Border Security, Asylum and Immigration Bill

House of Commons Report Stage Briefing

May 2025

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the UK justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This briefing addresses the Border Security, Asylum and Immigration Bill ("the Bill") in advance of its Report Stage in the House of Commons. In expressing our concerns about the Bill , alongside our support for certain amendments, we draw attention to our previous briefing[1] and also to independent legal advice obtained by us in relation to the impact of Serious Crime Prevention Orders ("SCPOs") on procedural fairness and human rights.[2]

Support for Measures in the Bill and Ongoing Concerns

3. We continue to support the Government's decision to fully repeal the Safety of Rwanda (Asylum and Immigration) Act. That Act set a concerning Parliamentary precedent to legislate a legal fiction by overturning a Supreme Court decision on a finding of fact and undermined the UK's proud reputation for upholding our domestic and international legal obligations.[3]

4. We also welcome the provisions in the Bill to repeal many of the provisions of the Illegal Migration Act ("IMA"). That legislation was unworkable, breached the UK's international law obligations and contained deeply unfair retrospective powers.[4] However, we consider that the Bill must go further. As currently drafted, several provisions from the IMA and Nationality and Borders Act ("NABA") have not been

[1] JUSTICE, *'Border Security, Asylum and Immigration Bill: Committee Stage Briefing'*, (February 2025).

[2] King and Spalding, *'The Human Rights Implications of Behavioural Control Orders,'* (2023); and King and Spalding, *'The Human Rights Implications of Serious Crime Prevention Orders: Supplemental Opinion'*, (2025).

[3] JUSTICE briefings on the *'Safety of Rwanda (Asylum and Immigration) Act'*.

[4] JUSTICE briefings on the *'Illegal Migration Act'*.

repealed. We strongly urge members of parliament to support amendments aiming to repeal provisions from these Acts.

5. We are supportive of the Government's intention to prioritise the determination of both asylum appeals and deportation appeals in the First-tier Tribunal. The appeal backlog is currently at an all-time high, with 41,987 asylum appeals outstanding in December 2024, taking on average 50 weeks to determine an appeal.[5] This is a 500% increase from the start of 2023 when 7,113 outstanding appeals were recorded.[6] However, we are concerned that the Government's proposed amendments NC6 and 7, providing that asylum appeals for those in supported accommodation and non-detained deportation appeals should be concluded with 24 weeks, will not properly address the backlog and could have damaging consequences on the fair administration of justice.

6. As Richard Atkinson, president of the Law Society stated, the target may be *"laudable in theory"* but *"it could prove unworkable in practice*" given the sheer number of cases currently in the system.[7] Amendments NC6 and 7 provide no consideration as to how Tribunals are expected to halve the time it takes for an appeal to be determined. We consider the proposal to legislate a timeframe to be unreasonable and unrealistic - addressing the backlog requires practical engagement with case management, Home Office compliance with deadlines and increasing access to legal representation to ensure individuals have a fair opportunity to present their case fully and efficiently rather than the legislation of impractical timeframes.

7. Indeed, we are concerned that these amendments are not motivated by the desire to ensure that peoples cases are not being subject to unreasonable delay but instead are born out of the Government's intention to reduce hotel accommodation for asylum seekers and increasing deportation numbers. This raises concerns around procedural fairness. This is of particular concern given that amendment NC6 only applies to appeals lodged by asylum seekers housed in supported accommodation. We foresee that this will result in even longer delays (increasing the current 50 week average) for asylum seekers outside of supported accommodation, which unfairly and unnecessarily discriminates against this cohort as they will be left to wait even longer in limbo.

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[5] R. Syal, '*Number of UK asylum seekers awaiting appeals up by nearly 500% in two years*', (The Guardian, 16 March 2025).
[6] HM Government, '*Immigration system statistics, year ending December 2024*', (27 February 2025).

[7] J. Hyde, '*Government Warned over 24 Week Target*', (The Law Society Gazette, 29 April 2025).

8. We are also gravely concerned about the effectiveness of expanding Serious Crime Prevention Orders, particularly given the recent proliferation of similar types of Behavioural Control Orders across the justice system, including those created by the Crime and Policing Bill.[8] In our 2023 working party report which explored the effectiveness of Behavioural Control orders at preventing harm, we identified systemic issues relating to the fairness of Behavioural Control Orders; their incompatibility with human rights including their interference with the right to a fair trial,[9] the inconsistent approaches adopted by the Police, Crown Prosecution Service and the Courts when dealing with orders and the inability of the Police to properly monitor or respond to breaches of Behavioural Control Orders due to capacity issues.[10] This creates postcode lotteries for victims and undermines the rule of law by making enforcement of the law depend on the victims' location rather than circumstances.[11] A lack of data and insufficient monitoring or evaluation also makes it impossible to determine the success rate of orders like Serious Crime Prevention Orders and it is unclear what evidence-base the Government has used, and what consultation that it has undertaken, to determine that expanding them will achieve their intended outcome.

