Discrimination Law Association

DLA BRIEFING FOR HOUSE OF LORDS
COMMITTEE STAGE - IMMIGRATION BILL 2015-2016

The Discrimination Law Association ("DLA"), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information, and the development and coordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

The DLA is a national association with a wide and diverse membership. The membership currently consists of over 100 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

The DLA shares the concerns of the Immigration Law Practitioners Association; the Race Equality Foundation; Liberty; the Joint Council for the Welfare of Immigrants and many others regarding both the stated overall aims of this Bill and the impact of the specific provisions on communities and on individuals. We are extremely concerned that the real impact of the Bill will not be to reduce illegal immigration, but will be to stoke up racial tensions, to increase incidents of unlawful race and religious discrimination, and to increase the likelihood and incidents of exploitation of vulnerable people by traffickers and criminal gangs. We consider that the additional provisions in respect of employment; housing; police powers; driving and language in particular will not facilitate or improve the objectives of fairness and community cohesion but will instead increase unlawful discrimination and stir up hostility and suspicion within society as a whole towards all migrants, the overwhelming majority of whom are lawfully present and entitled to work, occupy premises, drive cars in the UK. We are also extremely concerned that the wider impact will be to increase unlawful discrimination against black and Asian UK residents and citizens in housing, job searches, policing and in stop and search.

This Briefing by the Discrimination Law Association draws on our expertise as an organisation of lawyers, advisers, advocates and activists in the field of anti-discrimination and equality and is therefore limited to Clauses 8, 9, 13, 18 and 47 - 50.

1. The Equality Act 2010 makes it unlawful to discriminate against a person on grounds of race or religion. Discrimination may be direct or indirect, conscious or unconscious and may take the form of denial of a work opportunity, refusal to grant

services, or the application of a policy criteria or practice which impacts adversely on people who share a characteristic of race or of a religious belief. Public authorities in particular have responsibilities under section 149 of the Equalities Act 2010 to have due regard to the need to eliminate discrimination, harassment and victimisation; to advance equality of opportunity and to foster good relations between persons who have different characteristics, such as different race or faith.

2. We urge the members of the House of Lords to take full account of all the provisions of the Equality Act 2010, and in particular the duties on public authorities, when considering the provisions of the Bill.
3. Prevention of unlawful discrimination, and the active promotion of equality is not only desirable it is necessary in a democratic society, and we urge the members of the House of Lords to consider with care whether or not the measures urged are likely to lead to an unwillingness by landlords to let premises to black or Asian people, or an unwillingness by agencies or employers to give work to any one where there is any query over status.
4. The DLA believes that the changes to the legal tests applied to employers for example, or to landlords place an unreasonable burden on the employer and landlord to check documentation and paperwork which is too often difficult to understand; not necessarily available and occurs in myriad formats. We believe that the changes to the wording will lead to an increase in the instances of race discrimination simply because of a perceived risk of a criminal conviction. We are also concerned that the change of wording increases the application of criminal law to the essentially civil law relationships of employment and housing provisions. We see this as wholly unnecessary and undesirable.
5. We are also very concerned that the new tests will cause serious differences in the way that people who are from minority ethnic cultures, those whose first language is not English, and those who look or sound different to white British citizens, are treated every day. In particular we are concerned that the new rules will lead to these groups being challenged to produce proof of their right to live, work, rent and drive in the UK far more often than white British people are challenged, because of their race or their perceived faith.
6. The DLA is aware from research done by the Home Office and HMRC as well as countless other organisations that people from Black and Asian backgrounds are already more likely to be stopped and searched by the police than white British people; are more likely to be refused rental accommodation and face greater difficulties in the job market. We consider that the specific clauses identified below increase the likelihood of discrimination against a class of people in the job market and in the housing rental market because of their race, their perceived race and status or their religious background or perceived background.
7. If the possible impact of this legislation will be to increase discrimination against certain groups it must be wholly undesirable, and if it will not achieve the objectives it is intended to achieve, or if it is unnecessary to achieve the objectives because of the existing legislation, we argue that it ought to be opposed by parliament in its entirety.

Prevention of "illegal working"

Clauses 8 - 12 embody the government's determination to prevent "illegal working". With legislation since 1996 imposing civil and criminal sanctions on employers, amended in 2006 and in 2014, the Immigration Bill 2015-16 reflects the government's concern that the existing measures have failed to stop undocumented migrants finding ways to earn enough to survive in the UK.

