OPINION

for

JUSTRIGHT SCOTLAND & THE SCOTTISH REFUGEE COUNCIL

concerning

THE NATIONALITY AND BORDERS BILL

1 SUMMARY

1.1 Identification of victims of human trafficking:

1.1.1 Clauses 48 and 49 of the NBB amend the Modern Slavery Act 2015 and reduce the recovery period using the test that already applies under section 9 of the Scottish Trafficking Act: namely whether there are reasonable grounds to believe that an adult is a victim of an offence of human trafficking.

1.1.2 Potential for conflict exists because section 9 of the Scottish Trafficking Act entitles the Scottish Ministers to change the criteria to be applied in determining whether there are reasonable grounds to believe whether a person is a victim of trafficking and to change the identity of the authority responsible for making that determination.

1.1.3 There is a fair to good argument that the parts of Clause 49 that concern the start and end points and duration of the recovery period fall within the legislative competence of the Scottish Parliament. The same cannot be said of Clause 49(3) which prohibits the removal of a person during the recovery period.

1.2 Information notices and associated penalties:

1.2.1 There is a good argument that Clauses 46 and 47 of the NBB fall within the legislative competence of the Scottish Parliament.

1.2.2 We would expect the Scottish Ministers and Crown Office to be concerned about the UK Parliament passing provisions in relation to, *inter alia*, the credibility of individuals who

claim to be victims of trafficking where the law relating to human trafficking is generally within the legislative competence of the Scottish Parliament.

1.3 Criminalisation of victims of human trafficking/slavery and of refugees: new offences:

1.3.1 The Lord Advocate's instructions issued under section 8 of the Scottish Trafficking Act will continue to apply if Clause 37 of the NBB is enacted. Prosecution will remain subject to the public interest test.

1.3.2 there is a fair argument that Clause 51 of the NBB, to the extent it concerns when a person has made a trafficking claim in bad faith, falls within the legislative competence of the Scottish Parliament and should therefore be the subject of a legislative consent motion.

1.3.3 There may be some traction to be gained by lobbying Scottish Government on the potential for a legislative consent motion but the mitigation of these provisions may rest on the approach of the Lord Advocate to prosecution of the new offences.

1.4 Criminalisation of victims of human trafficking/slavery and of refugees: protection from refoulement and defences:

1.4.1 The NBB, if enacted, will not directly affect the content or validity of the guidance published by the Crown Office and Procurator Fiscal Service in 2015 in respect of section 31 of the Immigration and Asylum Act 1999: *Policy on Application of section 31 of Immigration and Asylum Act 1999 in respect of Refugees or Presumptive Refugees*.

1.4.2 However, if the amendments made by Clause 35 supersede the underlying case law on which the Guidance is based, a procurator fiscal could not apply the Guidance in a manner which is contrary to statute.

1.5 Age assessment:

1.5.1 The UK Parliament is entitled to legislate in relation to the conduct of age assessments as they may be required for immigration purposes but also for any other purposes.

1.5.2 There is at least a risk that regulations made by the Secretary of State under Clause 58 of the Bill might seek to regulate the making of age assessments, in relation to relevant persons, for other (devolved) purposes. To the extent that Clause 58 is capable of authorising such regulations then it should be subject to the legislative consent convention.

1.5.3 There will be impacts on Scottish local authorities if the regulations require a departure from the approach to age assessment established by the courts and supplemented by the guidance produced by Scottish Government. It could lead to a situation in which local authorities are required to make age assessments by reference to different criteria depending on the statutory regime for which the assessment was being made.

1.5.4 Any regulations made under Clause 58 may themselves be open to challenge by way of judicial review on grounds including breach of the ECHR rights of those affected.

1.5.5 Clause 58 could be deleted and the making of age assessments would continue to be a matter governed by common law principles established and developed by the courts in each jurisdiction.

1.5.6 Clause 58 could be amended to make it clear that regulations made under it may make provision for age assessment only in relation to immigration purposes.

1.6 Differential treatment of refugees according to manner of entry:

1.6.1 It is not clear to us whether the combined effect of Clauses 10 and 11 is in fact to empower the Secretary of State to make different provision for accommodation for asylum seekers based solely on their status as Group 1 or Group 2 refugees.

1.6.2 We are also not persuaded that that the power would in itself authorise differential treatment in areas such as the provision of healthcare, education, homelessness and housing services.

1.6.3 Where an asylum seeker is made subject to an NRPF condition then the provisions of the 1999 Act that exclude that asylum seeker from various benefits and services will bind the Scottish authorities responsible for those benefits and services.

1.6.4 Where Scottish public authorities have powers and duties in relation to individuals and those powers and duties are *not* excluded by primary legislation the public authorities remain responsible for discharging those duties in respect of refugees.

1.6.5 Should the Secretary of State seek to use the new powers to exclude or restrict the access of Group 2 refugees to healthcare, education and other services Scottish public authorities would have to take a view on the lawfulness of that decision or decisions and how they should respond in terms of continuing or ceasing to exercise their functions in respect of Group 2 refugees.

1.6.6 The scope of Clause 10(5) is extremely unclear and objectionable for that reason: affected individuals will have legitimate doubt about the kinds of differential treatment that is to be permitted.

1.6.7 Leaving aside the possibility of deleting the Clause in its entirety, one mitigation would be an amendment to delete the words "for example" in Clauses 10(5) and (6) so that the provision was clearly limited to the listed matters.

1.6.8 We think that there is only a weak argument that these provisions would be within the legislative competence of the Scottish Parliament and therefore subject to the legislative consent process.

1.7 Legal advice and support to "offshored" claimants:

1.7.1 The key question in terms of the availability of legal aid and advice and assistance is whether the Court of Session has jurisdiction to determine the matter in respect of which an offshored claimant seeks advice or representation.

1.7.2 A claimant who had reached Scotland before being offshored would be more likely than a claimant who had not to be able to persuade the Court of Session that it had jurisdiction.

1.7.3 Where a claimant is apprehended in the UK's territorial waters the question of jurisdiction is liable to turn on where exactly the claimant has reached. The Scottish courts have jurisdiction to hear disputes occurring in the territorial sea around Scotland's coasts.

1.7.4 The most certain means by which Clause 26 and Schedule 3 of the NBB could be mitigated would be through the inclusion of specific legislative provisions making it clear which courts have jurisdiction to deal with applications for judicial review against an offshoring decision.

1.7.5 The Scottish Parliament could pass legislation amending the Legal Aid (Scotland) Act 1986 Act to make express provision for support for offshored claimants.

1.7.6 The Scottish Ministers could make similar provision by regulations using section 36(1) of the 1986 Act.

1.7.7 In relation to advice and assistance, the current restriction on the availability of advice and assistance on questions of UK law to persons who might enforce that UK law in the Scottish courts arises not from the express words of the 1986 Act but from its interpretation by SLAB, as expressed in the guidance. SLAB could be invited to re-consider that interpretation in the context of offshoring decisions.

2 BACKGROUND

2.1 We have been asked for an opinion on certain aspects of the Nationality and Borders Bill ('the NBB') which was introduced in the UK Parliament by the UK Government in the summer of 2021.

2.2 In particular we are asked whether those parts of the NBB identified in our instructions:

2.2.1 impact on devolved competences and, if so, to what extent; and

2.2.2 impact on the responsibilities of "duty bearers" in areas of devolved competence, i.e. those public bodies who exercise powers and functions within devolved competence.