Proposed Amendments

Illegal Migration Act ("IMA")

9. Clause 38 of the Bill provides for the repeal of the vast majority of the IMA.[12] Whilst we welcome the decision to repeal most of its provisions, we are concerned that sections 12, 29 and 59 from the IMA will remain and we therefore call on the Government to also repeal them:

10. **Section 12 IMA** provides that it is for the Home Secretary to determine what a reasonable period of immigration detention is rather than for our independent courts and tribunals as was the case before. There are serious questions about whether this approach to detention is compatible with Article 5 ECHR (the right to liberty); as the Court of Appeal has previously found that it is *'the objective approach of the*

[8] See for example, Child Criminal Exploitation Prevention Orders, Youth Diversion Orders and the expansion of Criminal Behaviour Orders which are already available on acquittal.

[9] See independent legal advice sought by JUSTICE in 2023 and 2025: King and Spalding, *The Human Rights Implications of Behavioural Control Orders* (2023); and King and Spalding, *The Human Rights Implications of Serious Crime Prevention Orders: Supplemental Opinion* (2025).

[10] JUSTICE, *Lowering the Standard: a review of Behavioural Control Orders in England and Wales* (2023).

[11] *Ibid*., para 3.15

[12] Clause 38 provides for the repeal of the following provisions of the Illegal Migration Act 2023: sections 1-6 and schedule 1; sections 7-11; sections 13-15 and Schedule 2; sections 16-28; sections 30-51; sections 53-58; sections 61; sections 66.

courts which reviews the evidence available at that time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5'.[13]

11. Further, we are concerned that the retention of section 12 IMA coupled with the Bill's provision to extend deportation powers under Clause 41 will lead to an expensive and ineffective extension of the use and length of detention powers, which risks breaching Article 5 ECHR. Clause 41 of the Bill would extend detention powers for those who have received an initial decision to deport (stage 1) but not yet a deportation order (stage 2). We observe that 60% of those who leave immigration detention are released on bail (much higher proportion than those being returned).[14] We consider that there are practical improvements to the deportation casework of foreign national offenders which should be prioritised ahead of extending detention powers. For example, the previous Independent Chief Inspectors of Borders and Immigration highlighted the *'insufficient information to effectively identify which FNOs can be removed from the country today'* and that casework teams are *'often unable to progress cases'* for the Early Removal Scheme.[15]

12. **Section 29 IMA** significantly lowers the 'public order' exemption from trafficking and modern slavery protections. This means that any non-British citizen sentenced to *any* period of imprisonment will not be granted limited leave to remain as a victim of trafficking and can be removed even when they had a pending conclusive grounds decision[16], irrespective of their personal circumstances. This is concerning as many victims of trafficking and modern slavery are exploited into committing criminal offences. A previous Independent Anti-Slavery Commissioner said, in 2021, that limiting the public order exemption would *"severely limit our ability to convict perpetrators and dismantle organised crime group"'* and increase genuine victims *"vulnerability to further exploitation".*[17]

13. **Section 59 IMA** provides for the expansion of the list of countries from which asylum claims will be deemed inadmissible. Prior to the IMA, asylum claims from people from EU countries were automatically deemed inadmissible so an individual requires 'exceptional circumstances' to challenge their removal.

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[13] *Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931.

[14] Home Office, '*Accredited official statistics: How many people are detained or returned?*,' (13 June 2024)

[15] Independent Chief Inspector of Borders and Immigration, '*An inspection of the Home Office's operations to effect the removal of Foreign National Offenders,'* (October 2022 – February 2023), p2 and p6.

[16] The National Referral Mechanism process for identifying victims of modern slavery is a two-stage process; an initial 'reasonable grounds' decision identifying if someone is a potential victim before a final 'conclusive grounds' decision is made on whether the individual is a victim of trafficking/ modern slavery.

[17] This was in relation to a less restrictive proposal in NABA, to lower it to those with a 12-month sentence of imprisonment or more. Joint Committee on Human Rights, *'Legislative Scrutiny: Nationality and Borders Bill,'* (21 December 2021)

Section 59 IMA extends this so that asylum claims by individuals from some non-EU countries (including countries with significant human rights concerns such as Albania [18]) as well as human rights claims by people from those countries are also deemed inadmissible. Human rights claims are not based exclusively on risk abroad. They may include, for example, family circumstances in the UK so should not be excluded solely on nationality. The test requiring exceptional circumstances is a very high threshold for such claims and there would be no appeal of this decision; only a narrow route by judicial review of the Home Secretary's decision. This risks decisions which breach our obligations under the Refugee Convention and ECHR.

14. **In light of our concerns, we urge members of parliament to support the following amendments which would repeal sections 12, 29 and 59 of the Illegal Migration Act 2023:**

Amendment 35, in the name of Carla Denyer, which would repeal section 12.

Amendment 30, in the name of Lisa Smart, which would repeal section 29.

Amendment 3, in the name of Pete Wishart, which would repeal sections 29 and 59.

