breath of persons who can be authorised officers the power is so very widely drawn as to create a real risk of intrusive, oppressive and inappropriate searching.

**Amendment 161** in the names of Baroness Hamwee and Lord Paddick would place a limit of one month for the period that the Secretary of State can hold a driving licence before deciding whether or not to revoke it. It would thus ensure that driving licences were not withheld for lengthy periods from persons entitled to them simply because the Home Office had not, whether for reason of lack of resources or otherwise, come to a decision.

New s 25CC(5)(b) provides that a driving licence required to be retained must be retained “if it has been or is subsequently revoked” until the time limit for appealing has expired or until the appeal is determined. **Amendment 162** in the names of **Baroness Hamwee and Lord Paddick** removes the words “is subsequently”. This provides an opportunity to probe the effect of the words. If the licence is not revoked, how could there be an appeal? The words appear otiose.

## Clause 18 Offence of driving when unlawfully in the United Kingdom

**Amendment 163** in the names of **Lord Rosser and Lord Kennedy of Southwark** would provide a defence to the offence of driving when unlawfully in the United Kingdom where a person had a reasonable belief that he or she had a legal right to remain in the United Kingdom and acted in good faith. It is unclear what the words “in good faith” add to the amendment; if a person has a reasonable belief that s/he has a legal right to remain in the United Kingdom s/he should not be made a criminal. The amendment highlights that there is no defence on the face of the Bill. Tabling an amendment in identical terms in the Public Bill Committee, Sir Keir Starmer MP said

“ I use again the example I used last week or the week before, where someone has been sponsored but, unbeknown to them, there is something wrong with the sponsorship. They may therefore find themselves in a position where they do not have the status they should have, although they have a reasonable belief that they have a right to be here and they acted completely in good faith. What is the legal case and the moral case for criminalising a person in that situation?”<sup>38</sup>

The reply from the Solicitor General gave rise to the following exchange:

*“...in my view it is very broad and very subjective. It will create scenarios, for example, in which a defendant might claim they had reason to believe they were in the UK legally, simply because they had misunderstood the date on which their leave expired. It would be difficult to prove otherwise and then the purpose of the offence is undermined.*

*Let me deal with offences of strict liability in the context of driving. This concept is not new. For example, the offence of driving while disqualified under section 103 of the Road Traffic Act 1988, as amended, is an offence of strict liability, so this is not a new departure, although the defence would be a new departure when it comes to driving offences of this nature.*

**Keir Starmer:** *I am grateful to the Solicitor General for his explanation. I readily accept that this quasi-strict liability is not uncommon when it comes to driving and disqualification. The difference is that if someone is disqualified, they know they are disqualified. If there were a situation in which somebody, perhaps through sponsorship, genuinely and simply did not know that their status was as it was and would come within this defence, is the Solicitor General’s answer that that is just tough?*

**The Solicitor General:** *Not quite. There are a couple of caveats. First, a person who is prosecuted for this offence has the opportunity before the court issues judgment to put in mitigation about their belief as to whether they were legally present in the UK, and that would affect any sentence that might be passed by the court. Also, the Crown Prosecution Service will have guidance to ensure that migrants are not inappropriately prosecuted for this offence. ...*<sup>39</sup>

Reliance on prosecutorial discretion is not an adequate answer to an offence that has not been well-drafted. Pleas in mitigation go to the length of sentence, not to whether a person can be prosecuted or not. A criminal record has particularly serious implications for a person under immigration control. Since the coming into effect of sections 148 and 149 of the Legal Aid,

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<sup>38</sup> 3 November 2015, col 307ff.

<sup>39</sup> *Ibid.*

Sentencing and Punishment of Offenders Act 2012, convictions can never be spent for immigration and nationality purposes. They must always be declared and can form the basis for refusing a person leave, settlement or citizenship. In these circumstances mitigation of sentence is not enough.

**Amendment 164** in the names of **Baroness Hamwee and Lord Paddick** require that where a vehicle has been detained against the possibility of a person's being prosecuted for driving when unlawfully in the United Kingdom, the decision as to whether or not to prosecute must be taken within a month of the arrest. This would prevent indefinite detention of the vehicle.

**Government amendments 165 to 168** in the name of **Lord Bates** correct the provisions of the Bill on driving offences and the detention of vehicles as they are designed to apply in Scotland. Again, evidence of a Bill drafted in haste and, in particular, without an adequate understanding of the way in which the provisions will work in the devolved areas.

