ILPA PROPOSED AMENDMENTS AND BRIEFINGS TO AMENDMENTS TABLED FOR IMMIGRATION BILL: LORDS' REPORT FIRST DAY 9 MARCH 2015 (PARTS 1, 2 and *Powers of Immigration Officers etc.)* IN PART 3

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The briefing below covers the Bill to the end of the section on powers of immigration officers in Part 3. It does not cover the *Immigration Bail* part of part 3. It covers all amendments tabled as of 4 March 2016, including Government amendments. A further briefing will be produced for the second day if Committee stage on 15 March 2016.

Part 1

Director of Labour Market Enforcement

CLAUSE 1 Director of Labour Market Enforcement

GOVERNMENT AMENDMENTS

To Clause 1, page 1, line 5

To Schedule *Consequential and related amendments* page 74, line 40,

Purpose
To allow the Secretary of State to provide the Director of Labour Market Enforcement with a pension.

Briefing
Further proof, if proof were needed, of the haste with which this Bill has been drafted and that the underlying policy and operational implications are being addressed on the hoof. This, together with amendments proposing substantive new powers, as discussed below, makes the case for recommittal of Part 1 so that it can be considered properly.

CLAUSE 2 *Labour Market Enforcement Strategy*

GOVERNMENT AMENDMENTS to page 2 lines 25, 30 and 31

Presumed purpose
Would require Director to include in the annual strategy proposals as to the information to be shared with the Director and the form manner and frequency of provision of such information.

Briefing
These amendments accentuate a trend, already detected, for these matters to sound less like "proposals" and more like diktats, underlining concerns already raised as to how those who are being asked to share the information are to do more without more resources.

CLAUSE 3 *Non-compliance in the Labour Market etc.: interpretation*

GOVERNMENT AMENDMENTS to page 3 lines 28 and page 4 line 12

Presumed purpose
The first amendment extends the definition of a labour market enforcement function to cover all the functions of the enforcing authorities, the Employment Agency Standards Inspectors, Her Majesty's Revenue and Customs National Minimum Wage Team and the Gangmasters and Labour Abuse Authority.

The purpose of the second amendment is explained by the Government as follows

> "*These amendments add the use of the new LME undertakings and orders, and Slavery and Trafficking Prevention orders obtained by the Gangsmasters and Labour Abuse Authority for secondary and inchoate offences (e.g. assisting, inciting).*"

By a process of convoluted drafting Clause 3(3)(f) (ii) includes in the definition of a labour market offence (for which the orders can be used) an offence of, without reasonable excuse, doing anything that the person is prohibited from doing by a slavery and trafficking prevention order made on sentencing on the application of the Gangmasters and Labour Abuse Authority (subclause 3(3)(f)(i)) , or made following conviction for an offence under section 1of the Modern Slavery Act 2015 (subclause 3(3)(d)) or for an offence under s2 or s 4 of that Act committed in relation to a worker or person seeking work or in circumstances where person is the victim of behaviour which involves the commission of an offence under section 1 of the Modern Slavery Act 2014 or would do so if it involved the commission of an offence under that section if it took place in England and Wales (subclause 3(3)(e)).

Following amendment the definition of a Labour Market offence will also encompass breach of an order made following conviction for an offence of attempting or conspiring to commit the offences already covered by the clause as well as attempting or conspiring to commit an offence under the Employment Agencies Act 1973 9other than s 9(4)(b) of that Act), an offence under the National Minimum Wage Act 1998, an offence under the Gangmasters Licensing Act 2004. It will also encompass breach of an order made following conviction for an offence under section 2 of the Serious Crime Act 2007 which extends culpability out across conducting oneself in such a way likely to facilitate the commission of a serious crime. It will encompass

breaches of orders following conviction for offences of inciting a person to commit these offences and of aiding, abetting counselling or procuring their commission.

The amendment is technically extremely complex and merits scrutiny by expert committees and advisors specialised in criminal. It makes the case for recommittal on its own. One matter which it would be useful to probe is whether it is appropriate following the recent judgement of the Supreme Court in *R v Jogee* (Appellant) [2016] UKSC 8 in which the Supreme Court looked again at the law of secondary liability for crime that pertaining to the person who assisted, aided, abetted, encouraged etc. the principal, and the question of what the Supreme Court term "parasitic accessory liability". In an historic judgment given on 18 February the Supreme Court held that the common law in this area had taken a wrong turn. The Supreme Court said in its press release

> *"…foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage. It is a question for the jury in every case whether the intention to assist or encourage is shown.*
>
> *This brings the mental element of the secondary party back into broad parity with what is required of the principal. The correction is also consistent with the provision made by Parliament in a closely related field, when it created (by the Serious Crime Act 2007) new offences of intentionally encouraging or assisting the commission of a crime, and provided that a person is not to be taken to have had that intention merely because of foreseeability*."[1]

GOVERNMENT AMENDMENTS Page 4 line 13 (read with amendment to **Clause 21** ***Variation and Discharge*** **page 13 line 26** and **Clause 30** ***Regulations under Chapter 1***, **page 17, line 24**

Presumed purpose

To limit the regulation making powers in Chapter 1 to reserved matters. The Explanatory table of Government Amendments says "To put beyond doubt" but without these amendments the regulation making powers in Chapter 1 would not be confined to reserved matters.

Briefing

See the 1 March 2016 letter of Lord Bates to Lord Lang of Monckton chair of the Constitution Committee. The background to this provision is the Seventh Report of the Lords Committee on the Constitution, which states

> 11. *We wish to draw the attention of the House to a wider point in relation to those powers. Clauses 10, 11, 15 and 39-42, which relate to illegal working in respect of licensed premises and private-hire vehicles; orders for possession of properties; and the transfer between local authorities of responsibility for relevant children, only have effect (in some cases because the legislation to which they make amendments only has effect) in relation to England or England and Wales.*
>
> *12. However, clauses 10, 11, 16 and 43 provide regulation-making powers so that the provisions made or given effect by clauses 10, 11, 15 and 39-42 can in substance be extended to Northern Ireland and Scotland (and, where relevant, Wales). The formula used in clauses 10, 11, 16 and 43 is that the Secretary of State "may by regulations make provision" in respect of*

[1] https://www.supremecourt.uk/cases/docs/uksc-2015-0015-press-summary.pdf

Northern Ireland and Scotland (and, where relevant, Wales) which "has a similar effect to" the English provisions. Clauses 11, 16 and 43 are Henry VIII powers: regulations made under them can "amend, repeal or revoke any enactment".[6]

13. The UK Government's view is that clauses 10, 11, 16 and 43 do not engage the Sewel Convention, so Legislative Consent Motions (LCMs) are not required.[7] We note that this view has been disputed by some interested parties. For example, the Law Society of Scotland has stated that regulations authorised by clause 10 "would alter … licensing law, which is a devolved matter", and that "the effects of the proposals are not incidental to devolved matters" so that "consultation with a view to seeking the legislative consent of the Scottish Parliament should be initiated".[8]

14. The House may wish to ask the Government to justify its view that Legislative Consent Motions are not required for clauses 10, 11, 16 and 43.

These are matters worthy of further debate[2].

GOVERNMENT NEW CLAUSE AFTER CLAUSE 5 *Information Gateways*, NEW CLAUSE AFTER CLAUSE 5 *Information Gateways: Supplementary* and NEW SCHEDULE BEFORE SCHEDULE 1 *Persons to whom the Director etc. may disclose information* plus **GOVERNMENT AMENDMENT Clause 87 *Regulations* page 68, line 38** and **GOVERNMENT AMENDMENT Schedule 2 *Consequential and Related Amendments* page 79 line 5**

Presumed purpose

These amendments create information gateways that are very large. The only restrictions on such sharing are those recalled by the new Clause *Information Gateways: supplementary:* that which contravenes the Data Protection Action 1998 or is prohibited by Part 1 of the Investigatory Powers Act 2000.

The former provides that data must be processed in accordance with eight principles: Information must be:

- Fairly and lawfully processed
- Processed for specified purposes
- Adequate, relevant and not excessive
- Accurate and up-to-date
- Not kept for longer than is necessary
- Processed in line with individuals' rights
- Secure
- Not transferred outside the European Economic Area without

Sensitive personal data, data on

- racial or ethnic origin
- political opinions
- religion
- membership of a trade union

[2] http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7505.htm

- health
- sex life
- criminal activity

can be shared without consent where this cannot be obtained for a wide range of relevant purposes including, but not limited to[3]

- in the substantial public interest;
- where this is necessary for
- the purposes of the prevention or detection of any unlawful act
- the discharge of any function which is designed for protecting members of the public against–
    - dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or
    - mismanagement in the administration of, or failures in services provided by, any body or association;
- is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest;
- is necessary for the discharge of any function which is designed for the provision of confidential counselling, advice, support or any other service;
- is necessary for the exercise of any functions conferred on a constable by any rule of law.

The Data Protection Act gives individuals rights to know what data is held about them; but these do not in any way narrow information gateways.

Part 1 of the Regulation of Investigatory Powers Act concerns intercept evidence.

There are also limitations on the information that those working with the intelligence services may disclose. HNRC information may be disclosed with authorization at the requisite level.

No explanation or justification is offered of why these powers are needed.

Thus the safeguards are not strong when compared to the breadth of the powers. The new clause *Information Sharing* allows any person, including a legal person, i.e. a firm, organization or public body, to disclose information to the Director or a staff member for the exercise of any of the Director's functions. Having obtained the information, it can be put to use for any of the relevant functions.

We get an idea of the breath of legal persons who might use this gateway to share information with the Director's staff, when we look at the new Schedule before Schedule 1 which concerns those to whom the Director may disclose information. These include National Health Service Trusts and Local Health Boards, local councils, immigration officers and the police.

The Clause *Information Gateways: Supplementary* provides that a disclosure authorized by the section *Information Gateways* does not breach an obligation of confidence, or any other restriction, however imposed. What, for example, of medical confidentiality?

[3] Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 200/417).

The amendment to page 68 line 38 makes regulations made under new Clause which specify additional persons to whom information may be disclosed by the Director or a relevant staff member subject to the affirmative procedure.

The amendment to page 79 line 5 creates an information gateway by which information held by the Pensions Regulator which would otherwise be restricted may be disclosed to the Director or to a member of the Director's staff.

See what Lord Bates described in his letter to Baroness Foulkes, the Chair of the overworked Select Committee on Delegated Powers and Regulatory Reform, as "yet another" Delegated Powers memorandum. The Minister's willingness to accept responsibility and apologise for the method of proceeding should not be allowed to disarm criticism of the substance of it. Substantial, intrusive new powers are being introduced to the Bill at a very late stage without the opportunity for proper scrutiny.

See also Government Amendment to page 79, line 19 which is in similar terms but creates gateways through which information can be exchanged to and from the Gangmasters and Labour Abuse Authority or a relevant officer.

CLAUSE 6 *Information Hub*

GOVERNMENT AMENDMENT page 5 line 17

Presumed purpose
Gives the staff of the Director of Labour Market enforcement new powers to request of those who exercise labour market enforcement functions such information as it is considered would facilitate the exercise of the Director's functions and within such period as is required.

Briefing
The amendment returns us to the vexed question of resources. Those exercising Labour Market functions are to be required to service the Director but with no extra resources with which to do so.

The Government has stated in its response to the Consultation on Tackling Labour Market Exploitation that the Director will be able to 'pool' resources between labour inspection authorities, however, these authorities are already significantly underfunded and there is a risk that funding may be diverted from existing effective work.

