

## **JustRight Scotland and Scottish Refugee Council joint advocacy briefing to Legal Opinion and Cover Note, on the devolved impacts of the Nationality and Borders Bill**

### **Q1. Why did we obtain a Legal Opinion on the devolved impacts of the Nationality and Borders Bill?**

#### *Setting the scene*

JustRight Scotland and Scottish Refugee Council jointly commissioned a legal opinion from Christine O'Neill QC and colleagues at Brodies in order to better understand the devolved impacts of the UK Government's Nationality and Borders Bill (the Bill), for Scotland, and ways to mitigate its harms.

This joint advocacy briefing conveys the shared position and recommendations of JustRight Scotland and Scottish Refugee Council, based on our reading of the legal opinion and its cover note. This briefing does not in itself express the views of the authors of the legal opinion. We therefore strongly recommend that as well as reading this briefing, you also consult the legal opinion and its cover note.

Our joint and overarching assessment is that if the Bill is left unchallenged in Scotland or in the rest of the UK, that this Bill will be a *crushing dead weight* on the rights to safety for vulnerable people, including refugees, survivors of human trafficking and exploitation and those in [statelessness](#). Within these groups, the Bill will exert severe harm on children, women surviving male violence, disabled people and those with LGBTI+ identity.

#### *Specific reasons for commissioning this Legal Opinion*

We commissioned it for three reasons:

*First*, as human rights organisations, with decades of experience in this area, we have never witnessed such a significant attack on the rights of those requiring protection in the UK. This was evidenced by the step taken, in November, by the [four UN Special Rapporteurs](#) (SRs) on trafficking in persons; on human rights of migrants; on contemporary forms of slavery; and on promotion of human rights and fundamental freedoms while countering terrorism – in writing to the UK government to raise concerns about the compliance of this Bill with the UK's obligations under international human rights law. This followed on from the [UN High Commissioner for Refugees'](#) condemnation of the Bill in its Observations, published in October.

*Second*, we do not accept that the Bill's provisions fell almost completely within competencies reserved to the UK Parliament as stated within the Explanatory Notes to the Bill. This Bill is not just about immigration law. It is about how we identify and protect the most vulnerable within our society, or not, as the Bill's provisions reflect. Not only does much in the Bill encroach into areas of policy and law devolved to Scotland but its provisions, left unchallenged, will have a far-reaching impact on how Scotland treats and protects children, survivors of human trafficking and exploitation, refugees and vulnerable person within these groups such as women survivors of male violence, disabled people, and those with LGBTI+ identity. This Bill should concern us all. Further, some parts of the Bill if implemented in Scotland would challenge or change elements of the Scottish legal system – including how people access justice and secure their rights in Scottish courts.

*Third*, to assist human rights defenders, communities, local authorities, Scottish ministers and the Scottish parliament, to act practically by taking clear legal, policy and advocacy measures to challenge any regression as to how Scotland protects vulnerable groups in our communities and interference with the current strategies and systems in place in Scotland to uphold and protect all of our human rights. Left unchallenged this Bill will also undermine, in some cases severely, the Scottish government's international human rights incorporation plans, and the Scottish Human Rights Bill.

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### **Q2. Why are we and so many others, very concerned about the Nationality and Borders Bill?**

*Widespread human rights-based international, UK and Scottish opposition against this Bill*

It is not just us that are concerned about this Bill. In April this year, JustRight Scotland and Scottish Refugee Council led a Scottish coalition against the UK government's policy framework for the Bill, in [a letter from Scotland to the Prime Minister on the New Plan for Immigration](#). These concerns against that "New Plan" and the subsequent Bill have been expressed by the wider UK refugee and anti-slavery sectors, amongst many others, as reflected [here](#), and [here](#). Scottish Ministers also [oppose](#) this Bill.

Internationally, the four UN SRs have set out a wide ranging series of concerns that elements of the Bill, will breach the UK's obligations under international law – including the particular rights of women, survivors of male violence, children, disabled people, and those with LGBTI+ identity.

Moreover, the UN High Commissioner for Refugees, which holds the specific mandate for the interpretation and implementation of the UN Refugee Convention, has published a detailed legal analysis of the Bill, stating that the Bill undermines the UN Refugee Convention and, if implemented, would "[risk the lives and well-being of vulnerable people](#)". This analysis was reinforced by a [joint legal opinion](#) instructed by Freedom from Torture that concluded the Bill is incompatible with the intention, provisions and jurisprudence – including in the highest UK courts – of the UN Refugee Convention.

In substance, this Bill is a deeply regressive shift in UK immigration law. It is punitive legislation that restructures the UK's relationship with key international human rights law, including the UN Refugee Convention but also the European Convention against Trafficking (ECAT), the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the United Nations Convention on the Rights of the Child (UNCRC).