**Government amendment 170** in the name of **Lord Bates** would allow regulations to specify about the provision of a vehicle to make provision as to "the destination" of payments of costs in relation to the detention of the vehicle and any application for its release, where such payment is a condition of release. The wording is odd, and it is unclear why it is felt necessary to make express provision for this in regulations. The Minister should be pressed on what is envisaged.

**Amendment 169** in the names of **Baroness Hamwee and Lord Paddick** changes the definition of a relevant vehicle for the purposes of their detention to mean a vehicle not under the control of the person accused of driving without lawful excuse.

**Amendments 171-173** in the names of **Baroness Hamwee and Lord Paddick** are concerned with the power to enter premises to detain a motor vehicle. They remove provision for an "all premises warrant" thus requiring that any warrant be issued for specified premises.

In his March 2014 report *An inspection of the use of the power to enter business premises without a search warrant*, the Chief Inspector of Borders & Immigration, March 2014 examined powers of entry without a warrant. In 59% of the cases in his sample entry without warrant had been effected when the required justification for entry without warrant was not made out and in a further 12% the evidence on file did not allow him to determine whether it was made out or not. Recording was inadequate.

Failure to comply with guidance was widespread. In only 5% of cases was there evidence that whether to apply for a warrant had been considered. Speculative grounds were relied on and training was inadequate, with managers as well as staff under them not displaying knowledge of the correct procedures.

In the circumstances, anything that reduces the scrutiny the courts can bring to immigration officers' powers of entry and search is undesirable.

**Government amendments 174 and 175** in the name of Lord Bates are again "Oops, we forgot Scotland" amendments. Scots law does not permit even a constable to have an all-premises or multiple entry warrant and the amendments ensure the clauses reflect this. More careful consideration of the position in Scotland might have led to consideration of whether it was appropriate to take the powers at all.

## **Bank Accounts**

### **Clause 19 Bank Accounts**

ILPA supports **Baroness Lawrence of Clarendon, Baroness Hamwee and Lord Paddick** in their opposition to Clause 19 standing part of the Bill.

Banks and building societies would be required periodically to check the immigration status of current account holders and to notify the Home Office if a person does not have the correct legal status. Bank accounts can be frozen. There is a right of appeal against this. Banks would be required to facilitate the closure of bank accounts held by those without legal status.

Banks would be required to notify the Secretary of State when a check identifies that an account holder is a person disqualified from holding a bank account under the 2014 Act. Yet the banks would perform the check against information notified by the Home Office to an anti-fraud organisation (currently CIFAS). If the Home Office were making proper use of its own information it would not be necessary to outsource this work, with the attendant expense and regulatory burden, to banks. Shortcomings in Home Office information would affect checks carried out by the banks. According to the impact assessment<sup>40</sup>, in which it is acknowledged that numbers are very rough estimates indeed, numbers are anticipated to be small, c 900 matches per year after the first year are anticipated, out of some 76 million current accounts. The regulatory burden appears disproportionate.

Individuals are not compensated for losses and harm caused by the closure or suspension of their bank accounts as a result of mistakes made by the Secretary of State in identifying the account holder as a disqualified person.

Under 40C(3) inserted by this clause the Secretary of State may choose not to apply to the Court for a freezing order in respect of an account and instead notify the bank that the account holder is a disqualified person placing the bank under a duty to close the account or to prevent that account from being operated. There will therefore be no independent oversight by a Court or any other mechanism of the notification by the Secretary of State that leads to an account being closed or prevented from being operated. There will therefore be no opportunity for an individual to challenge the closure of their account or to challenge incorrect or unreliable information that has led to the closure of that account.

Throughout the Bill, it is assumed that Home Office information databases are consolidated, correct and up-to-date and that Home Office staff will provide correct information to banks as to whether an individual is a 'disqualified person' for the purpose of holding a current account.

In ILPA's experience, however, these remain significant and ongoing problems within the Home Office. The following case examples, drawn from experience of the Home Officer Employers' Checking Service, highlight some of the problems in Home Office record-keeping and in the accuracy or reliability of information provided by the Home Office:

*A worker was suspended by their employer because an application was still not showing on the database against which the Home Office makes its checks despite the payment for the*

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<sup>40</sup> Available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/462233/Immigration\\_Bill\\_bank\\_accounts\\_impact\\_assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf)

*application having been taken more than three years previously. The employer was told that she did not have permission to work.*