Whilst the Minister, the Rt Hon James Brokenshire MP announced a further £4million to support the work of HMRC on the National Minimum Wage at Report in the House of Commons[4], this must be seen in the context of the evidence of Sir David Metcalf of the Migration Advisory Committee before the House of Commons committee that:

> *I think that successive Governments have put more resources in—certainly into HMRC, but less so with the Gangmasters Licensing Authority. One understands the difficulties with the public*

[4] HC Report, 01 December 2015, column 208 at: http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151201/debtext/151201-0002.htm#15120141000002

finances, but we probably do not have sufficient resources. In the low-skilled report, we calculated that you would get an inspection from HMRC once every 250 years and you would get a prosecution once in a million years. Funding remains an issue, particularly for the Gangmasters' Licensing Authority[5].

Resources are a particular concern in relation to the Gangmasters' Licensing Authority (to be renamed the Gangmasters and Labour Abuse Authority by this Bill). The US State Department Trafficking in Persons Report 2015 has recorded concerns that funding and staffing for the Gangmasters' Licensing Authority had decreased and recommended that the UK Government increase funds for this agency[6]. The proposed measures to increase the role of the Authority in investigating and prosecuting criminal conduct relating to labour market non-compliance will place even heavier demands on resources.

Gangmasters and Labour Abuse Authority

CLAUSE 10 PACE Powers in England and Wales for labour abuse prevention orders

GOVERNMENT AMENDMENT Clause 10, page 6, line 42 after section insert "made under s114(4)(e) or"

Purpose

The effect of the amendment is to make regulations under new s114B(4)(e) subject to the affirmative procedure and thus to give effect to the recommendation of the Delegated Powers and Regulatory Reform Committee[7].

Briefing

The Delegated Powers and Regulatory Reform Committee said in its 18th Report

> *6. Paragraph (e) is a general provision which enables the Secretary of State to prescribe, by regulations, "any other purpose". Such regulations will require only negative procedure unless they amend primary legislation in which case the affirmative procedure applies.*
>
> *7. … powers to apply PACE provisions to officers of bodies other than the police are not novel. Equivalent powers are already conferred in relation to the Armed Forces, Her Majesty's Revenue and Customs and certain officers of the Secretary of State …, and are similarly exercisable by negative procedure regulations. Given this, both the delegation in new section 114B(1) and its associated negative procedure seem to us to be appropriate.*
>
> *8. We do not take the same view, however, in relation to the general power in subsection (4)(e) to enlarge the purposes for which the PACE powers may be applied. The Gangsmasters and Labour Abuse Authority , by virtue of these amendments, is acquiring significant new functions, about which it is wholly untested. It does not have the experience of the other bodies and officers to whom powers under PACE may be applied under sections 113, 114 and 114A. We*

[5] Public Bill Committee, House of Commons, 20 October 2015, Q37 at: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151020/am/151020s01.pdf

[6] US State Department, *Trafficking in Persons Report 2015, Country Narratives: United Kingdom,* http://www.state.gov/documents/organization/243562.pdf

[7] See http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7505.htm

consider that, in those circumstances, the House might expect the PACE powers to be applied only for purposes specified on the face of the Bill, and that a higher level of scrutiny ought to apply to any subsequent addition of further purposes by statutory instrument.

9. While we are prepared to accept the case for flexibility made in paragraph 15 of the supplementary memorandum in support of the power conferred by new section 114B(4)(e), we are not persuaded by what is said in paragraph 16 in favour of the negative procedure. ***We accordingly recommend that regulations made under new section 114B(4)(e) should require the affirmative procedure on any exercise of that power.***

CLAUSE 11 ***Relationship with other agencies: request for assistance***

GOVERNMENT AMENDMENTS Clause 11 (page 7, lines 17, 18, 22, 23, 24, 33 to 39, 40 and page 8 line 19

Presumed Purpose
To amend new Section 22A of the Gangmasters (Licensing) Act 2004, which creates formal powers for the Gangmasters and Labour Abuse Authority to ask for assistance and reciprocal powers to ask the Gangmasters and Labour Abuse Authority for assistance. The effect of the amendments is that the list of persons from whom the Agency can ask for assistance no longer mirrors the list of persons who can ask it for assistance. The change is that it can ask the Director General of the National Crime Agency rather than that Agency or one of its officers, for assistance. It is no longer the case that provision is made in the Bill for the National Crime Agency to ask the Gangmasters and Labour Abuse Authority for assistance. This is understood to be because the Crime and Courts Act 2003 already provides the National Crime Agency with powers to ask for assistance and the Gangmasters and Labour Abuse Authority falls within the scope of that power.

Meanwhile amendment 17 limits requests to those in respect of reserved powers only. The regulation-making power in respect of those from whom information may be requested and who may request information is retained.

Briefing
If these amendments achieve their aim, they avert an encroachment on devolved powers, the creation of overlapping and possibly conflicting powers in two statutes and the creation of information gateways that do not work. How many similar problems lie concealed in the text of part one, drafted under extreme time pressure to hit a moving target, with no time to absorb the effect of wave of amendments before moving on to the next? Is it such a simple matter to cast a request in terms that is limited only to reserved powers and will those making and receiving requests always be able to tell when their request touches on devolved matters?

CLAUSE 22 ***Appeals***

GOVERNMENT AMENDMENT page 13, line 14

Presumed purpose Omits unnecessary words "on an application" in referring to a Labour Market Enforcement Order made under Clause 16. All orders under Clause 16 are made on

application in contrast to, for example, orders made under Clause 18 which can be made by a sentencing court.

Briefing
More evidence of haste.

LME Undertakings and Orders: supplementary

CLAUSE 23 Code of Practice

GOVERNMENT AMENDMENTS Clause 23, page 14, lines 21 and 22.

Purpose
To make the Code of Practice giving guidance to enforcing authorities about the exercise of their functions in relation to Labour Market Enforcement Orders subject to a parliamentary procedure (the negative procedure) and thus give effect to the recommendation of the House of Lords Select Committee on Delegated Powers and Regulatory Reform. The date for the commencement of the Code will be appointed in regulations.

Briefing
The House of Lords Select Committee on Delegated Powers and Regulatory Reform said in its Eighteenth report:

> *10. This new clause requires the Secretary of State to issue a code of practice giving "guidance" to enforcing authorities, including the Gangsmasters and Labour Abuse Authority,[4] about the exercise of their functions under the ten new clauses introduced by Amendment Nos.43 to 52. They are significant functions, the exercise of which could result in a person being made subject to a "labour market enforcement order" (see the new clause introduced by Amendment No.49), backed by criminal sanctions in the event of non-compliance. The code of practice must be laid before Parliament and published, but is subject to no scrutiny procedure.*
>
> *11. In paragraph 4 of their further supplementary memorandum, the Home Office explain the absence of a Parliamentary procedure by pointing out that the subject matter of the code is confined to guidance only, and they refer in support to a similar absence in relation to guidance given under section 33 of the Modern Slavery Act 2015 ("the 2015 Act") which, they imply, is comparable.*
>
> *12. The Home Office appear however to have overlooked the significance of subsection (4) of the new clause, which requires an enforcing authority to "have regard" to the guidance when exercising its functions — a duty which does not feature in section 33 of the 2015 Act. A body that is required by statute to "have regard" to a code is normally, as a matter of public law, expected to follow the guidance in it, unless in particular circumstances it has cogent reasons for not doing so.*
>
> *13. **In view of that, we have concluded that the code should be subject to Parliamentary control. We consider that the negative procedure would afford an adequate level of scrutiny. That could either take the form of a draft negative procedure applied to the code itself, or a statutory instrument which brings the code into force being subject to the negative procedure. We recommend accordingly.***

CLAUSE 31 ***Interpretation of Part 1***

GOVERNMENT AMENDMENTS to page 18, line 18, 19 and 26

Purpose
To provide a definition of the Director by reference to Part 1.
To provide a definition of the HMRC Commissioners ("Commissioners for Her Majesty's Revenue and Customs")
To provide a definition of strategy by reference to section 2.

Supplementary provision

CLAUSE 89 ***Extent (pertaining to amendments effect by Schedule Consequential and Related Amendments)***

GOVERNMENT AMENDMENTS to page 70 lines 2 and 20

Purpose
Provides an exception from the statement that any amendment repeal or revocation made by the Act has the same extent within the United Kingdom as the provision to which it relates to deal with the amendments made to the Modern Slavery Act 2015 by the Schedule *Functions in relation to the Labour Market.*

Briefing
The effect of the Government Amendment to page 79 line 19 (described below) is to create new information gateways for the sharing of information with the Gangmasters and Labour Abuse Authority. This is done by amending the Modern Slavery Act 2015 with the insertion of new s54A *Gangmaster and Labour Abuse Authority: Information Gateways* and new schedule 4A *Information Gateways: specified persons.* These amendments mean that the new gateways extend only to England and Wales. They thus have territorial extent rather than being concerned with devolved or reserved powers. It is not clear to us why this approach has been taken and no explanation has been provided.

Schedule ***Functions in relation to the Labour Market***

GOVERNMENT AMENDMENT page 72 line 13

Purpose
Amends the section of the National Minimum Wage Act 1998 which deals with information sharing to deal with there being, when this Bill is passed, to include express reference to the Gangmasters Licensing Authority.

Briefing
Schedule *Functions in relation to the Labour Market,* at paragraph 5 amends section 13 of the National Minimum Wage Act 1998 *Appointment of Officers*. It creates a new definition of a "relevant authority". The current definition (by a complicated series of cross references) provides that "eligible relevant authority" means any Minister of the Crown who, or

government department or other body performing functions on behalf of the Crown which is party to arrangements made with the Secretary of State appointing officers for the purpose of the Act.

It would be helpful to have an explanation of why that definition does not already encompass the Gangmasters and Labour Abuse Authority.

It is of concern when provisions concerned with Data Protection and information sharing are so opaque that it is well-nigh impossible for an individual to determine the bodies with whom their information is being shared.

Schedule *Consequential and related amendments*

GOVERNMENT AMENDMENTS page 74, line 40, page 75, line 16, page 78 line 12, line 79 line 19, page 79 line 22

Purpose
The creation of further information gateways/superhighways.

The amendment to page 74, line 40 provides new exceptions to the prohibition on disclosing information obtained in the course of inspections of premises carried out under section 9 of the Employment Agencies Act 1973. The effect of the amendment is that the information can be disclosed to an officer acting under clause *Investigative functions* of this Bill, to an officer acting for the purposes of Part 2 of the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981, to the Pensions Regulator and to the Care Quality Commission.

The amendment to page 78 line 12 allow information relating to gangmasters to be supplied for any purpose "connected with" functions under the Gangmasters Licensing Act 2004. This is a broad and general definition.

The amendment to page 79, line 19 creates new information gateways through which persons may disclose informant to the Gangmasters and Labour Abuse Authority or a relevant officer. The only limitation on the disclosure is that it made "for the purposes of any function of the Authority or the officer under the Modern Slavery Act 2015. The information having been given in connection with one function, may be used by the authority or officer in connection with any other function and may be disclosed to a "specified person" if the disclosure is made for the purposes of the exercise of the function of the specified person. Provision is made that the disclosure does not breach an obligation of confidence owed by the person making the disclosure or any other restriction of the disclosure of the information, however imposed, save that there are exceptions for contraventions of the Data Protection Act 1998 and Part 1 of the Investigatory Powers Act 2000. See briefing above to the new Clauses after Clause 5: this is in similar terms. The same schedule lists specified persons to whom information may be disclosed by the Authority (any person may disclose information to it). Amendments to the Schedule setting out "relevant persons" are made subject to the affirmative procedure.