2.3 We are also asked whether, if there are such impacts, whether and how the impacts could be mitigated.

2.4 We are asked to comment specifically on:

2.4.1 the impact of the NBB on the identification of victims of human trafficking;

2.4.2 the potential effect of the NBB in criminalising survivors of human trafficking and/or slavery and those arriving irregularly in the United Kingdom;

2.4.3 the provisions of the NBB concerning age assessment;

2.4.4 the provisions of the NBB that result in differential treatment of refugees depending on how they arrive in the United Kingdom; and

2.4.5 the provisions of the NBB that allow for "offshoring" the processing of protection claims and the impact of those provisions on the ability of legal advice agencies such as JustRight Scotland to provide support to claimants under the current legal aid regime.

3 IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING

3.1 We have seen an email exchange between the Scottish Refugee Council and the Home Office in August 2021 in which the former asked the latter:

"Is it the position of the UK government in respect of this Bill and generally, that the decision to identify (i) a potential and (ii) a confirmed, trafficking / slavery survivor by a Competent Authority (as envisaged in ECAT) is in the legislative competence of the Scottish parliament?"

3.2 The response of the Home Office was that:

"In response to your query, we ask 'the decision to identify a potential / confirmed victim for what purpose?

If the purpose is to provide support and assistance to a victim of a relevant offence, our response is that this is clearly a devolved matter, which sits within the legislative competence of the Scottish Parliament (noting relevant provisions of the Human Trafficking and Exploitation (Scotland) Act 2015 in respect of Scotland and of the Modern Slavery Act 2015 in respect of England and Wales).

If the purpose is to identify a victim for any purpose which can impact on their immigration status e.g. protection from removal under the recovery period or potential to be granted discretionary leave following a conclusive grounds decision, our response is that this is a reserved matter."

Clauses 48 and 49 of the NBB

3.3 Clause 48 of the NBB, if passed, would amend sections 49 to 51 and section 56 of the Modern Slavery Act 2015 (with a new section 50A to be inserted via Clause 52 of the NBB). Sections 49 to 51 of the Modern Slavery Act extend only to England and Wales and concern both the guidance to be issued by the Secretary of State to public authorities in England and Wales relating to the identification and support of victims of human trafficking and the support to be provided.

3.4 Clause 48 would not amend the parallel provisions contained in the Human Trafficking and Exploitation (Scotland) Act 2015 ("the Scottish Trafficking Act") on provision of support to potential victims of human trafficking in Scotland by the Scottish Ministers.

3.5 Clause 49 of the NBB provides that the recovery period – the minimum period beginning on the date on which the 'positive reasonable grounds decision' is made and ending on the date on which a conclusive grounds decision is made – is to be 30 days. The identified potential victim may not be removed from the UK during the recovery period. Clause 49 of the NBB extends to the whole of the UK.

The Human Trafficking and Exploitation (Scotland) Act 2015

3.6 Section 9 of the Scottish Trafficking Act prescribes the conditions under which support is to be provided by the Scottish Ministers to potential victims of human trafficking.

3.7 The duty imposed by section 9(1) to provide support arises *"where there are reasonable grounds to believe that an adult **is** a victim of an offence of human trafficking*". The duty commences on the date on which *"it is determined there are reasonable grounds to believe that the adult **is** a victim of an offence of human trafficking".*

3.8 Section 9(6) provides that for the purposes of section 9 *"there are reasonable grounds to believe that the adult **is** a victim of an offence of human trafficking if a competent authority has determined for the*

purposes of Article 10 of the Trafficking Convention (identification of victims) that there are such grounds".

3.9 Section 9(8) empowers the Scottish Ministers to modify various elements of section 9 including the identity of the competent authority and the circumstances in which there are reasonable grounds to believe that the adult **is** a victim of an offence of human trafficking.

Analysis

3.10 Our reading of clauses 48 and 49 of the NBB is that they amend the Modern Slavery Act 2015 and reduce the recovery period using the test that already applies under section 9 of the Scottish Trafficking Act: namely whether there are reasonable grounds to believe that an adult ***is*** a victim of an offence of human trafficking.

3.11 The UK Government may argue that the amendments achieve a consistency in the tests applicable throughout the UK (and in particular restrict the scope of the current duty on the Secretary of State to provide support in England and Wales so as to match the scope of that duty in Scotland).

Potential for conflict with devolved competences

3.12 The potential for conflict exists because section 9 of the Scottish Trafficking Act entitles the Scottish Ministers to change the criteria to be applied in determining whether there are reasonable grounds to believe whether a person is a victim of trafficking and to change the identity of the authority responsible for making that determination.

3.13 In the event that those powers were exercised by the Scottish Ministers – or indeed if the Scottish Parliament passed primary legislation for the same purpose – then different mechanisms and tests might in future exist for identifying potential victims of trafficking in Scotland (a) on the one hand for the purposes of providing support under the Scottish Trafficking Act and (b) on the other hand for the purposes of the recovery period provided for by Clause 49 of the NBB.

3.14 There is no question that the UK Parliament is entitled to make provision for the identification of victims of human trafficking for the purposes of the provision of support and for the purposes of recovery period and removal from the United Kingdom.

3.15 There is a further question as to whether any such provision (including Clause 49 of the NBB) would fall within the Scottish Parliament's legislative competence and would therefore trigger the legislative consent convention. That turns on whether the Scottish Parliament could itself pass Clause 49 of the NBB.

The immigration reservation in the Scotland Act 1998

3.16 The Scottish Parliament may not make laws that "relate to" reserved matters. In this context the relevant reservation is that of *"nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents"* (Scotland Act 1998, Schedule 5, para B6).

3.17 The Scottish Ministers may not (save in limited circumstances) make secondary legislation (such as regulations under section 9 of the Scottish Trafficking Act) that contains provisions that would be outside the Scottish Parliament's legislative competence if included in primary legislation.

3.18 Whether a provision of legislation relates to reserved matters is to be assessed by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

3.19 There is now significant caselaw from the courts, including the UK Supreme Court, on how the question of whether a provision of an Act of the Scottish Parliament "relates to" a reserved matter. The caselaw is complex and not always consistent but the position has been summarised as follows:

"In order to "relate to" a reserved matter, a provision of a Scottish Bill must have "more than a loose or consequential connection" with it: Martin v Most 2010 SC (UKSC) 40, para 49 (Lord Walker JSC). In Imperial Tobacco Ltd v Lord Advocate 2013 SC (UKSC) 153, para 26, Lord Hope DPSC observed that the question required one first to understand the scope of the matter which is reserved and, secondly, to determine by reference to the purpose of the provisions under challenge (having regard among other things to their effect in all the circumstances) whether those provisions "relate to" the reserved matter. The purpose of an enactment for this purpose may extend beyond its legal effect, but it is not the same thing as its political motivation" (In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill 2017 SC (UKSC) 13 at paragraph 27*).*

3.20 Devolution Guidance Note 10 (published by the UK Government) notes that the convention applies *"when legislation makes provision specifically for a devolved purpose"* but "*does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter".*

3.21 The general approach of the Court has been to take a relatively 'generous' approach to the Scottish Parliament's powers and the question of purpose: so, for example, legislation to increase the penalties to be imposed for road traffic offences was not reserved because its purpose was reform of the criminal justice system (devolved) and not the amendment of road traffic legislation (reserved) and the purpose of legislation to place restrictions on the packaging and visibility of tobacco products was to promote public health (devolved) and not to regulate the sale and supply of goods to consumers (reserved).