Since we are aware that there has been past acknowledgment from Conservative governments that the undesirable consequence of fining employers and landlords is avoidance of risk by not renting to or employing people who look or sound foreign, we consider that increased sanctions will simply increase unlawful discrimination.

Clause 8

The government's stated aim is to *make Britain a less attractive place for people to come and work illegally*

Clause 8 creates a criminal offence of working without leave under immigration laws whatever the occupation or employment status of the individual. By the minor amendment proposed in Clause 8(2) of the Bill, it will be an offence under the Immigration Act 1971 s3(1)(c)(i) to work without leave.

This is an attack on workers themselves and is unnecessary given the stated purpose of the legislation. To create a separate stand-alone offence for an undocumented migrant to work is unnecessary but is likely to have the effect of increasing the regime of fear which already forces undocumented migrant workers and their family into destitution and into the hands of traffickers, criminals and the unscrupulous.

Not only does the proposed offence of working without leave carry a sentence of up to one year's imprisonment and/or a fine, but if a person is convicted, the prosecutor must consider whether they should be committed to the Crown Court so that their earnings while working without leave can be confiscated under the Proceeds of Crime Act 2002. If a person cannot work, and if earnings received can be taken, the result will potentially leave dependent children, ill or aged family members with no money and debt.

This clause needs to be considered alongside Clause 11 regarding proposed strict regulation of licensed premises and the accompanying new power for immigration officers to enter any licensed premises to look for illegal workers.

The DLA is aware that the data regarding the civil penalty on employers for employing undocumented migrant workers consistently over many years show a disproportionate number of immigration officer raids on restaurants and take-away establishments run by ethnic minorities. The Home Secretary believes that "*a significant proportion of illegal working happens on licensed premises. Measures in the Bill will ensure that those working*

illegally or employing illegal workers cannot obtain licences to sell alcohol or run late-night takeaway premises." The DLA anticipates that it will not be luxury bars and hotels which offer late-night hospitality but these same restaurants and take-away shops, with ethnic minority licensees, which will see even more frequent raids by immigration officers exercising with wider arrest, search and seizure powers provided under other clauses of this Bill.

DLA encourages your Lordships to consider joining with Lord Rosser and Lord Kennedy of Southwark in opposing the question that Clause 8 stand part of the Bill.

Clause 9

Clause 9 is intended to make it easier to convict an employer who employs an undocumented migrant. The DLA consider that this is an unnecessary extension of existing provisions, which already place a duty on landlords.

Under the existing offence an employer will be guilty if he employs a person knowing that the person is not entitled to do that work in the UK. As the explanatory notes state, the government believes that too many employers don't bother to find out whether a person can lawfully work in the UK and therefore fall outside the offence which requires knowledge of an employee's immigration status.

The proposal in the bill is to change the wording so that knowledge is not required, so that an employer or contractor will also commit an offence if he employs a person without specific knowledge but 'having reasonable cause to believe' the person is not entitled to do that work in the UK, and the sentence is to be increased from 2 years' imprisonment to 5 years.

Under the Bill an employer will also commit an offence if he employs a person who is disqualified from employment because of their immigration status and, although without specific knowledge, has 'reasonable cause to believe' the person is for that reason disqualified from employment. The sentence for both offences is to be increased from 2 years' imprisonment to 5 years.

By increasing the risk of criminal prosecution and longer sentence, the likelihood of discrimination by employers is similarly increased. These changes create an even greater disincentive to taking on any employee where there is any risk that they might not be entitled to work in the UK.

Employers may not be easily able to establish a positive right to work, and there is a real likelihood that refusal of work will be justified in terms of not wanting to take a risk. We are concerned that this will lead to a tendency for some to recruit only white British people; whilst others impose far more onerous requirements to prove status on any one who appears different before employment is offered.

Further, with the imposition of employment tribunal fees deterring most potential discrimination claimants and particularly those who are denied employment, there is a real likely hood that even blatant direct race discrimination is likely to go unchallenged.

DLA encourages your Lordships to consider joining Lord Rosser and Lord Kennedy of Southwark in opposing the question that Clause 9 stand part of the Bill.