The amendment also repeals section 55 of the Modern Slavery Act which made provision for a review of the Gangmasters' Licensing Authority which has been carried out.

For the new Schedule 4A *Information Gateways: Specified Persons* see above.

Briefing
It will be seen from the description of the purpose above that the new information sharing powers go beyond a response to amendments affected by this Bill. No explanation has been provided, nor indeed attention drawn, to the use of this Bill to make those unrelated changes.

It is difficult to understand the effect of the new subsection (5) inserted by subclause (3) of the amendment to page 74 line 40. It appears, despite subsection 4's being concerned with information obtained in the course of inspections, to provide a broader definition of the information to which exemptions from the prohibition on disclosure apply, viz. information obtained by an officer carrying out an investigation under the Clause *Investigative Functions* of this Bill.

The opaque and convoluted provisions make it difficult for those affected to understand their rights.

Schedule *Consequential and related amendments*

GOVERNMENT AMENDMENTS page 77 line 26 and page 78 line 13

Purpose
To maintain the status quo whereby the rules made by the to be renamed Gangmasters and Labour Abuse Authority are under parliamentary control, in accordance with the recommendation of the House of Lords Committee on Delegated Powers and Regulatory Reform which said in its 18th report:

> *14. Section 8 of the Gangmasters (Licensing) Act 2004 ("the 2004 Act") enables the Gangmasters and Labour Abuse Authority to make rules dealing with a number of matters, such as the conditions to be satisfied before a licence may be granted, the charging of fees, and the various procedural matters concerned with licences. At present, the rules must be made by statutory instrument and are subject to the negative procedure …. In future, however, Parliamentary control over the Gangmasters and Labour Abuse Authority's rules is to be removed, because paragraph 21 of the new Schedule introduced by Amendment No.77 amends section 25 of the 2004 Act to repeal subsections (4) and (6)(b).*
>
> *15. .. the Home Office seek to justify this change by explaining that the Gangmasters and Labour Abuse Authority's rules will in future require the consent of the Secretary of State, "who is answerable to Parliament". We do not find this in the least persuasive. In our view, general answerability (which applies in the case of every Minister in respect of almost every ministerial function) can never be regarded as a satisfactory substitute for specific control over the exercise of a delegated power to legislate.*
>
> *16. We are also wholly unpersuaded by the Home Office's suggestion that there is a similar power in section 7 of the Private Security Industry Act 2001… that is exercisable without Parliamentary control. On the briefest comparison of the power to publish licensing criteria under section 7 of the 2001 Act with the rule-making power in section 8 of the 2004 Act, it is clear to us that like is not being compared with like.*

17. We also notice that the obligation to make rules by statutory instrument subject to the negative procedure is to be expressly preserved where the Gangmasters and Labour Abuse Authority make rules about licences in Northern Ireland (see paragraph 22 of the new Schedule): that incongruity is not even mentioned, far less explained or justified, in the supplementary memorandum.

18. ***For all of those reasons we consider that the removal of Parliamentary control over rules made by the Gangsmasters and Labour Abuse Authority is inappropriate***

GOVERNMENT AMENDMENTS page 78 lines 37 to 45, page 79 lines 3-5 and 5

Purpose
Amend the Gangmasters' Licensing Act so that the amendments made to sections 8, 19 and 22A of that Act by this Bill do not take effect in Northern Ireland.

Briefing
This matter is devolved to Northern Ireland. The amendment to section 8 is in consequence of a decision to revert back to requiring the Gangmasters and Labour Abuse Authority's licensing rules to be made by statutory instrument (earlier drafts of this Bill had proposed getting rid of a parliamentary procedure, but the Select Committee on Delegated Powers and Regulatory Reform counselled against this.

The amendments to new s 22A of the Gangmasters' Licensing Authority are the amendments to page 7, lines 17, 18, 22, 23, 24, 33 to 39 and 40 and to page 8 line 19 of this Bill discussed above. The amendment to section 19 is the amendment to page 78 line 12 discussed above.

CLAUSE 32 Offence of Illegal working

STAND PART in the names of Lord Rosser and Lord Kennedy of Southwark

GOVERNMENT AMENDMENTS to page 19 lines 6 and **7** and **to page 20 line 1 in the name of Lord Bates**

AMENDMENT to page 19 line 6 in the names of Lord Rosser and Lord Kennedy of Southwark

Purpose
The stand part would remove from the bill proposals to create an offence of illegal working.

The Government Amendment means that the offence of illegal working is only committed by a person who knows or has reasonable cause to believe that they are disqualified from working by their immigration status.

The amendment in the names of Lord Rosser and Lord Kennedy of Southwark creates a defence of having reasonable excuse for working when disqualified from doing so by a person's immigration status. This could encompass those persons taken out of the ambit of the offence by the Government amendment, but also a broader class.

Briefing

ILPA supports Lord Rosser and Lord Kennedy of Southwark in their opposition to Clause 32's standing part of the Bill. We consider that neither the Government amendment nor their amendment to page 19 line 6 is sufficient to address the mischief created by the offence.

The provision has been opposed, inter alia, by Tony Smith OBE, Former Director General of the UK Border Force[8].

***Illegal working and seizures under the Proceeds of Crime Act* 2002**

We have yet to hear a justification for the creation of the offence which holds water. It is already a criminal offence, under section 24 of the Immigration Act 1971, to enter the UK without leave when leave is required, to overstay or to breach a condition of leave (such as working when work is prohibited). Thus not a single person could be prosecuted under this clause who could not already be prosecuted under existing offences.

The rationale for introducing a new criminal offence of illegal working is the potential opportunity to seize earnings through confiscation orders made under the Proceeds of Crime Act 2002. In a letter to Lord Rosser, to which the Minister made reference during the debate on the clause at Lords' Committee[9], the Minister stated:

> *[T]he new offence will provide us with a firmer basis for using Proceeds of Crime Act seizure powers – which apply only in cases where the cash involved exceeds £1,000. To be clear, the Government already uses Proceeds of Crime Act powers in relation to those committing immigration offences under existing provisions in the UK Borders Act 2007. In 2014-15, the courts approved the forfeiture of cash totalling £542,668 seized by immigration officers. Following criminal convictions for immigration-related offences courts ordered the confiscation of assets totalling £966,024. We expect that in-country seizure could double with the use of the extended powers enabled by the new illegal working offence".*

The Minister stated in Lords Committee that the introduction of the new offence would align the position of those found to be working whilst living in the UK illegally with those found to be working in breach of the conditions of their lawful stay. He explained that the Government can confiscate relevant sums from those who work in breach of the terms of their existing stay under the Proceeds of Crime Act 2002 but cannot do so for those working in the UK illegally and said that the Government is therefore seeking to close this gap[10]. New clause 32 increases the penalty for the existing offence of working in breach of conditions.

Confiscation orders under the Proceeds of Crime Act 2002

Statistics provided by the Government indicate that the Proceeds of Crime Act 2002 is not typically used in practice to confiscate earnings from those found to be working in breach of conditions of their lawful stay. It is also unlikely to be proportionate for prosecutors to seek a confiscation order under the Proceeds of Crime Act 2002 for working illegally in the UK.

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[8] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib05.htm

[9] House of Lords, Immigration Bill Committee debates, 18 January 2016 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0003.htm, column 626

[10] House of Lords, Immigration Bill Committee debates, 18 January 2016 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0003.htm, column 626

The Government has published figures, which indicate that the Proceeds of Crime Act 2002 is not typically used for offences of working in breach of conditions, although it is deployed in cases involving other immigration offences. In an answer to a parliamentary question, Lord Bates reported the following data for the offences for which confiscation orders totalling £966,024 were made:

> *There were 16 confiscation orders amounting to £966,024, these are broken down to the following offences.*

Offence	*Amount*
Forgery and Counterfeiting	*£162,997.55*
Facilitation investigation	*£10,665.95*
Sham Marriage - assisting unlawful immigration	*£85,519.29*
Fraud and Money Laundering	*£2.00*
Conspiracy to Facilitate a Breach of Immigration Law	*£25,466.62*
Conspiracy to assist unlawful immigration	*£330,352.72*
Fraud by false representation	*£1,020.32*
Assisting Unlawful Immigration into the UK	*£350,000.00*

> *In the case of Money Laundering, the small total is because of nominal confiscation orders. A nominal confiscation order for a small amount (such as £1), may be imposed where the court finds that the defendant has benefitted from his criminal conduct, but has no realisable assets. If circumstances change then the order can be revisited*[11].

The figures indicate that there were only 16 confiscation orders made under the Proceeds of Crime Act 2002 in 2014/15 and none of these followed criminal convictions for working in breach of conditions. ILPA members practising in criminal law have indicated that this finding reflects their practice experience that Proceeds of Crime Act proceedings are lengthy, costly and not readily used in the context of offences of illegal working. In practice, the confiscation order is attached to other more serious matters charged in the indictment.

There would be few cases in which it would be cost effective or in the public interest to pursue confiscation proceedings to seize wages earned as a result of illegal working as proceeds of crime. In making a confiscation order, the Court will need to consider the benefit obtained as a result of the criminal conduct and the actual recoverable amount. If there are no assets, only a nominal order of £1 may be made. The Crown Prosecution Service Guidance on Proceeds of Crime[12] says that it should prioritize the recovery of assets from serious organised crime and serious economic crime. Pursuing undocumented workers with few assets will therefore not be a priority. Undocumented workers who are working for little money and living 'hand-to-mouth' will have very limited realisable assets. The Guidance says that: *"If a financial investigation has revealed that a suspect has few or no realisable assets, then it may not be a proportionate use of resources to pursue confiscation".*

Proceeds of Crime Act proceedings are lengthy. They normally take place after sentencing by a criminal court and require the setting down of a timetable, with delays often well past six

[11] Lord Bates, Written Answer HL5290, Home Office Immigration: Proceeds of Crime, 02 February 2016 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5290/

[12] http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/

months after sentencing date. Section 14 of the Proceeds of Crime Act 2002 allows the postponement of the Proceeds of Crime Act proceedings for up to two years from the date of conviction (with further provisions for exceptional circumstances). This has particular relevance given the summary nature of the offence. The Proceeds of Crime Act proceedings may not be resolved by the end of the sentence served by an individual prosecuted for illegal working. Is it envisaged that individuals should be kept in immigration detention post completion of a summary only criminal sentence? Or would Proceeds of Crime Act proceedings take place in their absence? A desire to be present at one's criminal trial would be a strong argument to use to resist removal and thus a person from whom only a nominal sum were ever to be confiscated might remain in the UK for longer than thy would otherwise have done because of the proceedings. . These are practical considerations that would also weigh in the balance in considering the public interest as well as the significant cost implications for the Courts, the Crown Prosecution Service and the Legal Aid Agency.

A confiscation order must be proportionate to the aim of the legislation, which is to recover the financial benefit that the defendant has obtained from the criminal conduct (*R v Waya [2012] UKSC 51)*. The purpose of the legislation is not further to punish the offender by fining them, or to act as a deterrent. If the confiscation order is not proportionate then it will be a violation of the right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the European Convention on Human Rights[13]. This was established by the European Court of Human Rights in the case of Paulet v UK.