3.22 That generous approach has been modified more recently by decisions of the Supreme Court, particularly in the recent decision *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42 (6 October 2021) albeit not in the context of reserved matters.

Could the Scottish Parliament pass Clause 49?

3.23 In our view there is a fair to good argument that those parts of Clause 49 that concern the start and end points and duration of the recovery period fall within the legislative competence of the Scottish Parliament. The argument in favour of the Scottish Parliament having legislative competence is that the purpose of those parts of Clause 49 relate to the protection of victims of human trafficking and not to immigration and asylum.

3.24 In particular, it would be open to the Scottish Parliament to legislate to the effect that a conclusive grounds decision is not to be made before the end of a longer period (e.g. 45 days or 60 days or 90 days) beginning with the positive reasonable grounds decision.

3.25 We think that it is much more difficult to argue that Clause 49(3) which prohibits the removal of a person during the recovery period can be said to be within the Scottish Parliament's competence: the purpose of that provision (having regard to its effect) is in our view one that relates much more clearly to immigration.

3.26 The argument against Clause 49 being within legislative competence at all is that its overall purpose and context is one of immigration law. That is clearly the view of the UK Government: the explanatory notes to the NBB indicate that the Government does not consider that the legislative consent convention is engaged by Clause 49.

3.27 Given that the effect of Clauses 48 and 49 is to replicate the test currently contained in section 9 of the Scottish Trafficking Act, there may not be any great leverage to be obtained from arguing that Clause 49 is subject to the legislative consent convention.

3.28 However, so far as the introduction of a statutory minimum recovery period is concerned, there are certainly arguments to be made that this (and legislating as to the identity of the authority with responsibility for making a conclusive ground decision) is within devolved competence.

4 INFORMATION NOTICES AND ASSOCIATED PENALTIES

4.1 In our view there is a good argument that Clauses 46 and 47 of the NBB fall within the legislative competence of the Scottish Parliament. Clause 69 of the NBB confirms that these provisions are to extend to Scotland.

4.2 Clause 46 empowers the Secretary of State to serve a slavery or trafficking information notice on a person who has made a protection claim or a human rights claim. The context for the service of the notices is, therefore, an immigration context.

4.3 However, the information to be sought by such a notice is information that is relevant for the purposes of the competent authority making a reasonable or conclusive grounds decision in respect of the individual.

4.4 Clause 47 requires the competent authority to regard as damaged the credibility of a person who has provided relevant status information late. It would appear that the competent authority is bound by that duty for all purposes connected with the making of reasonable or conclusive grounds decisions including where such decisions are the gateway to support under section 9 of the Scottish Trafficking Act.

4.5 Reasonable and conclusive grounds decisions have as their predominant purpose the assessment of a person as being a potential victim of human trafficking or slavery. In our view an Act of the Scottish Parliament to enact Clauses 46 and 47 of the NBB would not be outside the Parliament's legislative competence: the process of identifying victims of trafficking does not on its face engage the immigration reservation in Schedule 5 to the Scotland Act 1998.

4.6 If that is correct then those clauses should be subject to the legislative consent convention.

4.7 It is likely to be argued by the UK Government that because the purpose of Clauses 46 and 47 is immigration the Clauses are therefore reserved. This is not a matter that can effectively be litigated: it is a matter ultimately for the UK Parliament and Government (and Scottish Parliament and Government) to decide whether they consider that a legislative consent motion is required.

4.8 Nevertheless, we think that the Scottish Ministers and Crown Office ought to be concerned about the UK Parliament passing provisions in relation to, *inter alia*, the credibility of individuals who claim to be victims of trafficking where the law relating to human trafficking is generally within the legislative competence of the Scottish Parliament.

4.9 In particular, if we are correct that Clause 47 would require the competent authority to treat a person's credibility as damaged for all purposes that provision will override the terms of the current (non-statutory for Scotland) guidance produced by the Home Office. Indeed that guidance will be revised to take account of changes made by the NBB.

4.10 In those circumstances the question would arise for the Scottish Parliament and Scottish Government as to whether steps should be taken to establish a separate competent authority for Scotland (using the powers under section 9 of the Scottish Trafficking Act or otherwise) and whether the Home Office guidance should be replaced with guidance as to the approach to a person's credibility, for trafficking

purposes, that is to be taken in Scotland. The Council of Europe's Convention on Action against Trafficking in Human Beings (see below) does not require signatory states to the Convention to have only one competent authority within its borders.

5 CRIMINALISATION OF VICTIMS OF HUMAN TRAFFICKING/SLAVERY AND OF REFUGEES: NEW OFFENCES

Clauses 37 and 51 of the NBB

5.1 Clause 37 of the NBB seeks to amend section 24 of the Immigration Act 1971 by introducing new criminal offences, including an offence of knowingly entering the UK without any necessary leave to enter and an offence of knowingly arriving without any necessary valid entry clearance. Conviction for these offences makes the person convicted liable to a term of imprisonment of up to 12 months on summary conviction or up to 4 years on indictment.

5.2 Clause 51 sets out exemptions to providing a recovery period (set out in Clause 49) to a potential victim of human trafficking or modern slavery on grounds that the individual is a threat to public order or has claimed in bad faith to be a victim of trafficking or modern slavery. A threat to public order includes being a "foreign criminal" as defined by section 32(1) of the UK Borders Act 2007. This definition includes individuals who are not British citizens and who have been convicted in the UK of an offence and sentenced to a year or more in prison.

5.3 The concern is that those arriving or entering the UK irregularly, such as refugees and/or persons under control of traffickers or who have suffered trafficked exploitation before arriving or entering the UK, may be prosecuted and convicted of Clause 37 offences and sentenced to more than a year in prison, with the consequence that they lose the protection of Clause 49.

5.4 Questions arise about the compatibility of these provisions with the UK's adherence to the requirements of the Council of Europe's Convention on Action against Trafficking in Human Beings ("ECAT") and the European Convention on Human Rights ("ECHR").

5.5 Article 26 of ECAT provides that signatories must, in accordance with the basic principles of their legal systems, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that their involvement has been compelled. Clients are concerned that Clauses 37 and 51 may be contrary to Article 26 of ECAT in that a person who was trafficked may be punished both by being convicted of an offence and by being denied the benefit from the protections set out in Clause 49 as a result of that conviction.

Impact on the Human Trafficking & Exploitation (Scotland) Act 2015

5.6 The law relating to human trafficking and exploitation is not the subject of a reservation in Schedule 5 to the Scotland Act 1998: it falls within the legislative competence of the Scottish Parliament. In Scotland, Article 26 of ECAT has been addressed by section 8 of the Scottish Trafficking Act.

5.7 Section 8 of the Scottish Trafficking Act provides that the Lord Advocate must publish instructions for prosecutors about the prosecution of individuals who are (or appear to be) victims or suspected victims of human trafficking or victims of related offences under section 4 of the Act (which concern slavery, servitude and forced or compulsory labour). These instructions must include the factors to be taken into account or steps to be taken when deciding whether to prosecute a person who commits an offence having been compelled to do so where that compulsion is directly attributable to them being, or appearing to be, a victim of an offence of human trafficking.

5.8 The most recent version of these instructions was published in August 2021.[1]

5.9 In determining whether or not to prosecute any offence, the procurator fiscal must determine whether or not it is in the public interest to do so. The Lord Advocate's instructions state:

"*To commence or continue with a prosecution against someone who has committed a criminal act as a result of being trafficked or exploited would risk re-traumatising the individual, would in some circumstances be contrary to obligations imposed by European and national law and would not be in the public interest*."