Alternatively DLA would draw your Lordships' attention to the amendment to Clause 9 tabled by Lord Rosser and Lord Kennedy of Southwark which would generally tighten the conditions for criminal prosecution in place of the Bill's wider/looser conditions intended to enable far more prosecutions which would tighten the conditions for criminal prosecution, requiring either knowledge or recklessness, in place of the Bill's wider/looser condition, 'has reasonable cause to believe', intended to enable far more prosecutions.

<u>"Right to Rent"</u>

The Bill seeks to strengthen the civil penalty scheme which the Immigration Act 2014 imposes on landlords and letting agents who are prohibited from allowing any person whose immigration status excludes a 'right to rent' to occupy residential property as a tenant or a lodger. The 2014 Act scheme was piloted in the West Midlands from 1 January 2015. However, the Prime Ministers announcement in a speech in May 2015 that it would be rolled out nationwide came before a full evaluation of the impact of that scheme was published.

In the 2014 Act, Parliament acknowledged the strong likelihood that penalising landlords or their agents if they failed to satisfy themselves regarding the immigration status of prospective tenants or lodgers would lead to increased housing discrimination based on colour, nationality, ethnic or national origins, and incorporated into the Act the requirement for a statutory code of practice for landlords or agents on avoiding discrimination. A main factor in the evaluation of the pilot scheme was the extent to which it had resulted in increased discrimination.

Following evaluation, the main finding in the published results of Home Office research[1] on the impact of the pilot scheme is a general lack of knowledge about the scheme resulting in non-compliance by a majority of landlords and agents. In some cases in the pilot area there was some evidence of different treatment of BME prospective tenants.

Research by the Joint Council for the Welfare of Immigrants[2], also with a relatively small sample size, suggests that discrimination is likely to follow when landlords and agents fully appreciate the scale of civil penalties they could face.

[1] Evaluation of the Right to Rent Scheme, Home Office, Research Report 83, October 2014
[2] "No Passport Equals No Home": An independent evaluation of the Right to Rent scheme, Joint Council for the Welfare of Immigrants, 3 September 2015

There is wide consensus that the West Midlands pilot scheme should continue, possibly supplemented with a second pilot in an area of greater housing pressure for example, a London borough, with better guidance for landlords and agents, better guidance for prospective tenants or lodgers and sufficient time for effective evaluation. More is needed than the statutory codes of practice, which in the original and revised version (Draft - Right to Rent Code of Practice for Landlords and Agents) which is due to come into force on 1 February and the continuing Code of Practice for Landlords - Avoiding unlawful discrimination when conducting 'right to rent' checks in the private residential sector, are not easy to understand.

DLA encourages your Lordships to consider the proposed New Clause to follow Clause 16, tabled by Baroness Hamwee and Lord Paddick which would defer for at least three years the national roll-out of the 'right to rent' scheme until publication of a comprehensive evaluation of pilot schemes in designated local authorities.

Clause 13

Not only is the government intent on making the 'right to rent' scheme a national scheme but, in the current Immigration Bill seeks to impose increased criminal sanctions on landlords and agents for failure to take specified actions. The Bill adds to the 2014 Act new section 33A making it an offence, punishable by up to 5 years' imprisonment, if a landlord knows or has reasonable grounds to believe that one of their residential premises is occupied by an adult, not necessarily the named tenant, who is disqualified by their immigration status from doing so.

A second offence is committed if the landlord knows or has reasonable grounds to believe that a tenant continues to occupy premises after their limited right to occupy has come to an end and fails to notify the Home Secretary as soon as reasonably practicable of this fact. With a new threat of prosecution and imprisonment hanging over landlords, the DLA considers it right to expect that landlords will have even greater incentive to refuse to accept as tenants and accompanying occupiers any person who looks or sounds foreign. By doing so landlords will avoid altogether the acknowledged burden of having to read, compare likenesses of potentially hundreds of possible documents of non-UK citizens and will choose race discrimination as the safer option.

The DLA anticipates that in parallel letting agents may find unlawful discrimination preferable to risking prosecution for new criminal offences set out in new section 33B of the Immigration Act 2014.

In addition, the DLA is very concerned that a further impact will be unlawful evictions of tenants or occupiers because of suspicions or concerns with no real redress or remedy for those evicted.