Cases such as *Nuro v the Home Office* [2014] EWHC 462 (Admin), cited by the Home Office[14] as a case where it was held not to be possible to obtain a confiscation order to seize earnings in the absence of a criminal offence of a self-employed handyman living illegally in the UK pre-date the judgment and discussion of proportionality in *Paulet v UK*, and may not survive *Paulet*. They are in any event unlikely to be common. It also remains the case that confiscation orders under the Proceeds of Crime Act 2002 can be brought in specific cases where fraud or deception has been used in relation to illegal working (for example where an individual has deceived their employer as to their entitlement to work in the UK)[15].
The purported justification for the introduction of a new criminal offence thus does not withstand scrutiny.

The example of criminalising illegal working for Accession state nationals

The criminalisation of illegal working is not, as has been suggested[16] a new departure. The Accession of Croatian (Immigration and Worker Authorisation) Regulations 2013[17] and the Accession (Immigration and Worker Authorisation) Regulations 2006[18] both created criminal offences for Croatian, Romanian and Bulgarian working without authorization in the UK and for those employing them in breach of the regulations.

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[13] See the discussion in *Paulet v The United Kingdom*; *Mouhid v. R. (Court of Appeal) (2014)*
[14] Lord Bates, Written Answer HL 5291, 28 January 2016 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5291
[15] See *R v Carter, Kulish and Lyashkov* [2006] EWCA Crim 416; *R v Paulet* [2009] EWCA Crim 1573
[16] Prime Minister's speech of 21 May 2015 available at https://www.gov.uk/government/speeches/pm-speech-on-immigration (accessed 20 September 2015).
[17] Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, SI 2014/1460, regulations 11-18 at: http://www.legislation.gov.uk/ukdsi/2013/9780111539156/contents (accessed 19 February 2016).
[18] Accession (Immigration and Worker Authorisation) Regulations 2006 SI 2006/3317 regulations 12 and 13 http://www.legislation.gov.uk/uksi/2006/3317/pdfs/uksi_20063317_en.pdf (accessed 19 February 2016).

In an answer to a parliamentary question, the Minister, the Rt Hon James Brokenshire MP provided data on prosecutions under the Accession (Immigration and Worker Authorisation) Regulations 2006 which showed that since they came into force on 01 January 2007, there had been three prosecutions under Regulation 12 (the employer offence) and no prosecutions under Regulation 13 (the employee offence). During the same period, 491 fixed penalty notices were issued to employees who breached the regulations[19].

In the same written answer, the Minister stated that the Home Office has no record of any Fixed Penalty Notices issued to Croatian nationals working in breach of the Croatian (Immigration and Worker Authorisation) Regulations 2013 and that the Home Office had not issued any civil penalties to employers in respect of breaches of those regulations[20].

The data therefore indicates that employees were not prosecuted under the offences of illegal working under either the Accession (Immigration and Worker Authorisation) Regulations 2006 or the Croatian (Immigration and Worker Authorisation) Regulations 2013, again raising the question of why the new offence is felt to be required. EEA nationals do not have "leave" to be in the UK and thus the range of other offences with which they can be charged is much narrower than is the case for a third country national. If the new offence were really filling a gap one would expect this to be all the more identifiable in EEA cases.

The data provides also suggests that the introduction of a new offence of illegal working may lead to the displacement of enforcement activity from employers to employees. Whilst there were only three prosecutions of employers, 491 employees were given a fixed penalty notice for illegal working. A fixed penalty notice offers the individual an alternative to criminal prosecution through the payment of a fixed penalty. The disparity between the enforcement action taken against employees compared with those employing them is cause for concern.

Effect on individuals

The Government amendment is designed to protect those with no cause to believe that they do not have permission. But a number of persons who will be placed at risk of greater exploitation by the provision do know this.

Impact on trafficked or enslaved persons

The employer of a domestic worker who had failed to renew their visa could tell them this and that they were a criminal and likely to be prosecuted if they presented themselves to the authorities. The defence would not apply in such a case.

A person who has worked unlawfully, for example where an abusive spouse failed to renew a visa as a means of control may fear prosecution for this and therefore be reluctant to come forward to try to regularize their situation.

In its summary for the Bingham Centre for the Rule of Law event on the Bill on 20 October 2015, Focus on Labour Exploitation (FLEX) said that the clause would mean that:

[19] James Brokenshire MP, Written Answer 12752, Worker Registration Scheme, 21 October 2015 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-21/12752

[20] *Ibid*

"a) that many victims of modern slavery in the UK would not risk referral in to the UK national referral mechanism if a negative conclusive grounds decision could mean imprisonment;
b) that traffickers would use this new offence as a threat through which to coerce victims in to exploitation; and
c) that trafficked persons could be criminalised for initially abusive undocumented working that then deteriorated into a trafficking situation."

FLEX argued that the deterrent effect of the could lead to breaches of Article 4 of the European Convention of Human Rights due to a failure to prevent, identify and protect victims and potential victims of slavery.

The Migration Advisory Committee's July 2014 report *Migrants in low-skilled work Migration Advisory Committee Summary Report July 2014 The growth of EU and non-EU labour in low-skilled jobs and its impact on the* UK[21] is relevant to this clause. The Committee stated:

> *The combination of non-compliance and insufficient enforcement can lead to instances of severe exploitation, particularly of vulnerable groups such as migrants.*

The report sets out:

> *We were struck on our visits around the country by the amount of concern that was expressed by virtually everyone we spoke to about the exploitation of migrants in low-skilled jobs… migrant workers are more likely to be exploited than resident workers as they are not aware of their rights and are afraid they may be sacked/evicted/deported if they complain was raised on a number of occasions.*

The trafficked or enslaved person who knows that they are not permitted to work will have no defence under the Government amendment. It may be that discretion will be exercised not to prosecute, although this has not always been the case, for example where children working in cannabis factories are concerned. In any event, the trafficked or enslaved person is not an expert on the exercise of prosecutorial discretion and cannot feel confident that discretion will be exercised in their favour. Sir Keir Starmer MP, himself a former Director of Public Prosecutions, cautioned against leaving the decision as to whether or not to prosecute to the discretion of the prosecutor:

> *I am not concerned about the defence under the Modern Slavery Act—we had that exchange earlier and I understand the position—but the wider point of when that defence is unavailable. …. Does the Minister accept that in such circumstances it is not right to leave it to the DPP's discretion? In other words, should not the DPP's discretion be exercised according to the known offence and known defences? …That is not to suggest that discretion does not operate in many cases, but if there is a proper case for having a defence, it ought to be for Parliament to write that into the Bill and then for the DPP to exercise discretion as to how it operates in individual cases. The alternative is the DPP effectively introducing a back-door defence, which has not been thought to be an appropriate use of guidelines.* [22]

The general deterrent effect of the threat of a criminal sentence may be increased by the new sentencing powers. Offences under section 24 of the Immigration Act 1971: of entering or remaining in the UK unlawfully or for working in the UK in breach of a condition of leave are

[21] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/333084/MAC-_Migrants_in_low-skilled_work_Summary_2014.pdf
[22] Public Bill Committee Cols 203 and 218.

summary only offences. This means that sentencing powers are limited to six months' imprisonment and are dealt with by the Magistrates Court.

The proposed new section 24B would introduce a new offence criminalising illegal working for both those found working whilst living unlawfully in the UK and those found working in breach of the conditions of their leave in the UK. This new offence would remain a summary only offence but would carry increased sentencing powers of 51 weeks in England and Wales, which is greater than the maximum penalty normally imposed by Magistrates Courts.

CLAUSE 34 ***Licensing Act 2003: amendments relating to illegal working***

GOVERNMENT AMENDMENTS to page 22 lines 22 and 29

Presumed purpose
To ensure that any secondary legislation can be amended by regulations to apply the Licensing Act 2003: amendments relating to illegal working provisions to Scotland and/or Northern Ireland.

Briefing
Removes the definition of a relevant enactment for the purpose of the setting out enactments that can be amended, repealed or revoked by regulation. This is for the purpose of making regulations to make similar provision to the Schedule *Licensing Act 2003: amendments relating to illegal working* for Scotland and/or Northern Ireland. The definition is replaced by a definition of an "enactment" which is broader as well as Scots or Northern Irish statutory instruments it will now include any secondary legislation.

Private Hire Vehicles

CLAUSE 87 Regulations (insofar as it pertains to Clause 35 Private Hire Vehicles etc)

GOVERNMENT AMENDMENT page 68 line 42

Purpose
Deletes an obsolete reference to regulations to apply the private hire vehicle provisions of the Bill to Scotland and Northern Ireland, following the decision at Committee stage to remove the enabling power in Clause 11 to extend provision to Scotland and Northern Ireland and, in its place, introduce substantive provision. In the case of Scotland, the provisions amend the Civic Government (Scotland) Act 1982 and, in the case of Northern Ireland, the Taxis Act (Northern Ireland) 2008[23].

Briefing
More evidence of haste.

[23] HL Report 20 Jan 2016: Col 798.

SCHEDULE *Private Hire Vehicles*

GOVERNMENT AMENDMENT page 121 line 22

Purpose
Adds a definition of "the Immigration Acts" to the Taxis Act (Northern Ireland) 2008.

Briefing
No definition of "the Immigration Acts" is contained in the "Interpretation Act (Northern Ireland) 1954. The rest of the UK can use the definition in the Interpretation Act 1978.

NEW CLAUSE after Clause 36

ILPA supports the **NEW CLAUSE Overseas Domestic Workers in the names of Lord Hylton and Lord Rosser**

Purpose
To give effect to the recommendations of James Ewins QC as to the overseas domestic worker visa as set out below. In particular to ensure that all overseas domestic workers are able to change employer and to remain in the UK for up to 2 ½ years.

Briefing
The Government has published James Ewins (now QC)'s' Independent Review of the Overseas Domestic Worker Visa. This is available at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf

Mr Ewins takes as his fundamental question

> *…whether the current arrangements for the overseas domestic workers visa are sufficient to protect overseas domestic workers from abuse of their fundamental rights while they are working in the UK, which includes protecting them from abuse that amounts to modern slavery and human trafficking.*

Thus his focus is on the minimum required to achieve this.

He concludes that that minimum is

> *10. On the balance of the evidence currently available, this review finds that the existence of a tie to a specific employer and the absence of a universal right to change employer and apply for extensions of the visa are incompatible with the reasonable protection of overseas domestic workers while in the UK (see paragraphs 65 - 87).*
> *In particular:*
>
> *10.1. The review recommends that all overseas domestic workers be granted the right to change employer (paragraph 90) and apply for annual extensions, provided they are in work as domestic workers in a private home (paragraph 93).*
>
> *10.2. The review finds that such extensions do not need to be indefinite, and that overseas domestic workers should not have a right to apply for settlement in the UK in order to be adequately protected.*

10.3. The review recommends that after extensions totalling up to 2 ½ years, overseas domestic workers are required to leave the UK (paragraphs 99 - 106)…..11… this extension is the minimum required to give effective protection to those overseas domestic workers who are being abused while in the UK

Mr Ewins recommended in his review that

6. The terms of the overseas domestic workers visa set out in the Immigration Rules be amended to provide for:

6.1. an initial term of six months (or shorter if the sponsoring employer leaves the UK before then);
6.2. a right to change employer, but limited to domestic work in a private household, that is not conditional upon claiming or proving any form of abuse;
6.3. a period of 28 day grace to find another employer, during which an overseas domestic worker not in work will not be deemed to be in breach of the immigration regulations by virtue of not being work;

Section 53 of the Modern Slavery Act 2015 was the Government's response to its defeat in a vote on overseas domestic workers during the passage of that Act. It made provision for overseas domestic workers who had been found to have been trafficked or enslaved to be able to change employer and to have leave to remain for up to 12 months. This amendment works by modifying section 53 in line with Mr Ewins' proposals. Thus:

It broadens the section to cover all overseas domestic workers. Mr Ewins said

12. Since this review finds that, in granting that right, it is both impractical and invidious to discriminate between seriously abused, mildly abused and non-abused workers, the consequence is that it must be granted to all overseas domestic workers.