5.10 The instructions relate to any criminal offence and they expressly acknowledge that the offences which may be committed by those who are trafficked may change over time. Paragraph 4 states:

"*The list of offences which victims of human trafficking or exploitation may commit is constantly evolving. The most common types of offences which victims commit in the process of trafficking or exploitation include immigration offences and possession of false identity documents."*

5.11 The instructions state that there is "*a strong presumption against prosecution*" of an adult of an offence where there is "r*eliable and credible information to support*" the fact that the person:

- is a victim of human trafficking or exploitation;
- has been compelled to carry out the offence; and
- the compulsion is directly attributable to being the victim of human trafficking or exploitation.

5.12 There is also "*a strong presumption against prosecution*" of a child for an offence where there is "r*eliable and credible information to support*" the fact that the child:

[1] https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance?showall=&start=4

- is a victim of human trafficking or exploitation; and
- the offending took place in the course of or as a consequence of being the victim of human trafficking or exploitation.

5.13 The instructions state that cases of this nature must be reported to the National Lead Prosecutor for Human Trafficking and Exploitation for a final decision on prosecution. They also note that the individual may not identify themselves as a victim and the absence of an NRM referral does not mean that the accused is not a victim of human trafficking or exploitation.

5.14 The Lord Advocate's instructions will continue to apply if Clause 37 of the NBB is enacted: the NBB does not seek to compel the Lord Advocate to proceed with prosecution of any offence. Prosecution will remain subject to the public interest test. In applying this test, procurator fiscals must continue to act in accordance with the Lord Advocate's guidelines.

Other impacts of Clauses 37 and 51 on devolved competences

5.15 As noted above, Clause 51 of the NBB empowers the Secretary of State to 'penalise' a person convicted of an offence introduced by Clause 37 and who has received a prison sentence of 12 months or more. However, it also empowers the Secretary of State to similarly penalise a person who has *"claimed to be a victim of slavery or human trafficking in bad faith".* The UK Government contends that this provision reflects article 13 of ECAT which provides that signatory states are not bound to observe the recovery and reflection period if it is found that victim status is being claimed improperly.

5.16 The NBB gives no further guidance on the meaning of "bad faith" and how that is to be assessed.

5.17 As noted above, the law relating to human trafficking is not reserved to Westminster. While it seems to us clear that it would not be within the legislative competence of the Scottish Parliament to make provision about the consequences in immigration law of a person being found to have claimed victim status improperly, there is in our view a fair argument (for the same reasons given earlier about the information notice provisions of the NBB) that provisions that empower a public authority to determine when a person has made a trafficking claim in bad faith do fall within the legislative competence of the Scottish Parliament and should therefore be the subject of a legislative consent motion.

5.18 The explanatory notes to the NBB indicate that the UK Government does not believe that Clause 51 falls within devolved competence and that no legislative consent motion is required. It would no doubt argue that the impact of Clause 51 on devolved matters is merely incidental to the provision's (reserved) immigration purposes.

5.19 We would again expect Scottish Ministers and Crown Office to have an interest in legislation to be passed by Westminster that is directed towards the regulation of the law of human trafficking.

Mitigation of Clauses 37 and 51

5.20 There may be some traction to be gained by lobbying Scottish Government on the potential for a legislative consent motion in respect of these provisions.

5.21 Given, however, that the UK Parliament can pass them without the consent of the Scottish Parliament, the mitigation of their ultimate impact may rest on the approach of the Lord Advocate to prosecution of the new offence.

6 CRIMINALISATION OF VICTIMS OF HUMAN TRAFFICKING/SLAVERY AND OF REFUGEES: PROTECTION FROM REFOULEMENT AND DEFENCES

Article 33 of the Refugee Convention

6.1 Under Article 33 of the Refugee Convention protection from refoulement may not apply where, having been convicted of a particularly serious crime, a refugee constitutes a danger to the community.

6.2 Clause 35 seeks to amend the definition of "a particularly serious crime" in section 72 of the Nationality, Immigration and Asylum Act 2002 from a crime that received a sentence of two years imprisonment to a crime that received a sentence of one year in prison. There is a rebuttable presumption that, as a result of being convicted of a particularly serious crime, the individual poses a danger to the community of the UK.

6.3 An individual convicted of an offence as set out in clause 37 could be subject to automatic deportation unless they can successfully argue in legal proceedings that to do so would breach their Article 8 ECHR rights in accordance with the exemptions set out in Part 5A of the 2002 Act.

Article 33 of the Refugee Convention and Section 31 of the Immigration and Asylum Act 1999

6.4 Our instructions refer to the guidance published by the Crown Office and Procurator Fiscal Service in 2015 in respect of section 31 of the Immigration and Asylum Act 1999: *Policy on Application of section 31 of Immigration and Asylum Act 1999 in respect of Refugees or Presumptive Refugees* (the "Section 31 Guidance").

6.5 Section 31 of the 1999 Act sets out a defence which may be available to refugees who are charged with certain crimes and is the UK's response to Article 31(1) of the Refugee Convention which

provides that:

"*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

6.6 This provision was interpreted in *R v Uxbridge Magistrates' Court and Another ex parte Adimi* [2001] QB 667 which confirmed that Article 31 applied to those seeking asylum as well as confirmed refugees and could also apply to situations where a person was seeking to leave the UK when they had been in the UK for a limited time only and were on the way to seek asylum elsewhere. Simon Brown LJ referred to refugees being "*ordinarily entitled to choose where to claim asylum*" and that a short stopover would not break the directness of their flight.

6.7 The case highlighted that Article 31 had not been given effect in UK law and shortly after this section 31 was enacted. It provides that:

"*(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—*

(a) presented himself to the authorities in the United Kingdom without delay;

(b) showed good cause for his illegal entry or presence; and

(c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country."

6.8 The offences referred to in this section in relation to Scotland are fraud, uttering a forged document, offences under section 4 or 6 of the Identity Documents Act 2010, deception (under section 24A of the 1971 Act) and falsification of documents (under section 26(1)(d) of the 1971 Act).

6.9 The scope of section 31 was considered in the case of *R v Asfaw* [2008] UKHL 31. The majority of the court held, following *Adimi*, that section 31 could also apply to an individual seeking to leave the UK and the phrase "coming directly" should be given a liberal interpretation. Lord Bingham held that:

"Subsection (2) apart, no indication was given of an intention to depart from Adimi. More importantly, no indication was given of an intention to derogate from the international obligations of the UK as fully

expounded in Adimi, as would be expected if that was the legislative intention. The indication was, rather, of an intention to reflect in statute the obligations undertaken by the UK in the Convention.

I am of opinion that section 31 should not be read … as limited to offences attributable to a refugee's illegal entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties for offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit. This interpretation is consistent with the Convention jurisprudence to which I have referred, consistent with the judgment in Adimi, consistent with the absence of any indication that it was intended to depart in the 1999 Act from the Convention or (subject to the exception already noted) Adimi, and consistent with the humanitarian purpose of the Convention."

6.10 The Section 31 Guidance currently reflects this broad interpretation of "coming directly" and the fact the defence applies to cases where individuals are in transit and seeking to leave the UK.

Impact of the NBB on the section 31 defence

6.11 If enacted, Clause 34 of the NBB would have the effect that persons who have stopped in another country outside the UK are not to be treated for the purposes of Article 31 of the Refugee Convention as having come to the UK directly unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

6.12 Therefore, the defence available under section 31 of the 1999 Act will be available to a person who has stopped in another country only where they can show that they could not reasonably have been *"expected to have sought"* protection in that other country.