*The Bill institutes a systemic punishment regime against people – refugees – who simply seek safety*

People seeking refugee protection in the UK already find themselves in a deeply harmful asylum system. These harms stem widespread denial by successive UK governments of fundamental socio-economic rights. The Bill is anti-refugee because it is anti-human rights legislation. It is a new nadir, severing the UK from the UN Refugee Convention. In its place, this Bill institutes a systemic [refugee punishment regime](#) to be visited immediately upon people, from countries like Afghanistan or Syria or Eritrea, who necessarily arrive irregularly and simply need safety. Precisely because this Bill prevents decision makers from seeing the "[face behind the case](#)", it will have particularly grave impacts on groups such as women survivors of male violence, children, disabled people, and those with LGBTI+ identity.

*The Bill interferes significantly and adversely with Scotland's anti-trafficking legislation and system*

Critically, some of the most harmful parts of the Bill are in areas devolved to the Scottish parliament, that they have legislated on. For example, the parliament passed the Human Trafficking and Exploitation (Scotland) Act 2015. It defined in Scotland the crime of human trafficking and exploitation. It provided rights of support and assistance to survivors. The Act also reflected that criminal prosecution in Scotland of perpetrators of this crime are in the jurisdiction of the Lord Advocate. None of this should be conflated with or tainted by UK immigration law. Increasing numbers of victims are born in Scotland, yet this Bill contains provisions that impact on how we identify and protect *all* victims.

Having both instituted a systemic punishment regime and rolled back protections for survivors of human trafficking and exploitation, the Bill lacks special provisions for children. Indeed the

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[Independent Anti-Slavery Commissioner has raised concerns about the lack of consideration given to children.](#) During the Committee stage of the passage of the Bill, the UK government stated that it did not want to create a “two-tier system” for adults and children. This is not only an absurd misunderstanding of the legitimacy of attending to the developmental capacities and legal status of children, but is deeply hypocritical, given that the creation of a two-tier system is central to the framework of this Bill.

*The Bill may lead to wider intrusions into jurisdiction and settled procedures of the Scottish legal system*

The Bill will potentially have a wider impact in Scotland beyond the UK immigration system, in ways that yet remain unclear. Parts of the legislation, if implemented in Scotland would contain powers to challenge or change elements of the Scottish legal system, including how people access justice and secure their rights in Scottish courts. The Bill also contains placeholder clauses that concentrate far-reaching powers – with impacts in devolved areas of policy and law - in the hands of the Home Secretary, which can be exercised with no, or limited, further UK or devolved parliamentary scrutiny.

### **Q3. How does this Bill affect Scotland and what can and should be done here against it?**

*The Bill is a direct, immediate and severe threat to Scotland’s aspirations to lead on human rights*

The Scottish government has taken a different approach to protecting human rights than the UK government. It has set out an ambition to be a “[world leader](#)” in using devolved powers to protect human rights. The Scottish government recently committed to build a legislative framework which incorporates key international human rights treaties by 2026. This Bill threatens that commitment by Scottish ministers, particularly if not challenged or mitigated here.

The Scottish parliament recently reaffirmed Scotland’s commitment to being a “good global citizen” in a government sponsored [debate](#) on the role Scotland can play regarding the grave humanitarian crisis in Afghanistan. Scotland has a proud record in welcoming people from all over the world, including but not only refugees, and it has reflected this welcome through its New Scots refugee integration and anti-trafficking strategies, as well as in wider its ambitions to incorporate human rights across Scottish society. This Bill is the polar opposite of all that and left unchallenged, it will take away rights and safety in Scotland, from many vulnerable people who need it in order to rebuild their lives.

Scotland has a distinctive legal framework and strategies for the protection of children and vulnerable adults from harm, and this is linked to a criminal justice system that precedes the devolution settlement. Parts of this Bill seek to either directly interfere with these Scottish systems of protection, or contain powers exercisable by the Home Secretary without further parliamentary scrutiny which would have the same effect. These provisions have a wider impact than solely in immigration cases – they affect how we identify and protect children, survivors of male violence, disabled people and people with LGBTI+ identity across Scotland. Other proposals have powers to challenge or change our Scottish legal systems, including how people access justice and how they use the courts to challenge unlawful government decisions. To that extent, these proposals should concern us all.

Finally, earlier this year, when the UK government consulted on proposed reforms to administrative law and judicial review across the UK, there was a clear and consistent message articulated by the Law Society of Scotland, the Faculty of Advocates and many senior members of the Scottish judiciary that an interference with these ancient and fundamental elements of the Scottish judicial system could create unnecessary complexity – potentially causing uncertainty, and inconsistency in our Scottish courts. This Bill again potentially encroaches on these areas of the Scottish legal system, with the longer term potential to impact how all people in Scotland use the courts to protect their rights.

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### Q4. Where does this Legal Opinion take us?

