

Nationality & Borders Bill: Risks to Secure Reporting

Clause 39: Immigration Offences and Penalties, *Harming Victims and Hindering the Police*

Clause 39 creates several new criminal offences including knowingly arriving in the UK without a visa or valid entry clearance and entering without leave or in breach of the immigration rules. This would have a significant impact, including for asylum seekers and people who have been trafficked. The maximum penalty for these new offences is increased: entering without leave or arriving without a valid entry clearance or electronic travel authorisation, or overstaying, is increased from 6 months to 4 years.¹

Clause 39 breaches the Refugee Convention by criminalising asylum seekers, including victims of trafficking. Due to the lack of safe legal routes, it is not possible to apply for entry clearance for the purpose of claiming asylum, and victims who are trafficked into the UK are at the mercy of their traffickers. Thus the law, if this clause was passed, would “require the impossible”² of this group. Victims would face not only trafficking, but also subsequent criminalisation.

This in turn places a duty on police to arrest and prosecute anyone who has entered or remained in the UK without a visa or valid immigration status. This will deter victims and witnesses of crime from approaching the police due to fears of the repercussions for anyone with insecure or uncertain immigration status. This will undermine the police’s ability to do their jobs of protecting victims and bringing perpetrators to justice. It will also enable perpetrators or exploiters who will take advantage of the additional barriers to secure reporting and target and maintain control of people accordingly and operate with impunity.³ Fear of persecution will further prevent those with insecure immigration status from reporting crime, whether as a witness or victim.

The problems

There are several problems with Clause 39.

By creating new criminal offences, Clause 39 would require police officers to arrest and investigate anyone suspected of these new offences related to immigration status. This might include individuals identified for instance in a nail bar, brothel, or drug farm. As noted above, the maximum sentences are increased and severe, and would trigger automatic deportation.

The individuals worst affected will not be criminals at all. They are vulnerable individuals and victims who could assist the police with investigations of the real criminals. They are victims, not perpetrators, in need of support, care and safety. It would be unlawful, cruel and undermine police investigations by criminalising the victims who may be key witnesses to crimes, especially as many would have been trafficked or coerced into the UK.

¹ <https://bills.parliament.uk/publications/44460/documents/1174>

² Bingham Centre for the Rule of Law Nationality and Borders Bill Part 2 - Rule of Law Monitoring, p.16.

³ <https://bills.parliament.uk/publications/44307/documents/1132>

Fear of immediate arrest for those who have entered or remain undocumented / without status under the new offences in Clause 39 will prevent vulnerable victims of crime from coming forward to seek support or report crimes they have been the victims of and/or witnesses to. In turn this will allow the perpetrators of crime off the hook while forcing vulnerable people to stay in dangerous and exploitative situations. Research from Latin American Woman Rights Service shows that victims of violence against women and girls (VAWG) with insecure immigration status are unlikely to approach the police because they believe that the police will prioritise their lack of legal status instead of being protected as victims of serious crimes.⁴ This change in law will make these fears a reality.

Furthermore, changes to guidance and legislation concerning the arrest and prosecution of migrants with insecure immigration status will consume a considerable amount of police resources and take up officers' time and the time of the Crown Prosecution Service. Police already have power to detain people subject to immigration control under Schedule 2 Paragraph 17⁵ which detains not for investigation of an offence but rather to identify the person's right to be in the UK. This new legislation is unnecessary and will only hinder the police and prosecution services ability to investigate real crimes.

Secure reporting for victims of crime:

Protecting victims and enabling the police to investigate the facilitators of trafficking and the perpetrators of abuse and exploitation must be prioritised over compelling the police to carry out the role of immigration enforcement. This was highlighted in the 2018 super complaint by Southall Black Sisters and Liberty on data sharing between the Police and the Home Office. The findings of which concluded that data sharing arrangements are significantly harming not only victims of crime but also the public interest, as crimes are not reported and therefore remain unpunished:

The UK aspires to be a humane, liberal democracy where the criminal justice system does not punish people for being victims but recognises and protects them. Government policy is clear that victims of crime should be treated without discrimination. [...] harm is currently being caused to the public interest and that this needs to be addressed."

*"That is why we are recommending a review of the law and policy in this area, to provide clarity to police on their priorities. We also recommend establishing safe reporting pathways, informed by the realities of victims' experiences, that reflect existing laws on everyone's right to data protection."*⁶

In December 2021, the Government published and laid before Parliament the Home Office and police data-sharing arrangements on migrant victims and witnesses of crime with insecure immigration status

⁴ <https://stepupmigrantwomenuk.files.wordpress.com/2019/05/the-right-to-be-believed-full-version-updated.pdf>.

⁵ [https://www.legislation.gov.uk/ukpga/1971/77/schedule/2/paragraph/17#:~:text=17\(1\)A%20person%20liable,U.K.](https://www.legislation.gov.uk/ukpga/1971/77/schedule/2/paragraph/17#:~:text=17(1)A%20person%20liable,U.K.)