6.13 Clause 34 also proposes to introduce a new section 31(4A) to provide that the section 31 defence is not available in respect of an offence committed by a refugee in the course of an attempt to leave the United Kingdom.

6.14 These proposals would override the legal effect of the decision in *Asfaw* and may as a matter of international law be incompatible with Article 31 of the Refugee Convention.

6.15 The NBB also seeks to define the circumstances in which an individual is to be judged to have presented themselves "without delay". This has not previously been defined in statute and the Section 31 Guidance provides that what is without delay is *"a matter of fact and degree; it depends on the circumstances of the case*".

6.16 Clause 34 seeks to define "present themselves without delay":

- for those arriving unlawfully in the UK, to be *"as soon as reasonably practicable after their arrival"* in the UK;
- for those who became a refugee in the UK while their presence was lawful, to be before the time when their presence in the UK became unlawful; and
- for those who became a refugee in the UK while their presence was unlawful, to be *"as soon as reasonably practicable after they became aware of their need for protection under the Refugee Convention."*

6.17 The NBB does not define "reasonably practicable". In the context of the requirement on an individual to make a claim for asylum as soon as reasonably practicable, the courts have stated that this does not mean at the earliest possible moment (*R v Mohammed Abdalla* [2011] 1Cr App R 35). This is reflected in the Section 31 Guidance which also notes that what is reasonably practicable will involve an objective and subjective element.

Application of section 31 defence to offences under section 24 of the 1971 Act

6.18 Section 31 of the 1999 Act does not refer expressly to offences under section 24 of the Immigration Act 1971 Act (which are to be amended by Clause 37 of the NBB). However, the Section 31 Guidance, at paragraph 11, states that:

"*Decisions to prosecute, not least for offences under the general criminal law rather than under Pt III of the Immigration Act, should be made only in the clearest of cases and where the offence itself appeared manifestly unrelated to a genuine quest for asylum (Admini Judgement)."*

6.19 Paragraph 24 states:

"Although section 31 applies to certain prescribed offences set out in section 31(4) at paragraph 17 other offences may well be covered by the defence if committed to facilitate entry to the United Kingdom in connection with a flight from persecution. So even if there are other charges reported at the same time as the offence mentioned in section 31(4) consideration must be given to whether the defence applies to the other offences or whether it is in the public interest to proceed with those other charges."

6.20 Offences under Section 24 of the Immigration Act 1971 are expressly noted as being amongst the other offences which would be covered.

Impact of the Bill on the Section 31 Guidance

6.21 The NBB, if enacted, will not directly affect the content or validity of the Section 31 Guidance. However, if the amendments made by Clause 35 supersede the underlying case law on which the Guidance is based, a procurator fiscal could not apply the Guidance in a manner which is contrary to statute. The Guidance would require to be amended (or at the very least applied) so as to reflect the

new provisions on the meaning of "coming directly" and those which state that the section 31 defence will not be available to offences which are committed in an attempt to leave the UK.

6.22 As mentioned above, a procurator fiscal considering a prosecution will still have to apply a public interest test in each individual case. The Section 31 Guidance states at paragraphs 26 and 27:

"Even when the criteria of section 31 are not strictly met, prosecutors must, as with every case, assess the public interest in raising proceedings.

If the facts and circumstances are not sufficient to found the defence in law, information regarding the personal circumstances or characteristics of the accused - for example, their age or the state of their physical or mental health, may be relevant factors when deciding if a prosecution is required in the public interest."

6.23 The application of the public interest test will remain unaffected by the NBB.

7 AGE ASSESSMENT

Clause 58

7.1 Clause 58 of the NBB would, if passed, confer on the Secretary of State a broad power to make regulations concerning "the processes for assessing the age of relevant persons".

7.2 Regulations to be made under Clause 58 can include provision about the test to be applied by immigration officers in determining whether a relevant person (that is, a person who requires leave to enter or remain in the UK) is a child. Regulations may also include provisions conferring functions on the Secretary of State and on **local authorities** relating to decisions as to whether a relevant person is a child, setting out the general principles and procedures to be applied in any case where it is to be decided whether a relevant person is a child and about the use of scientific methods in deciding whether a relevant person is a child.

7.3 Clause 58 extends to the whole of the United Kingdom and so the reference to local authorities must be read as including Scottish local authorities.

7.4 Age assessments are carried out by Scottish local authorities for a range of purposes and in different statutory contexts (see *L v Angus Council* 2012 SLT 304 and the discussion of *R (PM) v Hertfordshire County Council* [2011] PTSR). For example, they are carried out:

7.4.1 for the purposes of the immigration regime itself: a person will be treated differently in respect of their claim for asylum depending on whether they are an adult or a child. The Secretary of State is under an obligation to ensure that immigration functions are

discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom (Borders, Citizenship and Immigration Act 2009, s55);

7.4.2 by local authorities for the purpose of establishing whether they have obligations to a person under the Children (Scotland) Act 1995, in particular whether the person is a child to whom the authority owes a duty to safeguard and promote their welfare and/or to provide accommodation; and

7.4.3 for the purpose of establishing whether a person is a child for the purposes of the Scottish Trafficking Act.

7.5 Importantly, the Scottish Trafficking Act's provisions on age directly affect the duties owed by Scottish local authorities and health boards under other legislation. Section 12 of the Scottish Trafficking Act creates a "presumption of age": where (a) the authority has reasonable grounds to believe that a person may be a victim of an offence of human trafficking and (b) the authority is not certain of the person's age but has reasonable grounds to believe that the person may be a child then the authority must assume that the person is a child until an age assessment determines otherwise. The authority must make that assumption for the purpose of exercising the authority's functions under listed statutory provisions, including sections 22 and 25 of the Children (Scotland) Act 1995.

7.6 The conduct of age assessments is not governed by statutory provisions but by the common law. They are carried out by reference to principles established by the courts, supported in practice by guidance published by the Scottish Government: see, for example, *AU v Glasgow City Council* [2017] CSOH 122, citing *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin). The common law allows not only for challenges by way of judicial review to assessments of age but also allows for the possibility of actions for declarator of age.

Implications of Clause 58

7.7 The United Kingdom Parliament is entitled to legislate in relation to the conduct of age assessments. It may do so in relation to age assessments as they may be required for immigration purposes but also for any other purposes, including in areas that fall within the legislative competence of the Scottish Parliament and which are therefore 'devolved'.

7.8 Nevertheless, the following issues arise:

7.8.1 While it might be expected that any regulations to be made under clause 58 would relate to age assessment for immigration purposes only, the current drafting is extremely broad. There is at least a risk that regulations made by the Secretary of State might seek to regulate the making of age assessments, in relation to relevant persons, for other

(devolved) purposes. To the extent that Clause 58 is capable of authorising such regulations then it should be subject to the legislative consent convention.

7.8.2 Even if the power to make regulations is restricted to age assessment in relation to immigration matters (either expressly or because of the interpretation of Clause 58 by the courts) there will undoubtedly be impacts on Scottish local authorities if the regulations require a departure from the approach to age assessment established by the courts and supplemented by the guidance produced by Scottish Government.

7.8.3 It could (and it seems highly likely that it would) lead to a situation in which local authorities were required to make age assessments by reference to different criteria depending on the statutory regime for which the assessment was being made. An individual might be assessed differently when determining if they are a child for the purposes of the provision of support under the Children (Scotland) Act 1995, or for the purposes of the Crown prosecuting a third party for a trafficking offence that is aggravated by being committed against a child (Scottish Trafficking Act, section 6) or for the purposes of receiving the support of an independent child trafficking guardian (Scottish Trafficking Act, section 11).