Nationality and Borders Act ("NABA")

15. We are concerned that the Bill does not repeal any provisions from NABA. JUSTICE maintains the concerns raised in our previous briefings on NABA, that the legislation risks creating a system where people with a legitimate basis to be in the UK could be removed without effective access to justice. We consider that certain provisions must be repealed to ensure we strike the correct balance between a fair system, where those in need of asylum and trafficking protections were supported, and facilitating the removal of those with no such claim. Therefore, we support provisions being introduced into the Bill which would repeal concerning and obsolete sections from NABA.

16. For example, the differentiation between Group 1 and Group 2 refugees in section 12 of NABA (in force), a key component of the Bill, was abandoned by the previous Government in June 2023 though it remains on the statute book.[19] This sought to only grant temporary refugee permission to those who did not arrive directly from the country they fled from, though in reality most of these individuals would remain in the

[18] US State Department reports have found *'significant human rights issues'* in Albania such as problems with corruption and the independence of the judiciary, and the Government does not *'fully meet the minimum standards for the elimination of trafficking'.*

[19] UK Parliament, *'Illegal Migration Update: Statement made on 8 June 2023'*.

UK but require multiple applications to renew their permission to remain in the UK.[20] As the barrister Colin Yeo observed, *"what it does do is make more work for officials, thereby worsening the backlogs in the appeal system…it is actually counterproductive".*[21] In light of the urgent need to address the asylum backlog, acknowledged rightly by the new Government, it is surprising that this provision has not been repealed. It should be.

17. NABA also brought in significant changes to modern slavery/ trafficking protections, which this Bill is a timely opportunity to repeal. Section 59 (not in force) requires a decision-maker to hold late disclosure of information as damaging to credibility, despite the well-known difficulties many will have disclosing traumatic incidents. Section 63 (in force) excludes certain victims from modern slavery / trafficking protection by significantly extending the public order exception to anyone with a criminal conviction of 12 months imprisonment.

18. As set out above in relation to the IMA, many victims are trafficked into criminal activity. A joint report by the British Institute of International and Comparative Law, Human Trafficking Foundation and Anti-Trafficking Monitoring Group found that, in early 2023, 70% of disqualified individuals under the public order exemption had an element of criminal exploitation in their case.[22] Following a legal challenge, the previous Government's policy on interpreting section 63 had to be updated to require an assessment of the risk of re-trafficking.[23] However, we remain concerned that section 63 casts its net too wide when assessing public order exemption.

19. Such provisions risk undermining the UK's reputation as a world-leader in the fight against modern slavery and non-compliance with our international obligations under the Council of Europea Convention on Action against Trafficking ('ECAT'). As the then Victims' Commissioner and Independent Anti-Slavery Commissioner said at the time, NABA *"risks us failing to identify victims of modern slavery and providing them with the protection they need. Ultimately, this will only hinder us in stopping these criminals and preventing the victimisation of others."*[24] The Government should repeal section 59 and section 63.

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[20] Colin Yeo, *'Detailed policy on differential treatment of refugees announced,'* (Free movement, 28 June 2022)

[21] *Ibid*.

[22] Naoemi Magugliani, John Trajer and Dr Jean-Pierre Gauci, '*Assessing the Modern Slavery Impacts of the Nationality and Borders Act: One Year On'*, (June 2024).

[23] Matrix Chambers, '*Secretary of State for the Home Department withdraws public order disqualification policy'*, (22 January 2024).

[24] Dame Vera Baird and Dame Sara Thornton, '*The Nationality and Borders Bill fails to grasp what being a victim of slavery means'*, (11 January 2022).

20. Further, we highlight the following further provisions which we are particularly concerned about from an access to justice point of view and which we warned about during the passage of NABA [25]:

a) **Accelerated detained appeals (section 27, in force for making regulations).** In 2015, the Court of Appeal found that the then Detained Fast Track appeal process was unlawful because it created an unfair system for asylum and human rights appeals. The Court of Appeal found that the timetable would be "*so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their case"*. This clause requires the independent Tribunal Procedure Committee to set up an equivalent provision for detained appeals, which it has begun work on though accelerated appeals have not begun. Whilst we acknowledge the need to address the appeal backlog, a fast-track detained appeal process is not the way to address this. The previous attempt led to hundreds of cases having to be reconsidered by the Home Office as they were unfairly rushed, and any new rules are likely to be subject to further litigation. Clause 24 should be repealed to demonstrate the Government's commitment to fair rules that protect access to justice.

b) **Priority removal notices (sections 20 – 25, not in force).** Priority removal notices will give individuals liable for removal or detention a set period to access legal advice and provide any further grounds or evidence in support of a claim to the Home Office. After the 'cut-off' date, new claims will be subject to presumptions of damaged credibility (section 22), minimal weight of evidence (section 26). We stress the importance of ensuring individuals have adequate time to access legal advice to prepare legitimate challenges to removal. We also object to the attempt to bind the judiciary to the Home Office's approach on credibility for late claims; our independent judiciary can assess credibility objectively. Sections 23 and 24 provide for expedited appeals in the Upper Tribunal, with no onward appeal to the Court of Appeal; curtailing appeal rights in this way is an affront to access to justice. Such limited appeals will be for either initial claims, or fresh claims which have a realistic prospect of success, and risk being rushed with no mechanism to correct judicial error. Sections 20 – 25 should be repealed.