It increases the period for which an overseas domestic worker can extend his/her leave from six months to a total of two and a half years.

…the underlying rationale of a right to change employer is to give the overseas domestic worker a safe way out of an abusive situation, of which safe re-employment is an essential part. .. to make the right to change employer effective in practice, the duration of any extensions must be of sufficient length to give the overseas domestic worker both sufficient incentive and reasonable prospects of finding such alternative employment.

The ability to extend leave for up to a total of two and a half years is necessary to make the right to change employer effective, a real and not an illusory right. Mr Ewins says

…the commercial reality of an employer paying an agency fee for securing the services of such a person requires, in the evidence of some agencies, that a longer period of prospective employment is offered. It has been emphasised that this is particularly the case in circumstances where the employer is necessarily taking a risk by employing an overseas domestic worker who has escaped from a previously abusive employer and therefore comes without any references. Placing such employees is not as easy as placing others, it is said, and placing them for short periods is impossible. If this is correct, failure to make overseas domestic workers available for a longer period of time would substantially undermine the effect of a right to change employer.

It is important to understand that the extension is an adjunct to the right to change employer, rather than an end in itself.

During the passage of the Modern Slavery Act, the Government's only argument was that if workers could change employer without reporting to the authorities, then the abuse would not be identified. Mr Ewins has addressed this by making provision for the worker to be obliged to report that they have changed employer to the Secretary of State, who can then chose to investigate further.

This also addresses the concern as to the use of the ability to change employer by those endeavouring to exploit, rather than to protect the worker. It is strengthened by Mr Ewins' recommendation as to mandatory information sessions. The worker knows, from the off, that they have a right to change employer, not, or not merely, to have their exploiter changed for them.

All changes of employer could be investigated, or this could be done on an intelligence led basis. Whether investigated or not, information on changes could be collated, permitting of the identification of patterns of abuse.

It could be correlated with other information on which data is to be collected. Mr Ewins QC recommended

> *5. The Home Office should develop and implement clear policy and practice which will ensure the effective feed-back of information and intelligence drawn from the entry/exit data and change of employer/renewal applications to the application process itself.*

And set out

> *15. … with the introduction of entry/exit data from UKVI, it should be possible to collate such data with information drawn from overseas domestic workers visa applications, as well as applications to change employer and renew the visa as well as data from overseas domestic workers who enter the NRM. This review strongly urges the Government to collate and analyse such data to provide a clearer quantitative understanding of how the visa operates. 16. Further, implementation of this review's recommendations will provide data, information and intelligence which will enable the police, Immigration Enforcement or the proposed Director of Labour Market Enforcement, to take intelligence-led steps to investigate and pursue those who abuse overseas domestic workers with criminal, civil or immigration sanctions. Tasking such entities to take active steps to initiate enquiries into such abuse will require other measures beyond the scope of this report. However, it is the clear finding of this review that none of the basic protections of overseas domestic workers' fundamental rights should be conditional upon the worker initiating any such enquiry themselves, especially where the Home Office will have sufficient*

Mr Ewins QC recommends that

> *10. The Immigration Rules be amended to provide that:*
>
> *10.1. every overseas domestic worker who remains in the UK for more than 42 days shall attend an information, advice and support meeting;*

10.2. attendance at such a meeting shall be a mandatory condition of both the employer sponsoring the overseas domestic workers visa and the overseas domestic worker herself;

He said that

13. … such essential changes to the terms of the visa referred to above can only be of practical help to overseas domestic workers if those workers are empowered and enabled to avail themselves of these and other rights. Therefore, overseas domestic workers must be given a real opportunity to receive information, advice and support concerning their rights while at work in the UK. …

To this end:

13.1. This review recommends the introduction of mandatory group information meetings for all overseas domestic workers who remain in the UK for more than 42 days (paragraphs 122 - 132).

13.2. These meetings should be funded by an increase in the visa fee (paragraphs 133 - 134 and Appendix 5)

The amendment makes provision for this.

Mr Ewins acknowledges a concern raised by ILPA and others

134. The review has heard concern that a £50 fee increase may well be visited indirectly upon the overseas domestic workers themselves. However, if the improved provision of information, advice and assistance are effective, then such a consequence is but one of the abuses that the overseas domestic worker will be empowered to prevent. Furthermore, it is considered that the relative benefit of the meeting outweighs this risk and sum involved. ILPA is concerned that fee increases might be passed on to workers and should welcome

Other elements of the section are unchanged. These include the requirement that the work be as a domestic worker in a private household and for a period during which enforcement action will not be taken against a worker.

The amendment also provides an opportunity to press the Government to accept Mr Ewins' other recommendations.

ILPA considers that Mr Ewins' recommendations, which he identifies as the minimum necessary to protect overseas domestic workers, should be implemented without delay as an essential first step toward comprehensive protection.

Section 53 of the Modern Slavery Act 2015 is currently given effect by the amendments made by Statement of Changes in Immigration Rules HC 474 with effect from 15 October 2015. These are the most restrictive possible implementation of the hard-won section 53. Migrant domestic workers who have been recognized as victims of trafficking or slavery may have leave extended for up to six months (section 53 says "not less than six months"), but leave may be given in increments of less than six months. The worker has no recourse to public funds during this period and is permitted to work only as a domestic worker. The provisions provide little incentive to domestic workers to leave situations of abuse and risk their destitution when they fail to find gainful employment for such a short period.

Currently, the new leave is in addition to, not instead of, the existing leave. An overseas domestic worker is unlikely to opt for the new leave rather than the existing discretionary leave which the Government indicated in its letter to peers during the passage of the Modern Slavery Bill would be used in any event for those needing to stay more than six months.

An overseas domestic worker who is not persuaded to leave his/her employer by the protection previously in place is unlikely to be persuaded to do so by the provisions of the new rules. The chances of getting work if you can only stay in the UK for a maximum of six months are slim indeed And without work, how will a worker live without falling back into exploitation and abuse, when she or he has no recourse to public funds?

Perpetrators are currently free to perpetuate abuse, because workers are not persuaded to come forward with the offer only of six months limited protection. Only when they feel safe are workers likely to have the confidence to tell the authorities about what they have suffered. It places heavy demands upon a person in a situation of exploitation, enslavement and extreme poverty to reach sources of help, let alone where they do not speak English and are isolated and alone; let alone when they are undocumented, fear removal and are reluctant to jeopardise such income as they do receive and such status as they have. The two years leave proposed in the amendment is not an end in itself; as Mr Ewins makes clear in his report, it is there to make the right to change employer effective.

NEW CLAUSE after Clause 36

NEW CLAUSE *Asylum Seekers: permission to work after six months* in the names of Lord Alton and Lord Rosser.

Purpose

Provides for asylum seekers to be able to work if their claim is not determined within the Home Office target time of six months.

Briefing

Tabled at Committee stage as amendment 134 New clause after Clause 12 *Permission to work for asylum seekers after six months* in the names of Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Baroness Hamwee.

Briefing from Still Human Still Here[24]:

Allowing asylum seekers who have been waiting six months for a decision on their cases to work has several benefits:

- It provides asylum seekers with a route out of poverty. More than 3,600 asylum seekers have currently been waiting more than six months for an initial decision on their cases and surviving on just over £5 a day.

[24] Still Human Still Here is a coalition of some 80 organisations which includes nine City Councils the Red Cross, Crisis, the Children's Society, Mind, Citizens Advice Bureau, Doctors of the World, National Aids Trust, and the main agencies working with asylum seekers in the UK. For details, see: www.stillhuman.org.uk.

- It reduces the burden on the taxpayer as asylum seekers who are able to work will not need to be supported for extended periods and instead can contribute to the economy through increased tax revenues and consumer spending. It also safeguards their health and prevents them from having to resort to irregular work.

- It avoids the negative consequences of prolonged economic exclusion and forced inactivity (e.g. poverty, detrimental impact on mental health and self-esteem, break up of marriages and families, etc.).

- Other EU countries allow asylum seekers to work after nine months and eleven of them grant permission to work after six months or less if a decision has not been made on their asylum application.

- For those asylum seekers who are eventually given permission to stay, avoiding an extended period outside the labour market is key to ensuring their long term integration into UK society and encouraging them to be self-sufficient.

ILPA comments

The Minister in Commons Committee defended the Government's decision not to opt in to the recast reception conditions directive requiring member states to grant automatic access to the labour market for asylum seekers after nine months, saying that it considered that the Commission's proposal could undermine the asylum system "by encouraging unfounded claims from those seeking to use the asylum system as a cover for economic migration.[25] He did not address that if the Home Office decided cases within its (already generous) six months target time no permission would arise.

He suggested that persons could manufacture delays by not engaging with the process[26] but this is not the case, as persons can be refused for non-compliance[27].

Mr Blomfield MP pointed out that if the Government met its targets then it would not be granting permission to work even if the amendment were passed[28]. Sir Keir Starmer MP identified that some 3600 cases are currently not decided within the Home Office target time of six months. The Home Affairs Committee in its report of the work of the Immigration Directorates published on 4 March comments on the lack of improvement in tackling immigration backlogs,

> *We are concerned that the department may not be able to maintain the service levels it has set itself on initial decisions for new asylum claims within 6 months. To do so may require further funding and resources. (Paragraph 15)*
>
> *Our predecessor Committee regularly expressed its concern about the immigration backlogs. The current backlog of cases reached 358,923 in Q3 2015, an increase of 7,000 from a year earlier. It is deeply concerning that there has been so little improvement and we have to return and restate the issue again. (Paragraph 97)*[29]

[25] Public Bill Committee Col 461
[26] *Ibid*.
[27] *Ibid*.
[28] Col 462.
[29] http://www.publications.parliament.uk/pa/cm201516/cmselect/cmhaff/772/772.pdf.

The Minister argued that if a person seeking asylum is given the right to work this denies a job to a person with permission to work in the UK, but this is an oversimplification. The person seeking asylum is allowed to compete for the job. They could be competing with, for example, an EU national for a job that British citizens and those settled in the UK do not wish to do. Such jobs are often not highly skilled and do not appear on the shortage occupation lists to which persons seeking asylum are currently limited.

It was observed in the Commons' debate that the Minister was unable to point to any evidence in support of his fears that this would be a pull factor.

ILPA welcomes debate not only on the time limit but on the restriction to the shortage occupation lists. Currently persons seeking asylum who wait more than 12 months get permission to work, but are restricted to jobs on the shortage occupation lists. These are jobs they are unlikely to get given that their period of stay in the UK is uncertain. They are more likely to get low-skilled jobs that British citizens and those settled in the UK do not wish to do. If they work in those jobs then as well as the benefits to them this reduces the support budget, something the Government is trying to do.