7.8.4 Any regulations made under Clause 58 may themselves be open to challenge by way of judicial review on grounds including breach of the ECHR rights of those affected. This advice does not explore the ECHR issues that arise in the context of age assessment but we note that, for example, the cases of *Darboe & Camara v Italy* remain pending before the Strasbourg Court and concern whether age assessment processes violated the applicants' rights under articles 3 and 8 ECHR.

7.8.5 Should the procedures prescribed by regulations made by the Secretary of State under Clause 58 be incompatible with the Convention rights of affected individuals, local authorities risk acting in breach of their obligations under the Human Rights Act 1998 if they give effect to those procedures.

Mitigation of Clause 58

7.9 Clause 58 could be deleted and the making of age assessments would continue to be a matter governed by common law principles established and developed by the courts in each jurisdiction.

7.10 Clause 58 could be amended to make it clear that regulations made under it may make provision for age assessment only in relation to immigration purposes. This would not mitigate the practical problems that would arise for local authorities who may have to implement parallel and conflicting regimes for age assessment but would make it clear that the UK Government did not have powers, under this legislation, to prescribe age assessment processes more generally.

7.11 It would in theory be open to the Scottish Parliament to legislate, in due course, to align the process for assessing age in devolved contexts with the regime (anticipated to be) established by regulations made under Clause 58. However, the Scottish Parliament may not legislate in a manner incompatible with the Convention rights of those affected by its legislation. To the extent that any such legislation interfered with the rights of an individual under, for example, Articles 3 or 8 ECHR, it would be challengeable.

Statutory right of appeal

7.12 Clause 58(2)(e), if enacted, would confer on the Secretary of State the power to make regulations providing for appeals against age assessments to be made to the First-tier tribunal. Such provision would have the effect of displacing the current approach to challenging age assessments in Scotland (including for immigration purposes) set out in *AU v Glasgow City Council* 2017 SLT 1109 to the effect that such challenges should be brought by way of judicial review.

7.13 It is open to the UK Parliament to legislate in relation to remedies in the context of immigration law but there is the potential again for different processes to exist for the challenge of age assessments in different contexts.

Proposed Government amendments to the Bill

7.14 In the period since we were first instructed the UK Government has brought forward proposed amendments to the Bill relating to age assessment. We have not had the opportunity to analyse those in detail but they appear to support the analysis that it is intended that Scottish local and other authorities be bound by the age assessment mechanisms to be introduced by the Bill in relation to their functions generally in respect of children and young people who are subject to immigration control.

7.15 The amendments also appear to impose a positive duty on authorities, including Scottish local authorities, to refer a young person for age assessment even where the authority has accepted that the person is a child: an individual would be 'age-disputed' if the authority had 'insufficient evidence' to be sure of the person's age even if the authority itself was prepared to treat them as a child.

7.16 It appears to us that these amendments would also engage the legislative consent convention.

8 DIFFERENTIAL TREATMENT OF REFUGEES ACCORDING TO MANNER OF ENTRY

8.1 Our instructions refer to Clause 10 of the NBB which, if passed, would entitle the Home Secretary (and immigration officers) to treat differently "Group 1" and "Group 2" refugees. Group 1 refugees are those who (i) have come to the UK directly from a country or territory where their life or freedom was

threatened; (ii) presented themselves without delay to the authorities; and (iii) can show good cause for their unlawful entry or presence in the UK (if applicable). All other refugees are Group 2 refugees.

8.2 Our instructions also refer to the potential for the Secretary of State to accommodate Group 2 refugees (who are subject to inadmissibility consideration or declaration) in secure accommodation centres and to render such refugees destitute and to the potential for Clause 10 to be used to make other changes in the Immigration Rules beyond the matters listed in Clause 10.

Clauses 10 of the Bill

8.3 Clause 10(5) provides that the Home Secretary (and immigration officers) may treat Group 1 and Group 2 refugees differently "for example in respect of" certain listed matters. Those listed matters are (i) the length of any period of leave to enter or remain given; (ii) the requirements the refugee must meet to be given indefinite leave to remain; (iii) whether the refugee is made subject to a 'no recourse to public funds' condition and (iv) the treatment of the refugee's family.

8.4 Clause 10 does not expressly refer to different treatment in relation to the provision of accommodation albeit the power to treat the two groups of refugees differently is expressed broadly and it is clear that the UK Government intends that the list of matters referred to in Clause 10(5) should be read as being non-exclusive.

8.5 Clause 10 also provides that the Immigration Rules may include provision for the differential treatment allowed for by subsection 5.

8.6 Similar provision is made in relation to family members of asylum seekers.

Power to use accommodation centres and Clause 11 of the Bill

8.7 The Secretary of State is empowered by section 17 of the Nationality, Immigration and Asylum Act 2002 to arrange for the provision of accommodation in an accommodation centre for asylum-seekers and their families who are destitute or liable to become destitute. We are not aware of any case law dealing specifically with the exercise of the section 17 power (and we understand that as a matter of fact it has been used rarely).

8.8 Section 22 of the 2002 Act provides that the Secretary of State may provide support under section 95 of the Immigration and Asylum Act 1999 (which concerns destitute asylum-seekers) by arranging for the provision of accommodation in an accommodation centre.

8.9 Clause 11 of the NBB would make amendments to both the 2002 Act and the 1999 Act. In particular, it would introduce a new provision into the 1999 Act entitling the Secretary of State (when exercising the power under section 95 or 95A) to provide or arrange for the provision of different types of accommodation to supported persons on the basis of (a) the stage that their protection claim has

reached, including whether they have been notified that their claim is being considered for a declaration of inadmissibility and/or (b) their previous compliance with any conditions imposed on them under various immigration provisions.

The effect of Clauses 10 and 11

8.10 It is not clear to us whether the combined effect of Clauses 10 and 11 is in fact to empower the Secretary of State to make different provision for accommodation for asylum seekers based solely on their status as Group 1 or Group 2 refugees. Although the power conferred by Clause 10 to treat asylum seekers differently is expressed broadly there may be arguments for a narrow reading, particularly given that accommodation is specifically dealt with by Clause 11. We have not pursued that analysis further at this time but have assumed that the framework that is to be put in place may result in Group 2 refugees being treated 'less favourably' in terms of the provision of accommodation.

8.11 Our instructions also suggest that differential treatment may in due course extend into areas such as the provision of healthcare, education, homelessness and housing services.

8.12 In our view, the power to treat Group 1 and Group 2 refugees differently does not of itself confer a power to impose restrictions in relation to particular policy areas of the sort identified in our instructions. Instead, the power to impose such restrictions would itself have to exist independently of the Clause 10 power: Clause 10 simply purports to authorise differential treatment in the exercise of any such power.

No recourse to public funds

8.13 As those instructing us are aware, the imposition of 'NRPF' conditions has been the subject of considerable case law. The imposition of such a condition carries significant consequences for the individual to whom it applies. Sections 115 to 122 of the Immigration and Asylum Act 1999 have the effect of excluding such individuals from various forms of state support including social security benefits, housing and services under (in Scotland) the Social Work (Scotland) Act 1968.