c) **Late provision of evidence in asylum or human rights claim (section 26, not yet in force).** This clause requires decision-makers to give minimal weight to late evidence unless there are good reasons. We disagree with an automatic burden on individuals to show such good reasons before their evidence can be properly assessed and the extensions of these presumptions to the judiciary being a

[25] See JUSTICE's briefings on the *Nationality and Borders Act*.

concerning restriction on judicial independence. Late disclosure is already a factor in determining the credibility of evidence.

d) **Removals: notice requirements (section 46, in force).** Whilst it was welcome that section 46 clarified in legislation that an individual would usually require 5 working days' notice of their proposed removal date, there were exceptions which could lead to 'no notice' removals. Such removals are contrary to access to justice and the rule of law. 10B creates an exemption when a planned removal fails including adverse weather conditions and disruption (which is widely interpreted by the Home Office). 10E is especially problematic as it applies when a planned removal does not take place due to an individual taking judicial review action. Whilst removal must take part within 21 days of the court's decision, the clause runs the risk of an individual being removed before they can seek legal advice on the outcome. 10B and 10E should be repealed.

21. **In light of our the above, we urge members of parliament to support the following amendments which would repeal the above mentioned sections (sections 12, 20-27, 46, 59 and 63) of the Nationality and Borders Act:**

NC 4, in the name of Carolyn Harris, which would repeal sections 58-65, 68-69.

NC 32, in the name of Lisa Smart, which would repeal sections 12-65, 68-69.

NC 38, in the name of Carla Denyer, which would repeal sections 12, 16, 30-38 and 40.

New criminal offences

22. The Bill creates four new criminal offences: Supplying articles for use in immigration crime (clause 13); Handling articles for use in immigration crime (clause 14); collecting information for use in immigration crime (clause 16); and endangering another during sea crossing to United Kingdom (clause 18). Our concerns in relation to these provisions are as follows:

Defences: lack of specific protection for those providing legitimate legal services

23. We welcome that the defence of "*reasonable excuse*" applies to each of the new offences: in other words, if a person has a reasonable excuse for engaging in the relevant conduct, they will not be guilty of the offence. The burden lies on the defence to adduce sufficient evidence of a reasonable excuse such that

it is placed in issue. If they have done so, it is for the prosecution to prove beyond reasonable doubt (i.e. to the usual criminal standard) that the person charged did *not* have a reasonable excuse.

24. In respect of each offence under clause 13, 14 and 16, the Bill sets out a (non-exhaustive) list of circumstances in which the defence of "reasonable excuse" will apply. Under clause 13, for example, a person will have a reasonable excuse if their action was for the purposes of carrying out a rescue of a person from danger or serious harm. They will also have a reasonable excuse if they were acting on behalf of an organisation which aims to assist asylum seekers and does not charge for its services.

25. However, whilst we welcome the inclusion of those examples already contained within the Bill, we consider there to be a notable and concerning omission, namely an exception for those providing legitimate legal advice and preparing legitimate legal claims. Those who represent asylum-seekers in the UK, provide legal advice about their rights and publicise their work should be confident that they will not be caught by one of the offences, given the wide drafting of the Bill. Although the Bill does not necessarily preclude a defence for such individuals, in our view they should be specifically exempt from prosecution. Otherwise, those providing legal services to vulnerable individuals are left in an uncertain position which in turn, creates an unjustified risk to access to justice and the rule of law.

26. **We recommend that the following amendment be made to the Bill as it progresses to afford explicit protection from prosecution for those providing legitimate legal services:**

Clause 16(8), page 10, line 22, insert –

(d) the person was carrying out a legal activity, as defined in section 12(3) Legal Services Act 2007.

<u>Maximum sentences</u>

27. The maximum sentences for each of the new offences are as follows:

(a) Clause 13 (Supplying articles for use in immigration crime): 14 years' imprisonment

(b) Clause 14 (Handling articles for use in immigration crime): 14 years' imprisonment

(c) Clause 16 (Collecting information for use in immigration crime): 5 years' imprisonment

(d) Clause 18 (Endangering another during sea crossing to United Kingdom): 4 years' imprisonment

28. The maximum sentence for the Clause 13 and 14 offences are disproportionately high. To place these in context, the offence of possession of articles for use in terrorism has a maximum sentence of 15 years.[26] In the context of the overcrowding crisis currently impacting the prison estate - which last summer reached "n*ear collapse"* in the words of the Lord Chancellor[27] - we strongly encourage the Government to take an evidence-based approach to determining the appropriate maximum sentences for any new offences. There is a notable lack of robust evidence that lengthier custodial sentences achieve a deterrent effect or a reduction in reoffending.[28] This is explicitly acknowledged within the Impact Assessment to the Bill itself with regard to the clause 18 offence: *"There is limited understanding of the behavioural impact of this intervention, so the deterrence effect on dangerous behaviour may not be realised as intended".*[29]