*In March 2014 a man made an application on form FLR(O) for further leave to remain. The application was rejected shortly afterwards as being invalid because the Home Office said that it was made on the wrong form. It was however the correct form so, after correspondence failed to resolve the issue, his legal representatives issued a pre-action protocol letter. As a consequence of that letter the Home Office conceded the application had been made on the correct form and would be considered. However the Home Office computerised records did not show that the client's application was pending until the beginning of September by which time the man's employer had made a check with the Employment Checking Service which stated that he had no right to work. He lost his job.*

*A family member of an EEA national was refused a certificate confirming permanent residence, in circumstances where there should have been no doubt that she had a right of residence under European Union law. She was told by the Home Office that she had no status.*

*The Parliamentary and Health Service Ombudsman upheld a complaint by an EEA national who was unable to prove his right to work whilst UK Visas and Immigration dealt with his application for a permanent residence card after exercising EU treaty rights in the UK as a worker for five years. After submitting his application in May 2012, the individual was sacked from his job in July 2012 when the Employer Checking Service told his employer that it could not confirm his right to work.<sup>41</sup>*

Under the provisions of the Bill, individuals whose bank accounts are closed by the Secretary of State will have no means of preventing the closure or the suspension of their account and, at the same time, no form of redress against the Secretary of State if their account is closed or suspended by their bank in reliance on inaccurate information provided to it by the Secretary of State.

There is no duty on the Secretary of State to provide the person identified as a disqualified person with the information that formed the basis of that assessment leading to the closure of the account so that the individual has the opportunity to correct any inaccuracies. If the Secretary of State delays in responding to enquiries and rectifying mistakes made, disruption to the individual whilst their bank account is closed or suspended will be increased.

**New Clause after Clause 19 Ability to pay the Immigration Health Surcharge incrementally** in the names of **Baroness Doocey, Lord Alton of Liverpool and Baroness Lister of Burtersett**

**Presumed purpose:** to permit the immigration health surcharge to be paid in instalments

### **Briefing**

The Immigration Health Surcharge must be paid in full at the time of application.

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<sup>41</sup> Examples excerpted from: *Response of the Immigration Law Practitioners' Association to the Department of Communities and Local Government consultation Tackling Rogue Landlords and improving the private rental sector*, 20 August 2015, <http://www.ilpa.org.uk/resources.php/31308/ilpa-response-to-the-department-of-communities-and-local-government-consultation-on-tackling-rogue-l>

The sum at stake, the £200, £150 for students may appear modest. It is not. Factor in that it is a payment per year, that there will be a levy for each family member and then consider average earnings in different countries and exchange rates with the UK and it acts as a bar to entry.

Any health levy payable prior to arrival risks presenting a barrier for those nationals of countries where earnings are low and currencies weak relative to the UK. Similarly if a person must pay the levy for their entire period of leave up front: to do so exacerbates the effect of existing disparities. A person coming to work in the UK even from a poor country may see their earnings increase rapidly after arrival. Yet no consideration is given in any of the documents to tailoring it, through use of a multiplier such as those used in assessing earnings in the points-based system to address the risks of discrimination.

Students, who are now granted leave for the duration of course, suffer particularly from having to pay up front, as was highlighted in debates on the Immigration Act 2014 at Second Reading on 10 February 2014 by Lord Dholakia (col. 439), Lord Clement-Jones (col. 443), Baroness Warwick of Undercliffe (col. 449), Lord Patel (cols. 456-7), Lord Stevenson of Balmacara (cols. 502-3) and others.

### **New Clause after Clause 19 *Exemptions from the Immigration health surcharge in the names of Baroness Doocey, Lord Alton of Liverpool and Baroness Lister of Burtersett***

**Presumed purpose:** To provide exemptions from the immigration health surcharge for children under 18 and for survivors of domestic violence.

#### **Briefing**

Women are more likely to be victims of domestic violence than men<sup>42</sup> and thus to be left without entitlement in the case of relationship breakdown on these grounds. Doctors may be the first people outside the home to learn of domestic violence.<sup>43</sup> Medical evidence may be needed by survivors of domestic violence whose relationship with their British or settled UK spouse or sponsor has broken down and who are seeking leave to remain under the domestic violence rule.<sup>44</sup>

### **The Immigration (Health Charge) Order 2015 (SI 2015/792) sets out who is already exempt from the health charge. The Explanatory Note to the instrument provides**

*“Tier 2 intra-company transfer migrants (ICT) and their dependants will be exempt from the charge and will continue to receive NHS care free of charge. The ICT route brings the most highly-skilled international workers to the UK. UK workers benefit from working with these migrants, by sharing expertise and making use of reciprocal ICT arrangements in other countries. The ICT route also brings investment to the UK, boosting our economy and creating jobs for resident workers, not just migrant workers.*”

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<sup>42</sup> See the Office for National Statistics Statistical Bulletin: *Focus on violent crime and sexual offences*, 2011/13, England and Wales, 07 February 2013, available at [http://www.ons.gov.uk/ons/dcp171778\\_298904.pdf](http://www.ons.gov.uk/ons/dcp171778_298904.pdf) (accessed 23 August 2013).