⁶ <https://www.gov.uk/government/publications/police-data-sharing-for-immigration-purposes-a-super-complaint>

review (the Review).⁷ Its content contradicts the police complaints findings and instead states that data-sharing with Immigration Enforcement is essential to protect victims. The Review rejects the call made by sector representatives to establish a ‘firewall’ or system of secure reporting to make it safer for victims with insecure immigration status to approach the police to report crimes safely. The Review proposes an Immigration Enforcement (IE) Migrant Victims Protocol which it is said will prevent immigration enforcement action against victims whilst criminal investigations and proceedings are ongoing, and while the victims are being supported.

Organisations working with victims have voiced [strong disagreement with the Government's response as set out in a joint letter](#). The letter explains that there remains a conflict of interest so long as Immigration Enforcement is involved in receiving reports from and supporting victims of crime, given that its priority and overriding role is to enforce immigration rules rather than providing a safeguarding function so does not address the need for secure reporting.

Clause 39 Nationality and Borders Bill:

If clause 39 passes unamended police officers would be required to investigate and or arrest individuals suspected of the new offences. This rides roughshod over the Super Complaint findings and recommendations, Association of Chief Police Officers’ guidance⁸ and known best practice in safeguarding and victim support, which is clear that there should be no automatic data sharing between the police and the Home Office. This is in order that victims of or witness to crime are not deterred from approaching the police.

The solution:

Government should explain how the creation of new criminal offences and increased immigration enforcement will safeguard victims of crime and should move two amendments tabled to the Nationality and Borders Bill to enable victims and witnesses of crime to report crimes to the police and other relevant authorities without fear of criminalisation or immigration repercussions.

Amendment 124A

LORD COAKER

Insert the following new Clause—

⁷ Home Office and Police data sharing arrangements on migrant victims and witnesses of crime with insecure immigration status, 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/104112/4/HO_Review_Police_and_HO_data_sharing_migrant_victims.pdf

⁸ <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/vulnerable-adults/>

Guidance about security of reporting for victims of crime

(1) The Secretary of State must issue guidance to such public authorities and other persons as the Secretary of State considers appropriate about—

(a) the prohibition of automatic sharing of personal data for immigration purposes;

(b) specified circumstances in which data may be shared regarding victims of crime for the purposes of offences under s.39 of the Act;

(2) The Secretary of State may, from time to time, revise the guidance issued under subsection (1).

(3) The Secretary of State must arrange for any guidance issued or revised under this section to be published in a way the Secretary of State considers appropriate.

Member's explanatory statement

This new Clause would require the Secretary of State to make arrangements to ensure that everyone present in the UK is able to approach the authorities for assistance with and to report a crime without fear or criminal or immigration repercussions as a result of that contact or resultant data sharing with immigration enforcement.

Amendment 140:

THE LORD BISHOP OF LONDON, LORD ROSSER, BARONESS MEACHER

Insert the following new Clause—

“Victims of domestic abuse: data-sharing for immigration purposes

(1) The Secretary of State must make arrangements to ensure that personal data of a victim of a domestic abuse in the United Kingdom that is processed for the purpose of that person requesting or receiving support or assistance related to domestic abuse is not used for any immigration control purpose.

(2) The Secretary of State must make arrangements to ensure that the personal data of a witness to domestic abuse in the United Kingdom that is processed for the purpose of that person giving information or evidence to assist the investigation or prosecution of that abuse, or to assist the victim of

that abuse in any legal proceedings, is not used for any immigration control purpose.

(3) Paragraph 4 of Schedule 2 to the Data Protection Act 2018 does not apply to personal data to which subsection (1) or (2) applies.

(4) For the purposes of this section, the Secretary of State must issue guidance to—

(a) persons from whom support or assistance may be requested or received by a victim of domestic abuse in the United Kingdom;

(b) persons exercising any function of the Secretary of State in relation to immigration, asylum or nationality; and

(c) persons exercising any function conferred by or by virtue of the Immigration Acts on an immigration officer.

(5) For the purposes of this section—

“immigration control purpose” means any purpose of the functions to which subsection (4)(b) or (c) refers;

“support or assistance” includes the provision of accommodation, banking services, education, employment, financial or social assistance, healthcare and policing services and any function of a court or prosecuting authority;

“victim” includes any dependent of a person, at whom the domestic abuse is directed, where that dependent is affected by that abuse.”

Member's explanatory statement

This new Clause would require the Secretary of State to make arrangements to ensure that the personal data of migrant survivors of domestic abuse that is given or used for the purpose of their seeking or receiving support and assistance is not used for immigration control purposes.

Please also support amendments to Clause 39 by Lord Dubs and Baroness Ludford to remove the new offence (DI) and the related amendment of Baroness McIntosh and Baroness Hamwee which have the combined effect of removing “arrival” as an element of the offence.