29. With regard to the Bill's likely impact on the prison population, the Impact Assessment estimates that between four and six prison places will be required per year in relation to the clause 13 and 14 offences.[30] On the other hand, it notes that there is *"significant uncertainty regarding the volume of offences/ offenders each year [including] regarding how law enforcement and the courts will use this offence in practice [as well as the rates of convictions leading to immediate custody".*[31] The recently published Independent Sentencing Review was critical of how *"too often the knee-jerk response has been to increase sentence lengths as a demonstration of government action",* leaving the UK prison population very high by historic and international standards.[32]

30. We also note that the Bill is deliberately widely drafted with a low threshold for prosecution so as to *"deliberately catch those acting at too much distance from the people smuggling to be prosecuted under section 25 of the Immigration Act 1971 and where there is insufficient evidence of belief or intention to prosecute an individual under the Serious Crime Act 2007... or for conspiracy."*[33] In this regard we note,

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[26] Terrorism Act 2000, sections 57(4)(a) and 58(4)(a)

[27] '*Press release: Lord Chancellor sets out immediate action to defuse ticking prison 'time bomb'*, (July 2024).

[28] See, e.g., Sentencing Council, '*Reconceptualising the effectiveness of sentencing: four perspectives*', (2024); Sentencing Council, '*The Effectiveness of Sentencing on Reoffending*,' (2022).

[29] Bill '*Impact Assessment*', p. 77.

[30] *Ibid*., p. 58.

[31] *Ibid*., p. 78.

[32] '*Independent Sentencing Review: History and Trends in Sentencing',* p8 (February 2025).

[33] Bill '*Impact Assessment*', p. 30.

first, that the possibility that the Bill will contribute to the severe prison overcrowding crisis cannot be discounted.

31. Second, the lesser culpability of those whom the Government intends to criminalise under the new offences ought to be more accurately reflected in the corresponding maximum sentences. In this regard, it is worth noting that the money laundering offences under sections 330, 331 and 332 of the Proceeds of Crime Act 2002 have a mental element of "*knows or suspects*" or, in the case of the offences under sections 330 and 331, "*has reasonable grounds for knowing or suspecting*" and a maximum sentence of 5 years.[34]

32. We are seriously concerned about the disproportionately severe sentences that could be imposed upon individuals convicted of these offences. **We consider that the sentences must be properly scrutinised by members of parliament to consider their proportionality and potential impact on the prison population.**

33. In the interim, we support proposed amendments to the Bill seeking to protect vulnerable individuals being unintentionally caught by these offences and maximum sentences. Amendments 4, 5 and 30, provide that specific vulnerable groups such as individuals forced or coerced into criminal activities; a parent, family member or guardian accompanying minors; a victim of trafficking; a survivor of torture or gender-based violence; an unaccompanied child; a person at risk of prosecution; a pregnant woman; or a person holding refugee status cannot be found to have committed an offence under Clauses 13, 14 and 18.

34. Given that the Government's intention behind introducing these new offences is to target supply chains for people smuggling networks and to prevent risk to lives at sea posed by those connected to the facilitation of crossings[35], it is rational to include this amendment in the Bill to ensure that these vulnerable groups are not inadvertently charged. We consider that these amendments will bring the Bill closer to the Government's stated aim and will ensure that this list of individuals, who would accordingly be at particular risk in prison, are not subjected to completely inappropriate and disproportionate periods of incarceration.

35. Our concerns about the vulnerability of these groups is further exacerbated by the impact of the Sentencing Guidelines (Pre-Sentence Report) Bill which is currently making its way through parliament.

[34] Proceeds of Crime Act 2022, sections 330(2). 331(2), 332(2), 334(2)(b).

[35] HM Government, *'Human Rights Memorandum'* , (30 January 2025), p.5.

The Bill would limit the ability for judges to receive guidance on the need for pre-sentence reports on the basis of personal characteristics such as pregnancy, age or previous trafficking experiences thereby by exacerbating the risk of such high sentences being imposed as a result of the new offences created in the Bill.

36. We also support proposed amendments 36 and 38 which seek to ensure that that the new criminal offences under Clauses 14 (handling articles for use in immigration crime) and 16 (collecting information for use in immigration crime) only target individuals involved in people smuggling rather than vulnerable individuals seeking protection. These amendments seek to safeguard vulnerable individuals from criminalisation by amending the statutory defences to include those who did not gain financially from their actions.

37. In a similar vein, we support proposed amendment 37 which seeks to exclude telephonic devices and any means of charging a telephonic device, from the meaning of "relevant article" for the purposes of the offences created by Clauses 13 and 14. This amendment provides a further safeguard against the broad definition of "relevant article" as currently drafted in the Bill to ensure that individuals who simply have telephones, which is likely to be the majority of people, are not charged by reason of possessing a telephone and charger alone. Again, we consider this necessary given that a possible 14 year sentence for simply handling a telephone is otherwise clearly disproportionate.