Part 2 ACCESS TO SERVICES

Residential tenancies

CLAUSE 37 *Offence of leasing premises*

> **AMENDMENT** to **page 26 line 2 in the names of Lord Rosser and Lord Kennedy of Southwark. Their amendment to** Clause **88, page 69 line 29** is consequential upon this.
>
> **GOVERNMENT AMENDMENT to page 23, line 35**
>
> **GOVERNMENT AMENDMENT to page 23 line 36**

Presumed Purpose

The amendment in the name of Lord Rosser and Lord Kennedy of Southwark creates a sunrise provision which would prevent the new offences to be committed by landlords, landladies and their agents from coming into effect until an evaluation of the Immigration act 2014 provisions has been made and laid before parliament.

The Government amendment to line 35 provides a defence to a landlord or landlady accused of renting to a disqualified person which is that they did not know or have reasonable cause to believe that the person was disqualified and is available if the landlord or landlady, on discovering or coming to have reasonable cause to believe this has taken "reasonable steps" to end the tenancy within a "reasonable period"

The purpose of the Government amendment to line 36 does not appear to be as suggested in the Government's memorandum, see briefing.

Briefing

We do not consider that the Government amendment to create a defence addresses the main mischief of the clause, which is that it is likely that it will result in landlords and landladies taking a risk adverse approach and letting primarily to white British persons with passports.

The Government amendments do addresses in part the absurd result of the Bill as drafted that once a landlord/landlady knows that a tenant does not have a right to rent, s/he is committing the criminal offence created by Clause 37 during the 28 period for which s/he cannot evict the tenant. "In part" because this does not go to the definition of the offence or prevent a prosecution, but simply gives the landlord or landlady a defence. Given the conditions "reasonable steps" "as soon as reasonably practicable" it is likely to provide only the most limited comfort to a landlord or landlady and is unlikely to turn them from the notion that it would be much easier to let to someone with a British passport who conforms most nearly to their view of what a British persons looks and sounds like.

The amendment may have the unintended consequence of encouraging premature evictions or oppressive behaviour because landlords and landladies who have discovered that their tenant does not have the right to rent are concerned that unless they act very fast and are take a very harsh approach, they will not be able to benefit from the defence.

Summary eviction has been outlawed in housing law for decades. This bill reintroduces it. Under the Bill 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[30].

The Government amended the Bill in Lords' Committee[31] to require the landlord/ landlady's notice to the tenant to be in a prescribed form. 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 Bill introduces 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. Courts will be obliged to issue an Order for Possession and will have no discretion in the matter[32]. The Court will be

This is only half the story. The court will be unable to take account of the person's circumstances, for example a baby or children in the family, pregnancy, old age, disability or infirmity, making eviction inappropriate. The Minister suggested[33] 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 guarantees that these will not be used?

[30] HC Deb, 1 December 2015, col 208.
[31] Government amendment 153.
[32] Public Bill Committee, 29 October 2015, Col 263.
[33] Public Bill Committee col 278, 29 October 2016.

The eviction of children and families under these provisions will be 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.[34]

The Government amendment to line 36 restricts the application of s 22(9) of the Immigration Act 2014, which provides "A contravention of this section does not affect the validity or enforceability of any provision of a residential tenancy agreement by virtue of any rule of law relating to the validity or enforceability of contracts in circumstances involving illegality" to subsection 33A (1) rather than, as in the Bill as originally drafted, subsections 33A(1) to (5). The Government's briefing to the amendment suggests that this is "to ensure that any tenancy agreement is not invalidated where a landlord is charged with one of the offences relating to residential tenancies" and that this "will allow the parties to such a tenancy to enforce any provisions of a residential tenancy agreement". That appears to be the effect of applying s 22(9) to the section 33A, whether to s 33A(1) or to s 33A(1) to (5). Thus, as far as we can ascertain, the purpose of the amendment is simply to tidy up the drafting.

Sunrise provision

ILPA considers that the accent in debates on the amendment in the name of Lord Rosser and Lord Kennedy of Southwark should be on the data which the government intends to collect and publish to evidence how the scheme is working. See our briefing for the 24 January debate on the Immigration Act 2014 (Commencement No. 6) Order 2016 (SI 2016/11)[35]

The Home Office evaluation[36] of the scheme in the West Midlands was published on 20 October 2015, the day Committee stage of the Immigration Bill 2015-16 started in the House of Commons. The Joint Council for the Welfare of Immigrants carried out an independent evaluation and this was published on 3 September 2015[37].

In particular we should like to see data and collection and evaluation covering the following:

- what happens to those who can rent nowhere else;
- evidence of the extent to which British citizens from black and ethnic minorities, as well as the settled and persons with limited leave to remain in the UK face unlawful discrimination in the housing market including indirect discrimination;
- evidence of the extent to which British citizens without passports or driving licences, and those leading chaotic lives, face unlawful discrimination in the housing market including indirect discrimination;
- Evidence of difficulties landlords and landladies face in establishing whether their prospective tenant had a right to rent;
- Evidence about pressure on those types of housing (e.g. hostels) exempt from the scheme;

[34] Cols 262-263.
[35] Available at http://www.ilpa.org.uk/resources.php/31869/ilpa-briefing-for-the-house-of-lords-debate-on-the-motion-to-annul-the-immigration-act-2014-commence
[36] Available at https://www.gov.uk/government/publications/evaluation-of-the-right-to-rent-scheme (accessed 16 January 2016).
[37] http://www.jcwi.org.uk/sites/default/files/No%20Passport%20Equals%20No%20Home.pdf (Accessed 16 January 2016).

- Data on the number of landlords/landladies charged and the circumstances;
- Data on the numbers of civil penalties issued and final decisions on these;
- Numbers of persons coming to Home Office attention specifically as a result of the scheme and what if any enforcement activity was taken in their cases;
- Data on successful and unsuccessful prosecutions;
- Data on the impacts in both rural and urban areas;
- Information the impacts of guidance provided by the Government and the ease with which landlords and landladies can comply with the new checks and access the necessary guidance and support, broken down by whether the landlord or landlady is a member of a professional body, whether they use an agent and how many properties they manage[38];
- Information on the take-up of the checking service[39];
- Information on the quality of responses from the checking service and on its decisions;
- The specific impact on persons seeking asylum who do not live in Home Office accommodation but in the private rented sector[40];
- Homelessness as a result of the scheme;
- 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/taking action against a discriminating local authority landlord);
- costs of training and familiarisation for local authorities;
- Whether local authority Homelessness Draft Strategies and Equality Impact assessments taken account of the scheme;
- Difficulties in obtaining accommodation as a result of the scheme;
- The extent to which the scheme has increased the workload of local authorities.

Data collected should include information on:
- Immigration status of respondents to surveys(e.g. student situation is different from that of a spouse because of exemptions)
- Experience of those responding to surveys – have they taken on a new tenant/moved since the law changed and if so how many times.
- Ethnicity of respondents to surveys.

CLAUSE 40 Extension to Wales, Scotland and Northern Ireland

Government amendment to page 31, line 18

Purpose Remove provisions that allowed the Secretary of State to amend, repeal or revoke enactments within the Bill when making provision to extend the residential tenancies provisions to Scotland, Wales and Northern Ireland.

[38] *Ibid*., col 1090.
[39] 3 April 2014, col 1089.
[40] See HL Report 12 March 2015, col 1800.

Briefing

A partial response to a recommendation of the Delegated Powers Committee:

> *17. We always look closely at powers which enable unspecific amendments to be made in the very Act that confers them, and we expect the Government always to justify powers of that kind in express terms. We were therefore surprised to find no reference at all on page 11 or page 25 of the memorandum to the fact that clauses 16 and 43 include power to amend the Bill. While we acknowledge that it might be expedient to have power to amend provisions of the Bill in connection with their application outside England under subsection (1), we do not understand why the same facility is to be available when making similar provision outside England under a separate power under subsection (2).*
>
> *18. We also examine with particular care powers that enable an instrument to delegate legislative power, and we again found the memorandum to be unhelpful in relation to clause 43. Paragraphs 124 to 130 do not even mention that subsection (3) (b) confers a power of sub-delegation, and so there has been no explanation why the sub-delegated powers might be exercised by "any person" (who may not, apparently, be Welsh, Scottish or Northern Ireland Ministers or a Northern Ireland department). Moreover, nothing is said about the level of Parliamentary scrutiny that is to apply on the exercise of the sub-delegated powers. In short, there has been no explanation from the Government about why these exceptional powers are thought necessary, or in what way, by whom and subject to what Parliamentary control they might be exercised. Although section 53 of the Immigration Act 2014 is cited as a "comparable" precedent, it does not contain a power of sub-delegation.*
>
> *19.* ***In the light of those deficiencies, we recommend that the powers conferred-***
>
> - ***by clauses 16(3)(a) and 43(3)(a) to amend provision in the Bill by regulations under (respectively) clauses 16(2) and 43(2), and***
> - ***by clause 43(3)(b) in so far as the functions that may be conferred include the power to make regulations,***
>
> ***are inappropriate, unless the Minister can satisfy the House about why they are necessary and how they would be exercised. In any event, where legislative power is to be sub-delegated, it ought to be clear on the face of the Bill who is to exercise the sub-delegated power and what arrangements are to be made for its Parliamentary control[41].***

The Government response, set out in Lord Bates letter to Baroness Foulkes of 1 March 2016 said

> *"…we have responded to your concerns by amending the provision such that it no longer contains a sub-delegated power to make regulations. But… we consider it necessary to provide a power to amend the Bill itself…to allow the necessary flexibility in extending these provisions to Wales, Scotland and Northern Ireland. In adopting a different approach from that in relation to clause 16(3)(a) we are mindful that the substantive provisions...are textual amendments of other Acts. If we did need to amend a provision in those clauses, e.g. section 33A of the Immigration act 2014, we could amend this directly, rather than amending the Bill. But this*

[41] http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/73/7303.htm#a3

approach is not available in the case of Clause 43 [now clause 40] as the substantive provisions.. are freestanding"

Driving

CLAUSE 42 Offence of driving when unlawfully in the United Kingdom

GOVERNMENT AMENDMENTS to page 35 lines 3 and 5

AMENDMENT to page 35 line 5 in the names of Lord Rosser and Lord Kennedy of Southwark.

Presumed Purpose

The Government amendment makes it an element of the offence of driving unlawfully that an individual must know or have reasonable cause to believe that they are disqualified from driving by reason of their immigration status to commit the offence.

The amendment in the names of Lord Rosser and Lord Kennedy of Southwark is similar. A person does not commit the offence if they did not know and could not reasonably have been expected to know that they did not have leave.

Briefing

The most common example of those who believe their presence lawful is perhaps that of those brought from the Caribbean as children, examples of whose cases were described in the Legal Action Group research *Chasing Status: if I am not British then what am I?*[42] As its author, Fiona Bawdon, describes in her article in Legal Action Magazine

> *'Chasing Status' tells the stories of people we describe as 'surprised Brits' because of their shock at finding that their immigration status is being questioned after they have lived, worked and paid taxes in the UK for many decades… are now finding themselves threatened with destitution, unable to work or claim benefits, after being caught out by legislative changes they had no idea applied to them. With legal aid removed for immigration cases, they can no longer get expert legal help to resolve their status;… The six oldest 'Chasing Status' interviewees (whose ages range from 53 to 60) have been in the UK a total of 260 years. They entered the UK as children, and were educated, married …here. They have national insurance numbers and driving licences, pay their taxes and (until recently) could work and claim benefits, just like anyone else. Until being asked for proof of their immigration status by employers or the JobCentre, none had any reason to question it. In their interviews, they tell of disbelief at discovering that they are not as British as they thought they were: 'I thought I was going crazy'; 'It felt really strange'; 'I thought it was a joke, at first*[43]*'.*

These amendments should reduce the numbers of prosecutions in such cases. They do not, however, address the concerns raised by Baroness Lawrence of Clarendon and others about stop and search powers.