8.14 These provisions do not only have the effect of excusing the relevant authorities from duties to provide such support but impose prohibitions on the giving of support. So, for example, such a person is "not to receive" assistance under section 12(1) of the Social Work (Scotland) Act 1968 (see section 120 of the 1999 Act) or Section 22 of the Children (Scotland) Act 1995. However these general prohibitions are subject to qualifications provided for by Schedule 3 to the Nationality, Immigration and Asylum Act 2002 including that support may be provided where that is necessary to avoid a breach of a person's Convention rights.

Limits on the new powers

8.15 Clauses 10 and 11 confer discretion on the Secretary of State. They do not oblige her to take any particular action. In exercising the powers to be conferred by Clauses 10 and 11 of the NBB the Secretary of State therefore remains bound to act compatibly with the Convention rights protected by the Human Rights Act 1998.

8.16 The existence of the statutory 'permission' to treat different groups of refugees differently in relation to various matters (including accommodation) would not protect the Secretary of State from challenge that the exercise of the power in particular circumstances was a breach of Convention rights (including a breach of article 14 ECHR).

8.17 Equally, in exercising that discretion the Secretary of State is also bound to comply with other duties imposed on her in respect of immigration functions, including the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children in the United Kingdom (which requires the best interests of children to be treated as a primary consideration: see *R (MM (Lebanon)) v Home Secretary* [2017] 1 WLR 771.

8.18 It has to be expected that, if passed, the exercise of the Clause 10 and 11 powers will in due course be the subject of legal challenge.

Impact on devolved authorities

8.19 The impact of these provisions on devolved authorities including Scottish local authorities will depend on the manner in which they are exercised and the nature and success of any legal challenge that may be brought in due course. We make the following observations:

8.19.1 Where an asylum seeker is made subject to an NRPF condition then the provisions of the 1999 Act that exclude that asylum seeker from various benefits and services will – but only to the extent they remove all discretion – bind the Scottish authorities responsible for those benefits and services. Authorities are not liable for acting unlawfully in terms of section 6 of the Human Rights Act 1998 where they could not have acted differently as the result of one or more provisions of primary legislation (Human Rights Act 1998, section 6(2)(a)). However, as noted above, Schedule 3 to the 2002 Act does allow for the provision of support where such support is necessary to avoid a breach of Convention rights.

8.19.2 Similarly, various other immigration provisions qualify or exclude the application of duties owed by Scottish public authorities to asylum seekers (including children). So, for example, a local authority may not provide assistance under section 22 of the Children (Scotland) Act 1995 to children in their area who are in need where the Secretary of State

is providing support under section 95 of the 1999 Act or under section 17 of the 2002 Act (i.e. by providing support in accommodation centres): see 1999 Act, section 122. Similarly, local authorities may not provide assistance under section 22 of the Children (Scotland) Act 1995 to children from whom support is withheld or withdrawn in terms of Schedule 3 to the 2002 Act, unless they require to do so to avoid a breach of Convention rights.

8.19.3 We have not attempted to map the powers and duties of Scottish public authorities that are *not* subject to exclusions arising from immigration law provisions. Where such powers and duties are not excluded by primary legislation Scottish public authorities remain responsible for discharging those duties in respect of refugees.

8.19.4 In relation to the power of the Secretary of State and immigration officers to treat Group 1 and Group 2 refugees differently, we have already said that we think there must be doubt about whether these provisions alone would entitle the Secretary of State to exclude or restrict the access of Group 2 refugees to healthcare, education and other services. In the event that she did so, Scottish public authorities would have to take a view on the lawfulness of that decision or decisions and how they should respond in terms of continuing or ceasing to exercise their functions in respect of Group 2 refugees. That would be the case even if the decision was formalised in rules made under Clause 10(8): see by analogy *RR v Secretary of State for Work and Pensions v Equality and Human Rights Commission and others* [2019] 1 WLR 6430. They would not be protected from claims of breach of Convention rights if their own response was not mandated by primary legislation.

Legislative consent to Clauses 10 and 11

8.20 The explanatory notes to the NBB published by the UK Government indicate that the Government does not consider that Clauses 10 and 11 give rise to the need for a legislative consent motion. That is on the basis that the same provisions would not be within the legislative competence of the Scottish Parliament (or the Welsh Senedd or Northern Ireland Assembly).

8.21 We agree that Clauses 10 and 11 could not be included in an Act of the Scottish Parliament: they relate to the reserved matter of immigration. Nevertheless a (weak) argument could be made that particularly in relation to NRPF and the provision of accommodation for persons in need, the effect of the new powers under Clauses 10 and 11 is to extend the circumstances in which the powers and duties of Scottish public authorities in devolved areas may be limited or eliminated. To that extent it may be said that the legislation deals with devolved matters for the purposes of the legislative consent convention. We doubt that the UK Government would be persuaded of that argument.

Mitigating the impact of Clauses 10 and 11

8.22 The scope of Clause 10(5) is extremely unclear and objectionable for that reason: affected individuals will have legitimate doubt about the kinds of differential treatment that is to be permitted. We do not consider that the Clause could be used to enable Group 1 and Group 2 refugees to be treated differently in relation to access to services such as healthcare and education but the UK Government may take a different view about its breadth. The explanatory notes to the NBB offer no assistance in what Clause 10 is intended to encompass beyond the listed matters given as 'examples'.

8.23 Leaving aside the possibility of deleting the Clause in its entirety, one mitigation would be an amendment to delete the words "for example" in Clauses 10(5) and (6) so that the provision was clearly limited to the listed matters.

9 LEGAL ADVICE AND SUPPORT TO 'OFFSHORED' CLAIMANTS

9.1 You have asked us about the potential impact of the "offshoring" provisions on the ability of asylum seekers to access legal advice and, in particular, access to legal aid. You have identified three factual scenarios in which the need for legal support may arise:

9.1.1 An asylum seeker is apprehended in territorial waters in the Channel and then moved straight to an offshore facility.

9.1.2 An asylum seeker reaches Kent, claims asylum, and is present for a period of time for purely health/logistical reasons, before being removed to an offshore facility.

9.1.3 An asylum seeker presents in Scotland, claims asylum, and is then offshored.

"Offshoring"

9.2 Clause 26 and Schedule 3 of the NBB would make amendments to current legislation to make it easier for individuals to be removed to a third country while their asylum claim is pending and is intended to support what is described as "*the future object of enabling asylum claims to be processed outside the UK and in another country*".

9.3 In particular, amendments are intended to be made to section 77 of the Nationality, Immigration and Asylum Act 2002 and to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

The Legal Aid (Scotland) Act 1986 ("the 1986 Act") and SLAB Guidance

9.4 Section 13 of the 1986 Act defines civil legal aid as representation (and other incidental/preliminary forms of assistance) by solicitor or counsel in respect of certain proceedings listed in Schedule 2 to

the 1986 Act. The availability of civil legal aid is subject to certain conditions prescribed by sections 14 and 15 and by regulations made under section 13. However, these conditions do not require the applicant to be present in Scotland to be eligible for civil legal aid. Rather, the requirement for a 'Scottish' connection is served by restricting the proceedings listed in Schedule 2 to the 1986 Act to proceedings in Scottish courts and tribunals.

9.5 SLAB's guidance confirms this approach and both that guidance and the Civil Legal Aid (Scotland) Regulations 2002 contain provisions on the formalities to be followed when applying for legal aid for a client who is resident outside the UK. Although not concerned with immigration matters, *Venters v Scottish Legal Aid Board* 1993 SLT 147 is an example of a litigant resident outside of Scotland (in that case in South Africa) obtaining the benefit of legal aid for proceedings in the Court of Session.