38. **Therefore, we urge members of parliament to support the following amendments to the Bill:**

Amendment 4, in the name of Pete Wishart, which would specify that the offence created by Clause 13 cannot be applied to certain categories of individuals.

Amendment 5, in the name of Pete Wishart, which would specify that the offence created by Clause 18 cannot be applied to certain categories of individuals.

Amendment 30, in the name of Pete Wishart, which would specify that the offence created by Clause 14 cannot be applied to certain categories of individuals.

Amendment 36, in the name of Lisa Smart, which would amend the statutory defence for the offence created by Clause 14.

Amendment 37, in the name of Lisa Smart, which would exclude "telephonic device" and "means for charging telephonic device" from the meaning of "relevant article" for the purposes of

Clauses 13 and 14.

Amendment 38, in the name of Lisa Smart, which would amend the statutory defence for the offence created by Clause 16.

New immigration powers

Seizure of electronic devices

39. Clauses 19 to 26 would allow for the seizure, without permission, of "relevant articles" (likely mobile phones or electronic devices) to access information about the facilitation of illegal immigration. The High Court previously found that the blanket seizure of mobile phones of small boats arrivals was unlawful and the Home Office conceded it was a breach of the Data Protection Act and Article 8 ECHR.[36] However, despite a requirement for the power to be used only where there are reasonable grounds of suspicion that a person has a relevant article, the definition of "relevant article" is very broad and we are concerned that in practice this power may be used for the blanket seizure of mobile phones from anyone who arrives irregularly.

40. **We therefore urge that members of parliament give consideration to the following as the Bill progresses:**

Amend the Bill to narrow the definition of "relevant article" to ensure it is not, in practice, a blanket seizure of the electronic devices of asylum-seekers. At the very least, an amendment should be added to make clear that these powers can only be used compatibly with the Data Protection Act 2018 and UK General Data Protection Regulations.

Retrospectivity

41. Legal certainty requires individuals to know their rights and how they can be enforced. This is an important part of the UK's legal system and our common law traditions. The Attorney General has spoken of the *"restoration of our reputation as a country that upholds the rule of law at every turn"* and *"the*

[36] *HM v Secretary of State for the Home Department* [2022] EWHC 695 (Admin) and *Sealed Order.*

strengthening of Parliament's role in upholding the rule of law".[37] Lord Bingham emphasised that his first principles of the rule of law was that it was *"accessible and so far as possible intelligible, clear and predictable".*[38] This means that that retrospective legislation should only be passed in *"very exceptional circumstances".*[39] There are a couple of retrospective provisions in this Bill which we do not think are properly justified:

42. **Clause 41** would change the detention rules (see above) but also states that they *"are to be treated as always having had effect".* This is a significant retrospective power and limited information has been provided by the Home Office as to why it is required. It would be inappropriate to use this legislation to retrospectively authorise the unlawful detention of individuals, if this is the intention.

43. **Clause 53** would retrospectively permit the Home Office to charge certain fees (for UK visa qualification and English language assessment services) which it has admitted it collected without proper legal authorisation.[40] We note the potential financial Home Office liability if such a change is not made, but query if that is sufficient to justify significant retroactive legislation which potentially engages Article 1 Protocol 1 of the ECHR.

44. Unless adequate, exceptional explanations for these provisions are provided by the Government, we urge Parliament to amend the legislation to remove their retrospectivity. There has been a growing trend in the use of retrospective powers by successive UK governments which sets a dangerous precedent for the rule of law in this country.

45. **We therefore recommend that the following amendment be made to the Bill as it progresses:**

Remove Clause 41(17) from the Bill.

Remove Clause 53 from the Bill.

[37] Attorney General, '*2024 Bingham Lecture on the rule of law'* , (15 October 2024).

[38] Lord Bingham, '*The Rule of Law' Sir David Williams Lecture*', (16 November 2006).

[39] House of Lords Constitution Committee, *'Nationality and Borders Bill',* (21 January 2022), para 22.

[40] Hansard, '*Immigration and Nationality (Fees) (Amendment) Order 2024*', (11 November 2024).

Serious Crime Prevention Orders

46. **Clauses 48 – 52** of the Bill expands the current scope and availability of Serious Crime Prevention Orders. SCPOs are a type of civil Behavioural Control Order, introduced by the Serious Crime Act 2007 which can impose onerous conditions upon a person subject to them, restricting their ability to be present in a particular area, access certain services, associate with certain persons, travel, own particular possession and/or engage in certain activities.[41] Breach of a condition or requirement is a criminal offence, punishable by up to 5 years imprisonment.[42] Currently, SCPOs are available on complaint to the High Court ("SCPOs on Complaint")[43] or following a conviction at the Crown Court ("SCPOs on Conviction").[44]

47. SCPOs can be imposed upon any person aged 18 or over, on the basis that the person a) has committed, (b) facilitated the commission by another person or c) has conducted himself in a way that was likely to facilitate the commission, of a serious offence in England and Wales.[45] The court must also consider that there are *"reasonable grounds"* to believe that an order would protect the public by *"preventing, restricting or disrupting a persons involvement"* in serious crime, before imposing an order. SCPOs can last up to 5 years at a time, although they are subject to renewal.[46]

48. The Bill makes the following changes:

    (a) **Inclusion of electronic monitoring** – Section 48 of the Bill makes it possible for the courts to impose electronic monitoring requirements / tagging on individuals who are subject to SCPOs.[47] However, new Government Amendments 14 – 19 limit the application of electronic monitoring requirements to England and Wales only.