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[42] Available at http://www.lag.org.uk/media/186917/small_chasing_status.pdf

[43] Fiona Bawdon, Legal Action, October 2014, available at http://www.lag.org.uk/media/184964/immigration_feature.pdf .

After Clause 43

NEW CLAUSE *Ability to pay the immigration health surcharge incrementally* in the names of Baroness Doocey, Lord Alton of Liverpool and Baroness Lister of Burtersett

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.

The sum at stake, the £200, £150 for students may appear modest. But 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.

After Clause 43

NEW CLAUSE *Exemptions from the Immigration Health Surcharge* in the names of Baroness Doocey, Lord Alton of Liverpool and Baroness Lister of Burtersett

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[44] 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.[45] Medical evidence may be

[44] 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 (accessed 23 August 2013).

[45] See *Identifying domestic violence: cross sectional study in primary care*, Richardson, J., *BMJ* 2002:324.

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.[46]

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.*
>
> *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.*

The position of nationals of Australia and New Zealand is changed by the Immigration (Health Charge) (Amendment) Order 2016[47], debated in the House of Lords on 2 March 2016 at col 142[48], where lord Ashton of Hyde described the change as "ensuring equal treatment" for all non-EEA nationals.

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[46] Immigration Rules, HC 395, paragraphs 289A to 289C.

[47] http://www.legislation.gov.uk/ukdsi/2016/9780111143278/contents

[48] See http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160302-gc0001.htm#16030297000233 For the House of Commons debate see http://www.publications.parliament.uk/pa/cm201516/cmgeneral/deleg3/160229/160229s01.htm

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.

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

After Clause 43

NEW CLAUSE ***Access to higher education for young people leaving care who have leave to enter or remain*** **in the name of Baroness Kennedy of the Shaws**

Purpose

The purpose of the amendment is two-fold. First it requires the Secretary of State for Business Innovation and Skills to make regulations to ensure that care leavers with leave to enter or remain who are ordinarily resident in the UK are eligible for higher education student loans.

Secondly, it requires the Secretary of State for education and skills to make regulations to provide that care leavers with leave to enter or remain, or seeking asylum or other leave shall be charged tuition fees at home and not overseas student rates. Those who have pending asylum or other applications who would not be eligible for a student loan.

Briefing

The need for this amendment arises as a result of changes made to the Immigration Bill by a Government amendment at report in the House of Commons. The Government amendment inserted new clause 1A into Schedule 3 to the Nationality, Immigration and Asylum Act 2002, prohibiting local authorities from paying higher education fees (fees for university degree courses and for higher education courses leading to a Diploma in Higher Education, a Certificate of Higher Education, a BTEC Higher National Diploma or Higher National Certificate or for professional examination courses beyond A-level standard) to a care leaver whom they are supporting who has limited leave to remain (humanitarian protection, discretionary leave or leave under the Immigration Rules) or a pending asylum application.

These changes can be achieved through amendments to secondary legislation, to the categories of eligibility in existing regulations on student loans[49] and the level of tuition fees[50].

Assurances to seek:

[49] *The Education (Student Support) Regulations 2011, SI 2011* setting out the categories of persons in England who are eligible for a student loan for higher education courses.
[50] *The Education (Fees and Awards) (England) Regulations 2007, SI 2007/779* identifying categories of persons in England who may not be charged higher education tuition fees, that is fees at the overseas rate.

- **The Minister should be asked to give an assurance that regulations will be made so that young people leaving local authority care who have been granted leave to enter or remain will be eligible for student loans provided centrally by the Department of Business, Innovation and Skills.**

- **The Minister should be asked to give an assurance that regulations will be made so that care leavers are charged tuition fees at the home fees rate, including where they would not qualify for a student loan as asylum seekers with a pending claim.**

Eligibility for student loans for higher education

The explanatory statement provided to the Government amendment tabled for Commons report stated that *"[i]nstead, to obtain such support, the person will be required to qualify under the Student Support Regulations"*. This was disingenuous to say the least.

Under these regulations, young people who have not been recognised as refugees but have been granted humanitarian protection only qualify for such a loan if they have leave to remain and have had three years ordinary residence in the UK. For those granted other limited leave, the Department of Business Immigration and Skills *Policy Statement Interim Policy for handling cases* following the Supreme Court Ruling in *Tigere*[51] provides that where a person does not have permanent residence, cases will be considered under criteria such as having lawful leave and having lived at least half their life in the UK. Many young people leaving care, including those granted humanitarian protection, do not qualify for student loans under the regulations as currently drafted.

Similarly disingenuous were the Minister's comments at Commons Report that the provision "addresses an anomaly[52]" in the treatment of "adult migrant care leavers" and is to ensure "equality of treatment." That special provision is made for young people with humanitarian protection or otherwise unable to return to their country of origin recognises their special needs and that they are alone without family support; it would endeavour to put them into a position equivalent to that of other young people resident in the UK, not give them some unfair advantage.

Home tuition fees for higher education

This is addressed in the second part of the amendment. The Government document, *Reforming support for migrants without immigration status*, suggests that this Bill removes the difficulty faced by local authorities as a result of having to pay higher education tuition fees for care leavers under their leaving care duties at the overseas rate. But it does this by preventing local authorities from paying higher education fees for care leavers at all. The rate at which different categories of student are charged university fees is set out in regulations on fees set by central government that can, and should, be amended.[53]

The eligibility criteria for home tuition fees for higher education mirror the eligibility criteria for a student loan. Therefore care leavers living in the UK are charged overseas tuition fees for

[51] *R (Tigere) v Secretary of State for Business, Innovation and. Skills* [2015] UKSC 57.
[52] HC Deb, 1 December 2015, col 225.
[53] *The Education (Fees and Awards) (England) Regulations 2007, SI 2007/779* identifying categories of persons in England who may not be charged higher education tuition fees, that is fees at the overseas rate.

higher education if they have humanitarian protection but have not been ordinarily resident in the UK for three years; if they have other forms of limited leave to remain and not lived at least half their life in the UK; or if their application for asylum, human rights protection or other forms of leave remains pending.

Provision should be made for care leavers granted leave to enter or remain to be made eligible for centrally provided student loans for higher education. In this case, tuition fees set at the home fees would normally follow.

For young people leaving care whose applications for asylum, human rights protection or other leave remains pending, eligibility for higher education tuition fees at the home fees rate rather than the higher overseas rate would enable care leavers living in the UK and unable to access student loans for higher education to access funding from charitable trusts to prevent them from having to delay entry to higher education whilst their asylum or human rights application remains pending.

Local authorities have a general duty under the Education and Skills Act 2008 to encourage, enable and assist young people in their area to participate in education or training. The statutory guidance to local authorities on exercising these functions highlights the importance of engaging young people in education or training after compulsory schooling has ended:

> *6. Participating in education or training for longer means young people are more likely to attain higher levels of qualifications and have increased earnings over their lifetime, better health and improved social skills. This in turn contributes to a more highly skilled, productive, and internationally competitive workforce*[54].

Supporting children to remain in education after the age of 16 years is also a key element of the Government's anti-poverty strategy which recognises the role of education in improving the life chances of children not just in the immediate term but also in breaking the poverty cycle affecting their children in the long term[55].

The situation of children leaving care is recognized by the Government in its strategy for care leavers:

> *Around 10,000 young people leave care in England each year aged between 16-18 years old*[1]*. They leave home at a younger age and have more abrupt transitions to adulthood than their peers. Unlike their peers who normally remain in the family home, care leavers will often be living independently at age 18. […]*
>
> *Research and inspection reports show that the quality of support care leavers receive is patchy and that their journey through the first decade of adult life is often disrupted, unstable and troubled. They often struggle to cope and this can lead to social exclusion, long term unemployment or involvement in crime. For example, 34% of all care leavers were not in*

[54] Department for Education (2014) *Participation of young people in education, training or employment: statutory guidance for local authorities*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/349300/Participation_of_Young_People_Statutory_Guidance.pdf

[55] HM Government, Child Poverty Strategy 2014-17, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324103/Child_poverty_strategy.pdf, paras 35, 46.

education, employment or training (NEET) at age 19[3] in 2013 compared to 15.5% of 18 year olds in the general population[56].

The poor educational outcomes and life chances of children leaving care are well-documented:

> *Care leavers are less likely to have achieved 5 A*-C GCSEs (37% of looked after children compared to 80% of non-looked after children in 2012). Only 6% of care leavers go into higher education compared to 23% of their peers at aged 18.[57]*

Ensuring care leavers are supported into education is therefore a key priority of the Government's care leaver strategy:

> *A big priority for government is, therefore, to ensure that children in care and care leavers get the support they need from schools, colleges, universities and local authorities to maximise their educational attainment and employment opportunities.[58]*

The United Nations High Commissioner for Refugees and the Council of Europe have identified the needs of young people seeking protection in the transition to adulthood in joint research undertaken by both agencies:

> *Reaching the age of majority has a strong impact on the psychological well-being of unaccompanied and separated children in general, but it proves to be all the more acute for those seeking asylum or being granted international protection, given their particular vulnerability and needs[59].*

They recommend improved support for access to education for separated young people seeking protection:

> *The study shows that access to education for UASASRC may be seriously undermined when they reach the age majority, and even beforehand, whereas testimonies demonstrate that continuing education would greatly facilitate the transition to adulthood as a whole. Access to education should be better supported, including, where necessary, after young unaccompanied and separated asylum seekers and beneficiaries of international protection have reached the age of majority, as it plays a critical role in their transition[60].*

Access to education can often provide an important focus for young people to move forwards with their lives after experiences of violence in their country of origin, during journeys to the UK or in the UK itself. Delays in the processing of their asylum or human rights applications and in the recognition of their protection needs prevent young people from accessing higher education.

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[56] HM Government (2013) *Care Leaver Strategy: A cross-departmental strategy for young people leaving care*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266484/Care_Leaver_Strategy.pdf, p.4.

[57] Department of Education: *Outcomes for Children Looked After by Local Authorities in England:* 31 March 2012; HM Government (2013) *Care Leaver Strategy: A cross-departmental strategy for young people leaving care*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266484/Care_Leaver_Strategy.pdf, p.6.

[58] *Ibid.*

[59] UNHCR / Council of Europe (2014) *Unaccompanied and separated asylum-seeking and refugee children turning eighteen: what to celebrate? UNHCR / Council of Europe field research on European State practice regarding transition to adulthood of unaccompanied and separated asylum-seeking and refugee children*, at: https://www.coe.int/t/dg4/youth/Source/Resources/Documents/2014_UNHCR_and_Council_of_Europe_Report_Transition_Adulthood.pdf, p.10.

[60] *Ibid.*

Part 3 ENFORCEMENT

CLAUSE 49

GOVERNMENT AMENDMENTS page 46 lines 6 and 7

Purpose
Replaces the power of the Secretary of State to direct a prison officer or prison custody officer to direct to search for, seize and retain nationality documents from a person detained in a prison or young offender institution in respect of whom she intends to make a deportation order with a power to direct them to search a person in respect of whom notice has been given of a decision to make a deportation order against that person

Briefing
Although described as "minor and technical" and as "clarifying" the meaning of the provision in the explanations attached to Lord Bates' letter, as we understand it this restricts the power to search under this particular limb of the Clause and thus improves on the clause.