Clause 18 - Offence of driving in the UK

The Explanatory Notes for the Bill state (para. 15) that making it a criminal offence for an undocumented migrant to be driving a vehicle on a road in the UK "fits with the wider agenda of making it difficult for those seeking to establish themselves in the UK unlawfully". To make a new stand-alone offence related solely to driving offers an opportunity to raise the spectre of seizure and, following conviction, forfeiture of the vehicle.

The DLA is concerned about this new offence for a number of reasons.

Under the Immigration Act 1971, s.24, it is already an offence to enter or remain in the UK without leave, whether the person is walking, driving, sitting or sleeping. The driver may hold a valid licence from another jurisdiction and be driving a taxed vehicle which he owns or has full permission to drive, fully covered by insurance. As the Explanatory Notes continue, "In practice we anticipate that this new offence will be used mainly by the police who, in the course of their work, may encounter illegal migrants driving on UK roads."

The prospect of the enforcement of this offence as part of day-to-day policing needs to be considered in the context of the differential treatment that occurs in day to day policing. It is by now well known that year on year the statistics for police use of their stop-and-search powers show that these powers are consistently used disproportionately against black and Asian people. The recent report by Her Majesty's Inspectorate of Constabulary[3], looking for the first time at police stops under s.163 of the Road Traffic Act 1988 found that the proportion of BME drivers who reported having been stopped was almost double the proportion of white drivers who reported such stops. The DLA is concerned that this new offence gives the police a basis for stopping vehicles being driven by a person who looks foreign.

In most cases the driver will be fully entitled to be driving on a UK road, and are concerned at the probable disproportionate impact on black and ethnic minorities of having to prove their right to drive, the associated inconvenience and damage to community relations. The need to establish the right late at night on a dark street may mean that the driver cannot continue on their journey but may be arrested on suspicion and taken to their home to produce relevant passport or other documentation. In the view of the DLA this new offence adds nothing and offers no gain, but may cause new and serious harm to police community relations.

Clauses 47 - 50 English language requirement for public sector workers

While appreciating that these provisions derive from a Conservative Party manifesto commitment, the DLA regards them as both excessive and unduly restrictive. It is the fiduciary duty of every public authority to provide services which will best meet the needs of its service users. Some public authority services depend on good oral communication

[3] Stop and Search Powers 2: Are the police using them effectively and fairly? HMIC, March 2015

between staff and service users, for example teachers, librarians, social workers, doctors, certain prison staff; some services require only a minimum amount of communication, for example, housing maintenance and repair staff, school meals staff, environmental health officers; and some services require almost no communication with members of the public who benefit from the service including refuse collection staff, staff responsible for road maintenance or cleansing of gulleys and drains. It is correct to expect that each public authority will in the recruitment, training and management of its staff, ensure that staff in customer-facing roles have the requisite language skills to carry out such roles.

What the DLA queries is the necessity for detailed legislation and a lengthy statutory code of practice to achieve what is good employment practice. If any legislation is needed, which we doubt, it could be a simple single clause making it a duty on providers of services to the public to ensure that all staff have the language fluency necessary to communicate effectively and clearly to meet the requirements of their post.

It is relevant to remind your Lordships that from the early days of the Race Relations Act 1976 the use of English language requirements has been the subject of challenge as indirect discrimination, since, depending on the standard of English specified, disproportionately men and women of certain ethnic or national origins or nationalities may be disadvantaged; the language requirement will only be indirect discrimination if the employer is unable to show that it is a proportionate means of achieving a legitimate aim. Put simply, that the standard of English is appropriate and necessary for the performance of the job in question. The DLA is concerned that Clause 47 may result in public authorities demanding standards of English beyond what is necessary for particular jobs, thereby potentially discriminating against workers fully able to perform the job for whom English is not a first language. To increase barriers to employment for ethnic minorities is unwelcome and wholly undesirable.

The DLA is surprised s that private and voluntary sector contractors providing public services are not included under these requirements from the outset. Instead Clause 49 enables the Home Secretary to extend the duty to external providers at a later date. Any review of the customer-facing roles within local authorities, health services, prisons, government departments will find a high proportion of such roles now carried out by employees of private and voluntary sector contractors. If your Lordships agree to the provisions in Clause 47 then the DLA strongly recommends that contractors providing public services should be subject to the same duty at the same time as public authorities.