<sup>43</sup> See *Identifying domestic violence: cross sectional study in primary care*, Richardson, J., *BMJ* 2002:324.

<sup>44</sup> Immigration Rules, HC 395, paragraphs 289A to 289C.

*7.14 Certain vulnerable groups will be exempt from paying the charge and will continue to receive free NHS care. These are – children looked after by the local authority, migrants making an application for asylum, humanitarian protection, or a claim that their removal from the United Kingdom would be contrary to article 3 of the European Convention on Human Rights. A person who applies for limited leave under the Home Office concession known as the destitute domestic violence concession will also be exempt, as will a person applying for leave to remain relating to their identification as a victim of human trafficking. A person making an immigration application as a dependant of a person applying under the categories set out in this paragraph is also exempt from the charge.*

*7.15 The charge will not apply to migrants who are exempt from immigration control, such as accredited foreign diplomats and their dependants and serving members of HM Armed Forces and visiting Armed Forces exempt under the Immigration Act 1971 as such a person does not need to apply for entry clearance or leave while they are exempt. A dependant of a member of HM Armed Forces or those exempt under the armed forces provisions of the Immigration Act 1971 applying for entry clearance or leave to remain under the Immigration Rules will be exempt from the charge under this Order. 7.16 Those making an immigration application connected to an EU obligation, such as an application under the Turkish European Communities Association Agreement, are exempt from payment of the charge under the Order. 7.17 Nationals of Australia and New Zealand will not pay the charge, in recognition of current international agreements between these two States and the UK for the provision of healthcare without charge for their nationals. A British Overseas Territory citizen who is resident in the Falklands Islands is also exempt, in line with our commitments to the Islands.*

Thus it will be seen that the amendment is about widening existing exemptions and making them less complicated. It would provide an exemption for all children, not just for those who are looked after; for all survivors of domestic violence, not just those who have availed themselves of the destitute domestic violence concession. The amendment represents a sensible simplification of these exemptions.

As to the Intra-Company Transfer route, the analysis set out above is now being reconsidered. The Migration Advisory Committee has been asked by the Government to examine Tier 2 and, in particular

### ***Intra-company transfers***

*16. The Tier 2 (Intra-Company Transfer) category is the most used route under Tier 2. The Government has asked that the MAC consider the scope for action to tighten the intra-company transfer provisions:*

- a. What criteria should be used to determine eligibility for the intra-company transfer route?*
- b. Subject to legal requirements, how can the Government tighten the Tier 2 (Intra-Company Transfer) provisions? Should this route be limited to genuine skills shortages and highly specialised experts only?*
- c. What will be the impact on businesses and the economy of tightening the intra-company transfer provisions?*
- d. What will be the impact of a cap on the number of migrants a sponsor can employ based on the percentage of each organisation's UK workforce?*
- e. What impact does the Tier 2 (Intra-Company Transfer) route have on the domestic labour market?*

- f. Should allowances continue to be included in the salary threshold for the Tier 2 (Intra-Company Transfer) route? If allowances were excluded from the salary threshold, what would be the impact?
- g. What is the impact on existing UK companies and UK resident workers of the current intra-company transfer provisions in relation to companies outsourcing contracts with third parties?
- h. What would be the impact of putting tighter intra-company transfer restrictions on companies which outsource contracts with third parties?
- i. What is the impact on existing UK companies and UK resident workers of the use of the current intra-company transfer provisions in relation to the IT sector?
- j. What would be the impact of putting tighter intra-company transfer restrictions on the IT sector specifically?<sup>45</sup>

See further

House of Commons library briefing, 14 August 2014: Health surcharge Q and A  
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7274>

[http://www.legislation.gov.uk/uksi/2015/792/pdfs/uksiem\\_20150792\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/792/pdfs/uksiem_20150792_en.pdf)

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<sup>45</sup> See the Call for evidence at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441429/Call\\_for\\_Evidence\\_Review\\_of\\_Tier\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441429/Call_for_Evidence_Review_of_Tier_2.pdf). The report of the Committee is awaited.