    (b) **Creation of Interim SCPOs** – Section 49 of the Bil creates a new type of "Interim SCPO", where an application for a full order, has been made but not yet determined and the court considers it 'just' to impose one.[48] Applications for Interim SCPOs will take place without notice being given

[41] Serious Crime Act 2007, s5.

[42] Serious Crime Act 2007, s16(2).

[43] Serious Crime Act 2007, s1.

[44] Serious Crime Act 2007, s19.

[45] It includes fraud; money laundering; computer misuse; environmental crimes; child sex and prostitution and drug trafficking. Serious Crime Act 2007, Schedule 1.

[46] Serious Crime Act 2007, s16(5).

[47] Inserts new section 5B-5D into the Serious Crime Act 2007. This change will affect all types of SCPO in England and Wales.

[48] Inserts new section 5E into the Serious Crime Act 2007.

to the person who is to be subject to it, "*where notice of the application is likely to prejudice the outcome sought by the applicant."*[49]

(c) **Extending the list of parties that can apply for a SCPO on complaint** - Currently only the Director of the Serious Fraud Office and the Director of Public Prosecutions can make an application to the High Court for an SCPO.[50] The Bill would expand this to several other agencies including the National Crime Agency and HMRC.

(d) **Inclusion of Notification Requirements** – Section 51 provides that a person subject to any type of SCPO must provide the police or applicant authorities with certain information within 3 days of an order coming into force.[51] Notifiable information includes not only name, address and contact details, but also social media and gaming usernames, vehicle information, financial information and employment details.[52] Failure to provide the required information within the required timeframe without reasonable excuse; knowingly providing false information or not updating the applicant body to changes to the information is a criminal offence. The maximum penalty is a fine; imprisonment up to 6 months or 5 years depending on whether it is summary conviction or indictment.[53] It is unclear whether a breach of a notification requirement will also constitute a breach of an order and if so, how this will affect the punishment.

(e) **Creation of SCPOs on Acquittal or during Appeal in the Crown Court -** Section 52 increases the powers of the Crown Court to impose SCPOs.[54] In particular, the Crown Court will be able to impose an SCPO on a person following their acquittal or when allowing an appeal provided that it is a) "*satisfied"* that the person has been involved in serious crime (whether in England and Wales or elsewhere) and b) when the court has "*reasonable grounds"* to believe that an SCPO would protect the public by preventing, restricting, or disrupting involvement by the person in serious crime in England and Wales. This is despite a jury finding a person innocent of an offence.

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[49] Inserts new section 5F into the Serious Crime Act 2007.

[50] Unless it is a terrorist related SCPO in which case a chief officer of the police can apply but only after they have consulted with the Director of Public Prosecutions.

[51] See Section 1(1) of new Schedule 1A which is inserted into the Serious Crime Act 2007 by section 49 of the Bill.

[52] The list of notifiable information can be extended by way of regulations made by the Secretary of State under section 49(5)(j).

[53] See sub-section (3) of new Schedule 1A which is inserted into the Serious Crime Act by section 51 of the Bill.

[54] By inserting a new Section 19A into the Serious Crime Act 2007.

49. We oppose the provisions in the Bill to expand SCPOs. To do so will only frustrate existing pressures within the Behavioural Control Order regime and justice system, as set out in our 2023 report.[55] For example:

(a) **No evidence or data to show that SCPOs work -** There has been no official review of the way that SCPOs currently function. Data relating to their use is not published centrally and, therefore, it is impossible to confirm whether SCPOs are a successful, proportionate or cost-effective measure to "*prevent, restrict or disrupt*" a person's involvement in a serious criminal offence.

(b) **Inconsistent use of orders across the country** - There is significant variation in the use of SCPOs across the country, and the types of conditions and requirements they impose.[56] This is problematic for the rule of law, creates postcode lotteries and undermines the effectiveness of the measures. We are particularly concerned by the inconsistent approaches taken to electronic monitoring, envisaged by the Bill. As currently drafted, Clause 46 of the Bill, alongside new Government Amendment 14-19, provides that electronic monitoring will only apply in England and Wales. It is not clear why such measures are required in England and Wales and, in addition to our concerns set out below in terms of the proportionality of electronic monitoring, we consider it irrational and unworkable to include them for one part of the UK only.