After CLAUSE 56

GOVERNMENT NEW CLAUSE Guidance on the detention of vulnerable persons

Purpose
Requires the Secretary of State to issue guidance to be taken into account by those assessing whether an individual is "vulnerable" and if it is determined that they are, whether to detain them. The guidance must be laid before parliament in draft and will be brought into force by regulations. The guidance must be taken into account by those to whom it is issued.

Briefing
The Government has produced information for peers *Detaining individuals for the purposes of immigration control – consideration of risk issues.* Close reading of that document reveals that

- The Government has not accepted Stephen Shaw's call for an absolute exclusion from detention for pregnant women. Instead, pregnant women will be automatically considered to be amongst those regarded as being at the highest level of risk. This was confirmed by the Minister in his oral evidence to the Home Affairs Committee[61].
- The Government has not agreed to the removal of the words "which cannot be satisfactorily managed in detention" from the reference to individuals suffering from serious mental illness despite repeatedly having been found to have breached the Article 3 of the European Convention on Human Rights, the probation on torture, inhuman or degrading treatment or punishment in respect of such persons.

The document quotes the Ministerial statement that the Government

[61] HC 772, 9 February 2016, response to Q 67. See ata.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/the-work-of-the-immigration-directorates-q3-2015/oral/28840.html

> *"…will introduce a new "adult at risk" concept into decision-making on immigration detention with a clear presumption that people who are at risk should not be detained, building on the existing legal framework. This will strengthen the approach to those whose care and support needs make it particularly likely that they would suffer disproportionate detriment from being detained, and will therefore be considered generally unsuitable for immigration detention unless there is compelling evidence that other factors which relate to immigration abuse and the integrity of the immigration system, such as matters of criminality, compliance history and the imminence of removal, are of such significance as to outweigh the vulnerability factors."*

It also quotes paragraph 55.10 of the current Home Office Enforcement Instructions and Guidance, which provides:

> *The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:*
> - *those suffering from serious mental illness which cannot be satisfactorily managed within detention (in C[riminal] C[asework] D[epartment] cases, please contact the specialist Mentally Disordered Offender Team). Enforcement Instructions and Guidance In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;*
> - *those where there is independent evidence that they have been tortured;*
> - *people with serious disabilities which cannot be satisfactorily managed within detention;*
> - *persons identified by the Competent Authorities as victims of trafficking unaccompanied children and young persons under the age of 18 (but see 55.9.3 above);*
> - *the elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;*
> - *pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);*
> - *those suffering from serious medical conditions which cannot be satisfactorily managed within detention.*

How confident can we be that this amendment is not merely a new bottle for old wine? Paragraph 55.10 is supposed to protect persons at risk. It has not done so.

In our experience, it is far from exceptional that the mentally ill, survivors of torture and trafficked persons, the elderly and those with physical health problems are detained. Stephen Shaw writes

> *…it is perfectly clear to be that people with serious mental illnesses continue to be held in detention and that their treatment and care does not and cannot equate good psychiatric practice…Such a situation is an affront to civilised values.*

A case revealed that the Home Office and its contractors had been operating an unlawful policy on the use of force on pregnant women and children in immigration detention.[62] The 2012 report of the Chief Inspector of Prisons on the Cedars centre in which families are detained found:

[62] *Chen and Others v SSHD* CO/1119/2013.

> *HE.18 Substantial force had been used in one case to take a pregnant woman resisting removal to departures. The woman was not moved using approved techniques. She was placed in a wheelchair to assist her to the departures area.*
>
> *When she resisted, it was tipped-up with staff holding her feet. At one point she slipped down from the chair and the risk of injury to the unborn child was significant. There is no safe way to use force against a pregnant woman, and to initiate it for the purpose of removal is to take an unacceptable risk.*

The Inspectorate called for force not to be used. The call w\as not accepted. Instead the Home Office offered a consultation. It was only in the face of a legal challenge that it backed down.

The case of *R (on the application of Yiyu Chen and Others) v Secretary of State for the Home Department* (CO/1119/2013) was an urgent judicial review claim challenging the Secretary of State's failure to have a policy in place in respect of the use of force against children and pregnant women. The claim was issued on 31 January 2013 following the Secretary of State's rejection of the Her Majesty's Inspectorate of Prisons' recommendation that she use force against these two groups only in situations where there is a risk of harm to self or another.

The Claimants sought urgent interim relief in the form of an injunction, prohibiting the Secretary of State from using force against these two groups until the issues were determined. On 12 February 2013 Mr Justice Collins granted an injunction prohibiting the Secretary of State's from using force against the four claimants (a pregnant woman and three children, all at risk of an enforced removal).

On 22 February 2013 the Secretary of State reinstated the former policy from Chapter 45 of the Enforcement Instructions and Guidance, which states that the UK Border Agency cannot use force against pregnant women, save to prevent harm. On 10th April 2013, Lord Taylor of Holbeach told the House of Lords that:

> *The recommendation in the report by HM Inspectorate of Prisons on Cedars pre-departure accommodation that force should never be used to effect the removal of pregnant women and children was rejected by the UK Border Agency.* [63]

The Government response to the Home Affairs Select Committee Eighth Report of session 2012-2013: The work of the UK Border Agency (April - June 2012) states:

> *The UK Border Agency would prefer that pregnant women, vulnerable adults and under 18s who form part of family groups in Cedars left the UK voluntarily and compliantly. It would not be practical to consider a blanket ban on the use of physical intervention on pregnant women and under 18s as this might encourage non-compliance and render the Agency unable to maintain effective immigration controls.*

Bhatt Murphy solicitors, who acted for the claimants in Chen, wrote to the Home Affairs Select Committee on 28 March 2013, saying

> *We are concerned that the policy position set out in that response* [the government's response to the Committee*] directly contradicts the assurances which have been given to the Court and*

[63] HL Deb, 10 April 2013, c313W.

the parties in this action, which is now reflected in policy guidance published on the UK Border Agency's website, and upon which the Claimants have been invited by the Home Secretary to withdraw their claim for judicial review.

As to mental illnesses, the cases illustrate graphically what is going wrong. In *R (S) v Secretary of State of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011) the Court held that the circumstances in which S was detained at Harmondsworth constituted inhuman and degrading treatment in breach of article 3. Those circumstances included:

- Detaining him despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals;
- Serious deterioration in his mental state, with numerous acts of self-harm, psychotic symptoms, feelings of acute anguish and distress, and allowing him to reach such a deteriorated state that he lacked capacity to make decisions in his own best interests;
- The failure to respond assessments by the in-reach psychiatrist that he was unfit for detention and required urgent compulsory treatment in hospital under the Mental Health Act; and
- One incident in which officers encountered S, naked and bleeding, being pulled along a corridor by another detainee in view of a crowd of detainees after he had attempted suicide.

In *R (BA) v Secretary of State of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011), the Court held that the circumstances of his detention, at Harmondsworth, constituted inhuman and degrading treatment in violation of article 3 Those circumstances included:

- Detaining him despite a clear and documented history of severe mental illness and contrary to expert advice that detention would be likely to cause deterioration. There was *"a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness"*[64];
- The failure within the Home Office to ensure that clinical information about his deteriorating condition was accurately communicated to senior officials responsible for deciding whether he should be released. The judge referred to *"a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare"* and described the Assistant Director's concern to manage press interest in the event of his death as *"callous indifference to BA's plight"*[65].

In R (HA) v Secretary of State of State for the Home Department [2012] EWHC 979 (Admin) (17 April 2012), the circumstances which led the Court to find that Article 3 had been violated in HA's case included:

- Acts which *"violated his own dignity"* (prolonged periods of time in isolation; sleeping on the floor, often naked, in a toilet area; drinking and washing from a toilet; self-neglecting, including not eating properly and not washing or changing clothes for prolonged periods; and suffering from insomnia);
- Not receiving appropriate medical treatment for a prolonged period of more than 5 months;
- The use of force on him on several occasions.

[64] Judgment, paragraph 236.
[65] Judgment, paragraph 237.

In R (D) v Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012), another case in which a violation of Article 3 was found, the judge described the Home Office approach as "irrational" and "laisser-faire". The Secretary of State maintained throughout that there had been no error and no breach of Article 3 or even of Article 8 even though the Official Solicitor was acting as D's litigation friend by the time of the hearing because D's mental state was such that he could not instruct his solicitors.

HM Chief Inspector of Prisons has reported on an 84 years' old frail Canadian man suffering from dementia who died in detention in handcuffs having been kept handcuffed for five hours.[66]

The Minister, James Brokenshire MP, said "Risks surrounding the safeguards within the system for particularly vulnerable applicants have also been identified to the extent that we cannot be certain of the level of risk of unfairness to certain vulnerable applicants who may enter D[etained F[ast] T[rack]."[67]

It is not exceptional that under-18s are detained because of an age dispute that the Home Office consider far from borderline.

Paragraph 55.10 creates risk both because of the categories of person it permits to be detained and because of practical problems in its application which means that those whom the Home office does not intend to detain, save in "exceptional circumstances", are unlikely to be detected. What confidence can we have that those risks will not be replicated under the new guidance?

During the evidence session on 22 October 2015 the following exchange took place between Mr Whittaker MP, the Government Whip and Jerome Phelps of Detention Action:

> ***Craig Whittaker:*** *Do any of you have any evidence that there is any abuse in the detention centre?*
> ***Jerome Phelps:*** *The most apposite evidence would be the series of finding by the UK courts of breaches of article 3 in relation to highly vulnerable mentally ill migrants in detention, who should not be detained anywhere except for under exceptional circumstances. Article 3, on inhuman and degrading treatment, is a very high threshold. Until recently there had never been a case of this, but in the past four years there have been six cases of desperately vulnerable people who have had complete psychiatric collapse in detention, to the article 3 breach level.*
>
> ***Q 229 Craig Whittaker:*** *I do not want to undermine or belittle the six cases by any stretch of the imagination, but from the thousands who have been through the system in the past four years, which is what you mentioned, it is an incredibly small part. It would therefore be very difficult to say that the system is broken. Is that right?*
>
> ***Jerome Phelps:*** *I do not think any of us have suggested that everyone in detention is abused. It is a small part but we have functioning safeguards, such as the bail system. What is concerning about the Bill is that it is removing some of those safeguards.* [68]

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[66] *Report of unannounced inspection of Harmondsworth Immigration Removal Centre*, 2014, section 1, paragraph 1.3 available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf
[67] Hansard 2 July 2015, HCWS83.
[68] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151022/am/151022s01.htm

The exchange concerns breaches of Article 3 of the European Convention on Human Rights: the prohibition on torture, inhuman or degrading treatment or punishment. It is a right non-derogable at any time, including times of war or public emergency threatening the life of the nation. That torture inhuman or degrading treatment of mentally ill individuals can happen once does indeed suggest to us that the system is broken.

All those detained under Immigration Act powers are vulnerable: to lack of respect for their rights, to abuse, to mental health problems, by the fact of their detention. The notion of being "vulnerable" is perhaps more helpfully considered through the term "powerlessness". Persons detained under Immigration Act powers are relatively powerless and there are structural reasons for that. These have tangible effects not only on a person's ability to vindicate their rights and ensure that they are treated in accordance with law and policy properly applied, but on the distress arising from the powerlessness that detained persons feel.

Detention by administrative fiat without limit of time is unacceptable. An "adults at risk" policy is not the answer. A time limit on immigration detention and automatic judicial oversight are a starting point, not the answer, but a starting point. They will be debated on the second day of Committee on 15 March 2016.