9.6 Section 6 of the 1986 Act provides that 'advice and assistance' for the purposes of the Act includes any oral or written advice on the application of Scots law. Section 8 provides that advice and assistance *"shall be available in Scotland for any client*" provided certain financial conditions are met. We do not consider this provision requires the client to be in Scotland, provided the advice is in relation to a matter of Scots law. SLAB's guidance confirms our understanding but explains:

"A client who does not live in Scotland at the time of the application for advice and assistance may still be eligible but they will need to demonstrate that the subject matter is a matter of Scots law. As explained above that includes matters of UK law which would, in the normal course of events, be enforced in the Scottish legal system.

Scots law has to be the law that applies to the client. If a client asks for advice on a matter of UK law, which applies to the client as a consequence of the client being subject to the law of another UK jurisdiction, the client is not eligible for advice and assistance under the Legal Aid (Scotland) Act 1986. If the client has a past link with Scotland, or plans to move to Scotland, this will not be sufficient if advice is to be given on a matter which does not otherwise qualify as Scots law."

9.7 We understand that in practice SLAB's interpretation of the legislation and guidance is that where a person is moved from Scotland to an immigration centre in England and served with a deportation notice in the English centre, legal aid and advice and assistance will not be available to that person because the legal issues concern a matter that would be the subject of challenge in the English courts rather than the Scottish courts.

Challenges to removal decisions

9.8 Challenges to removal decisions may be subject to rights of appeal to the Tribunal, although in cases certified by the Secretary of State under Schedule 3 to the 2004 Act the right of appeal may be required to be exercised from the third country or there may be no right of appeal at all. Where there

is no right of appeal it may be possible for the removal decision to be challenged by way of petition for judicial review (see for example *Al v Advocate General for Scotland* 2015 SLT 507).

Jurisdiction of the Court of Session re decisions of Secretary of State

9.9 Ministers of the Crown are domiciled throughout the United Kingdom for the purposes of civil proceedings against them (Civil Jurisdiction and Judgements Act 1982, section 46) and therefore, in principle, a decision of the Secretary of State that is amenable to judicial review can be challenged in any of the jurisdictions of the United Kingdom (as a result of rule 1 of Schedule 8 to the 1982 Act) which provides for a person to be sued in the place where they are domiciled).

9.10 That general principle is subject to a number of qualifications:

9.10.1 Appeals from or reviews of the decisions of tribunals are excluded from the general principle established by rule 1 of Schedule 8 to the 1982 Act. In those circumstances the question of jurisdiction is governed by the statutory rules governing the review of decisions of the particular tribunal in question or, if there are none, the common law (see *Tehrani v Home Secretary* 2007 SC (HL) 1).

9.10.2 As a matter of common law, for the Court of Session to exercise its supervisory jurisdiction there must be some connection between Scotland and the power or jurisdiction conferred on the decision-maker (*Tehrani*, para 49). Where the exercise of functions being challenged is under a system of law that applies throughout the UK and are liable to be felt by a person "in Scotland" then the Court of Session is likely to have jurisdiction (*Tehrani*, para 52).

9.10.3 However, even where the Court of Session has jurisdiction, it is possible that the Court may be persuaded to refuse to exercise that jurisdiction on the basis of a plea of *forum non conveniens* – when another court within the UK may be the most appropriate forum in which the case should be considered.

Implications of Clause 26 and Schedule 3

9.11 Because the availability of civil legal aid is available only in connection with proceedings in those Scottish courts listed in Schedule 2 to the Legal Aid (Scotland) Act 1996, the key question will be whether the Court of Session has jurisdiction to determine an application to the supervisory jurisdiction by a person challenging a removal decision. So far as advice and assistance is concerned, the effect of the Scottish Legal Aid Board's guidance on matters of UK law is that the availability of advice and assistance turns on whether the matter that is the subject of the advice may be enforced in the Scottish legal system: again the jurisdiction of the Court of Session will be key.

9.12 In terms of the three scenarios presented to us, we think that there must be real doubt about whether the Court of Session would consider that a claimant who had reached Kent and spent time there before being subject to removal had a sufficient connection with Scotland such as to confer jurisdiction to determine a petition for judicial review.

9.13 By contrast, a claimant who had reached Scotland would be more likely to be able to persuade the Court that it had jurisdiction.

9.14 Where a claimant is apprehended in the UK's territorial waters the question of jurisdiction is liable to turn on where exactly the claimant has reached. The Scottish courts have jurisdiction to hear disputes occurring in the territorial sea around Scotland's coasts (and has jurisdiction to hear certain disputes occurring beyond the limits of the territorial sea as the result of specific statutory intervention, e.g. under section 11 of the Petroleum Act 1998).

Mitigating Clause 26 and Schedule 3

9.15 The most certain means by which Clause 26 and Schedule 3 could be mitigated would be through the inclusion of specific legislative provisions making it clear which courts have jurisdiction to deal with applications for judicial review against an offshoring decision.

9.16 Without such provisions it will be for the Court of Session itself to determine when it has jurisdiction to hear such claims. Where it accepts jurisdiction then legal aid will be available.

9.17 A separate question arises about whether legal aid – or advice and assistance – could be made available to support a claimant whose claim has been offshored even where the Scottish courts would not have jurisdiction to deal with a challenge to that offshoring decision. We consider that:

9.17.1 The Scottish Parliament could pass legislation amending the 1986 Act to make express provision for such support so long as such legislation was within its legislative competence: as to which, see below.

9.17.2 Separately, section 36(1) of the 1986 Act empowers the Scottish Ministers to *"make such regulations under this section as appear… necessary or desirable for giving effect to… this Act"*. Without prejudice to that generality, any such regulations may *"modify any provision of this Act so far as appears… necessary to meet"* certain special circumstances. These special circumstances are defined in section 36(3) include where a person seeking or receiving legal aid or advice and assistance is not resident in Scotland (section 36(3)(a)). In principle, the Scottish Ministers could use their regulation-making powers to make it clear that civil legal aid and advice and assistance are to be made available to persons who have been the subject of offshoring decisions even where those

persons cannot demonstrate that the Scottish courts would have jurisdiction to determine the legal issues in respect of which they require advice, assistance or representation.

9.17.3 In relation to advice and assistance, the current restriction on the availability of advice and assistance on questions of UK law to persons who might enforce that UK law in the Scottish courts arises not from the express words of the 1986 Act but from its interpretation by SLAB, as expressed in the guidance. SLAB could be invited to re-consider that interpretation in the context of offshoring decisions.

9.18 Any legislation passed by the Scottish Parliament, and any regulations made by the Scottish Ministers, would however require to be within devolved competence.

9.19 As set out above, the Scottish Parliament may not make laws that "relate to" the reserved matters of *"nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents"* (Scotland Act 1998, Schedule 5, para B6). The Scottish Ministers may not (save in limited circumstances) make secondary legislation (so may not make regulations under the 1986 Act) that contains provisions that would be outside the Parliament's legislative competence if included in primary legislation.

9.20 Whether a provision of legislation relates to reserved matters is to be assessed by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances. In our view, provisions made by the Parliament or by the Ministers using their powers under the 1986 Act to make available legal aid or advice and assistance to claimants who have been offshored, even where the enforcement of their rights may not be possible in the Scottish courts, would not engage this reservation. The purpose of such provisions would be to enable claimants to vindicate their legal rights and those provisions would have no effect on the substantive law of immigration or asylum (unless that law included express provision denying claimants access to publicly funded legal advice).

Brodies LLP

9 November 2021