(c) **A lack of resourcing, training and infrastructure to monitor and enforce orders properly.** The Government has not provided any reassurance about how applicants and enforcement bodies will have the capacity to deal with the addition of two new types of SCPO, let alone facilitate the extra demands caused by electronic monitoring and notification requirements. As stated in the Government's Impact Assessment, only 13 out of 43 police forces have clear arrangements in place relating to the use of SCPOs and monitoring and enforcement.[57] This will be further complicated by the fact it is envisaged that an individual might be subject to more than one SCPO at a time, particularly given that poor communication infrastructure between different courts and police forces often leads to current breaches of orders going unnoticed.[58]

(d) **Overlap with other orders and offences:** conduct covered by a Behavioural Control Order often falls within the remit of several other offences and Behavioural Control Orders. This causes confusion in determining when to pursue a criminal offence, when to impose an order and which

[55] JUSTICE, '*Lowering the Standard: a review of Behavioural Control Orders in England and Wales*', (2023).

[56] *Ibid*.

[57] '*Home Office Draft Impact Assessment Rationale for Intervention*' (B), (2 April 2024).

[58] JUSTICE, '*Lowering the Standard: a review of Behavioural Control Orders in England and Wales*', (2023).

order to use. The type of offence that can lead to an SCPO is extremely broad. As currently drafted, it has the potential to overlap with Labour Market Enforcement Orders, Sexual Risk Orders, Sexual Harm Prevention Orders, Serious Violence Reduction Orders; Female Genital Mutilation Orders; Slavery and Trafficking Prevention Order; Slavery and Trafficking Risk Orders, Violent Offender Order, as well as potentially overlapping with new orders created by the Crime and Policing Bill. The situation is chaotic and untenable. Rather than introducing two further types of SCPO, the Government should be working to streamline and simplify the range of orders currently in existence.

(e) **Setting people up to fail** – Breaches of conditions within orders are common.[59] Often, this is because individuals lack adequate support to comply with the restrictions and requirements imposed by the orders and/or do not fully understand the rules that they were expected to abide by. This is worsened in situations where individuals are neurodivergent, have intellectual disability and/or language barriers. All too often, insufficient screening is available to ascertain whether this is the case. This is gravely concerning given that breach of an SCPO can lead to five years imprisonment and raises serious questions regarding procedural fairness. Not only that, but we consider that the measures to expand SCPOs are unworkable in light of the current strain on the prison system. This is particularly concerning, not just from a fairness perspective but also in light of the fact that breach of an SCPO leads to imprisonment privacy perspective Given that breaches of a SCPO lead to imprisonment, and given the current strain on the prison system and over-crowding. Again, the Government has not addressed the impact of SCPOs on the wider criminal justice system.

(f) **Impact on Human Rights and Right to a Private Life –** Being subject to an SCPO is a serious and life-changing event, particularly given the duration of the SCPO and the punishment for breach. As set out in the legal advice obtained by JUSTICE, individuals are subject to restrictions and requirements that can impact on their rights under the ECHR including their right to a private and family life (Article 8), the right to freedom of thought and religion (Article 9), the right to freedom of expression (Article 10) and the right to peaceful assembly and association (Article 11) .47 We agree with the position stated in our legal advice, that the introduction of electronic monitoring and notification requirements make the impact upon these rights even more severe and, when considering the overall impact of the conditions and restrictions imposed upon an

[59] Albeit, difficult to assess situation fully due to lack of data.

individual, could amount to an unlawful deprivation of their liberty under Article 5.[60] We therefore have grave concerns about the proportionality of the suggested changes, including the fairness of someone being subject to electronic monitoring and notification requirements. Furthermore, as currently drafted, there is inadequate support and opportunities for individuals to challenge an application for an SCPO; a condition contained within it, or to vary an SCPO or seek to get it discharged.

(g) **Impact on Article 6 Right to a Fair Trial and Procedural Fairness** – We agree with the position stated in the independent legal advice, that expanding SCPOs by making them available on acquittal or available without notice on an interim basis, risks breaching the absolute protections of Article 6 and the Right to a Fair Trial under the Convention. Procedural safeguards inherent within the criminal law must not be usurped by allowing courts to impose SCPOs and determine someone's involvement in crime, upon a weaker standard of proof and using evidence that would be otherwise inadmissible in a criminal trial. For example, it is unclear how a court will determine that it is "satisfied" that a person has been involved in serious crime in the context of that person having just been acquitted by a jury in the Crown Court or how it can ever be reasonable for it to do so. This would amount to criminalisation by the backdoor.

50. For all of these reasons, we strongly rejected the changes proposed to SCPOs within the Bill. Instead of expanding SCPOs without providing any justification or evidence for doing so, the Government should conduct a thorough review of how SCPOs and related orders are functioning currently. In particular, the Government must streamline the existing orders within this space to avoid duplication and wasted resource. Any review must identify how bodies are currently monitoring for equality and human rights impacts when applying for, imposing and enforcing orders and ensure that procedural fairness and the rule of law is upheld. Significant investment is also required to ensure that applicants and enforcement bodies have the right resources to safely use SCPOs and respond to breaches of them.

51. We therefore urge Parliament to:

Remove Clause 48 to 52 from the Bill

[60] King and Spalding, '*The Human Rights Implications of Serious Crime Prevention Orders: Supplemental Opinion*', (2025).

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