#### *The Legislative Consent Motion Convention*

The cover note to the legal opinion reminds us that the powers of the Scottish parliament were conferred by the UK parliament as a part of the devolution settlement. This means that the UK parliament retains powers to legislate in areas of devolved competence. However, in recognition that that a stable constitutional settlement requires a devolved authority to have some assurance of control in areas that are mainly devolved, a constitutional convention was established – the “Legislative Consent Motion” (LCM) process.

This convention holds that the UK parliament will not normally legislate on a devolved matter without the consent of the relevant devolved legislature. LCM’s are not binding but they continue to play a vital role in the development of our constitutional law and in safeguarding the devolution settlement.

The [Explanatory Notes](#) accompanying the Bill assert that a LCM is not necessary, from any of the devolved parliaments in the UK. However, our view, based on the legal opinion, is that there are areas of this Bill that reach far into areas of devolved competence, where an LCM should be required, and this convention should apply.

#### *Some important and adverse impacts on devolved policies and legislation, which stem from this Bill*

In part based on this legal opinion, we highlight below a few key areas of the Bill which seek to remove individual rights and undermine our distinctive Scottish frameworks for protecting vulnerable groups:

- Providing for **differential treatment** of people based on their route of arrival, with the Bill’s currently framed “Group 2” refugees most at risk of wide-ranging penalties and restrictions, including making such refugees who necessarily arrive by irregular means, immediately liable to a criminal offence of unlawful arrival, or delaying any consideration of their protection claim, and even if that claim is ultimately granted, subjecting them to the No Recourse to Public Funds (NRPF) restriction. This “differential treatment” clause threatens conditions even more abject than the current asylum system, and raises very serious and wide-ranging human rights concerns for duty bearers in Scottish public authorities. The provision may also strengthen the ability of the Home Secretary to change the Immigration Rules, without further scrutiny by either the UK or devolved parliaments.
- Provisions on **age assessments** reach into the Scottish child protection system. Age assessments are usually conducted to determine eligibility for child services under the Children (Scotland) Act 1995. The Bill currently compels Scottish local authorities to undertake age assessments at the direction of the Home Office, or else refer children to National Age Assessment Boards. It allows the Home Office to set new standards against which age assessments are to be conducted, which seems likely to overwrite the common law standards applicable in Scotland, supported by [Scottish government Practice Guidance](#). It also introduces the use of deeply invasive, unethical and inaccurate medical age assessments. These changes are particularly concerning and may indeed be in violation of children and young people’s rights under the [UNCRC](#) and the ECHR. The opinion states that many of these changes should be subject to the legislative consent convention.
- Provisions relating to **human trafficking and exploitation** where the law and policy in this area is devolved to Scotland. As set out above, the Bill impacts on who is a survivor of human

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trafficking and how we protect them, as well as prosecute the perpetrators. It is not a coincidence that the joint concerns raised by the four SRs about the clauses in the Bill which relate to identification and exclusions from accessing support are the same concerns raised within this legal opinion. The SRs noted that the provisions in the Bill place the effectiveness of ongoing anti-slavery efforts at risk particularly for vulnerable groups such as women, children, disabled people, those with LGBTI+ identity, and other migrants. The Bill risks contravening key international legal instruments and obligations. This is even more concerning for Scotland, where the support and assistance system for survivors as well as how we identify and prosecute victims are expressed and contained within the Human Trafficking and Exploitation (Scotland) Act 2015. These provisions are further implemented within our distinct criminal justice system and following specific Scottish procedures around safeguarding and protection. This is why the legal opinion notes that our Scottish ministers and the Crown Office and Procurator Fiscal Service should be concerned about such provisions, to the extent that consideration should be given to the establishment of a separate system to identify and protect victims of exploitation and human trafficking within Scotland.

- Proposals to “*offshore*” *claimants*’ raises concerns about our obligations to provide legal advice and support to people claiming international protection who have arrived in Scotland and are then taken off-shore to process their claims for asylum. There are important questions about the availability of funded legal advice for these individuals. The opinion recommends reviewing Scottish legislation around the provision of legal aid to make express provision for appropriate funded advice if the offshoring provisions come to pass.

### **Q5. What must happen now?**

We believe the UK government should scrap this Bill. We will continue to support the work of MPs, especially in the Opposition benches, who are committed to stopping it. However, we clearly cannot rely on the Bill being scrapped. We must give consideration and focus on what *is* within Scotland’s gift.

Scotland must act with a full appreciation of how harmful this Bill is to people seeking refugee protection, those who have suffered trafficking and exploitation and vulnerable groups therein, including women and children, survivors of male violence, disabled people and people with LGBTI+ identity. We must do all that is in our power to offer safety, respect and dignity.

Specifically, we are calling for:

#### **Scottish parliament:**

- *For the Scottish parliament to fully expect that Scottish ministers will furnish it with a suitably critical and expansive Legislative Consent Memorandum (the Memorandum). That Memorandum should give a clear outline of the provisions in the Bill that Scottish ministers consider relate to Scotland and their impacts. It is our view that a LCM should not be confined only to matters that the UK Government opine require the legislative consent of the Scottish parliament. We hope this briefing, the legal opinion and its cover note assist Scottish ministers in the preparation of such a Memorandum to work through the Scottish parliament, in relevant Committees and in the main Chamber. We further hope that Scottish ministers will request that the Scottish parliament both withhold legislative consent in matters they feel are in devolved competence, and that the parliament unifies in critiquing this Bill in the process.*

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### **Scottish ministers:**

- *To maximise protections for victims of trafficking* who will be adversely affected by the Bill by working with the Scottish anti-trafficking and wider human rights sector to make best use of their powers under section 9 (8) & (9) of the Human Trafficking and Exploitation (Scotland) Act 2015. In particular, we urge Scottish ministers to give the most serious consideration to instituting an independent Scottish identification responsibility, via regulations, so all presumed or confirmed trafficking and exploitation survivors in Scotland are identified, supported and assisted here, for the clear purpose of recovery from their abuses and ordeal.
- *To undertake a full review of flagship Scottish government strategies and relevant Scottish legislation*, including in particular: [New Scots refugee integration](#), the [Ending destitution together](#) and the [Ending homelessness together](#) policies as well as the national plans on [Violence against women and girls](#) and [Mental health](#). This is all with a view to act within devolved areas of competence to prevent and mitigate the harmful impacts of the Bill, and the review should consider the adequacy of resourcing. Non-legislative measures can play a significant role in reducing harm, and Scotland should be proud of its ambitious and inclusive national strategies and actions. However, in the face of this Bill, they need reviewed and swiftly strengthened in order to keep people safe, with rights respected and to demonstrate Scotland's difference and its social citizenship and inclusion.
- *To commit to ensuring that the planned Scottish human rights legislation provides an explicit commitment to upholding the rights of refugees and migrants in Scotland*, alongside other commitments to create specific human rights provisions where no international treaty exists, such as, a right to a healthy environment and the rights of LGBTI+ people. Scotland is showing bold leadership in pursuing the incorporation of human rights by devolved legislation and this must fully include those seeking international protection and vulnerable groups therein.

### **Scottish Members of Parliament (MSPs):**

- *Parliamentarians should take a proactive interest in this Bill* and its grave and imminent implications for their constituents and regions. In particular, we urge them to undertake scrutiny of the Bill through its LCM process in parliament and, we hope, speak out against this legislation. We also urge parliamentarians to proactively engage with people in their areas who stand to be directly and adversely impacted by this Bill, learn from them and associated services and community organisations, and stand in solidarity. Finally, we hope parliamentarians can help secure practical, resourced measures, nationally and locally, to safeguard rights and safety for those who stand to be most harmed by this legislation.

### **Scottish public authorities, including Scottish local authorities**

- *To undertake a full review of the impact of the provisions of the Bill on their duties to protect and support individuals and families within their statutory areas of responsibility*, to proactively identify areas where there is a risk of breach of individual rights and to proactively safeguard against that risk – by ensuring clear guidance to staff, adequate training and adequate resources to continue to meet those responsibilities. In addition, to review the impacts on policies from this Bill and institute measures locally to safeguard rights in practice.

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- *To pledge to implement and uphold a protective firewall between all of our public services and immigration enforcement, in order that those seeking safety in Scotland experience our public services as agents of protection, not an extension of the “hostile immigration environment”.*

### **The Lord Advocate:**

- *To provide clear, human rights-compliant Instructions to police and prosecutors on interpreting the public interest with regard to criminal offence provisions in the Bill, especially that relating to “unlawful arrival”. These instructions should convey a clear understanding of patterns of need and vulnerabilities within those who necessarily arrive by irregular means to the UK. These recommended Lord Advocate Instructions should draw upon the existing [Policy guidance](#) on non-prosecution of refugees for entry-related offences, as well as connect with and be mutually complementary to the Lord Advocate’s [Instructions on human trafficking](#).*

### **Scottish civil society organisations**

- *To work as allies and partners both against this Bill as well as in helping to ensure that the Scottish Human Rights Bill provides an explicit commitment to upholding the rights of refugees and migrants in Scotland, alongside other commitments to create specific human rights provisions in Scotland, such as the right to a healthy environment and the rights of people with LGBTI+ identity, where no international treaty exists.*
- *To undertake a review of their work, with a view to identifying where the Bill will make refugees and migrants more vulnerable to harm or more likely to require services, advocacy or support, and to proactively take steps to address reaching out and providing services or support to meet that future need.*

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**JustRight Scotland and Scottish Refugee Council**

November 2021