Written evidence from Amnesty International (DPB0001)

Introduction:

1. In this submission, Amnesty International UK (AIUK) focuses on the immigration exemption to data protections provided at paragraph 4 of Schedule 2 to the Bill.

2. That we do not focus on other aspects of the Bill should not be taken as implying that we do not or would not have any human rights concerns regarding other aspects of this Bill. The immigration exemption nonetheless demands specific consideration given the extraordinary breadth in the way it is framed and the impact it would have.

3. In very short summary, the exemption would mean that several basic protections against improper, inaccurate and harmful use of data would not apply where it was said that applying the protections could in some way prejudice 'effective immigration control'.

The relevant provisions of the Bill:

4. Clause 14 of the Bill is to give effect to Schedule 2. Subparagraph (2) of that clause states:

> "*In Schedule 2 –*
>
> *(a) Part 1 makes provision adapting or restricting the application of rules contained in Articles 13 to 21 of the GDPR in specified circumstances, as allowed for by Article 6(3) and Article 23(1) of the GDPR;...*"

5. The meaning of GDPR is given at clause 2(10):

> "*'The GDPR' means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).*"

6. Paragraph 4 of Schedule 2 (which is to be found in Part 1 of that Schedule) consists of three subparagraphs. The first of these provides that "*the listed GDPR provisions*" do not apply when personal data is processed to the extent that those provisions would be likely to prejudice the purpose of either "*the maintenance of effective immigration control*" or "*the investigation or detection of activities that would undermine the maintenance of effective immigration control.*"

7. The third of these subparagraphs (read with the second) would exempt all persons handling the relevant personal data to an equal extent in relation to some, but not all, of what are described in the first subparagraph as the listed GDPR provisions. It would do so in circumstances where one person (or e.g. Government department) obtains the data from another (e.g. another Government department or private body) for either of the two purposes specified in the first subparagraph.

8. The listed GDPR provisions are those set out in paragraph 1 of Schedule 2.

Main submission:

9. We are gravely concerned at the human rights implications of the immigration exemption in this Bill. There are three aspects to this. Firstly, there is the interference with privacy, and the right to respect for private life under Article 8 of the 1950 European Convention on Human Rights (ECHR), constituted by the taking, holding and sharing of personal information in circumstances where fundamental safeguards are exempted.[1] Secondly, there is the risk to various rights, including but not limited to the right to respect for family and private life and the right to liberty (Article 5, ECHR), entailed by the use of this data in circumstances where those safeguards are exempted. Thirdly, there is the disproportionate impact that the provisions are likely to have, in relation to each of the preceding two aspects, on persons identified by characteristics of race, religion or national origin (Article 14, ECHR).

10. To comprehend the full extent of these concerns it is necessary to consider both the detail of the safeguards to which the exemption is proposed and the range of decisions and actions to which a person may be subjected on the basis of the personal information to which the exemption would relate.

11. The safeguards (listed GDPR provisions) to which the exemption relates include such basic matters as:
    - That processing someone's personal information is lawful, fair and transparent (Article 5(1)(a), GDPR);
    - That this data is processed accurately and kept up to date (Article 5(1)(d), GDPR);
    - That this data is held securely (Article 5(1)(f), GDPR);
    - That the person to whom this data relates is informed of the data being held (Article 14, GDPR), for how long it may be held (Articles 13(2)(a) & 14(2)(a), GDPR) and for what purpose it may be used (Article 13(1)(c) & 14(1)(c), GDPR); and
    - That this person may inspect the data (Article 15) and request its erasure or correction (Articles 13(2)(b) & 14(2)(c), GDPR).

12. At House of Lords Committee stage, the Minister sought to reassure the House that the exemption "*does not set aside the whole of the GDPR for all processing of personal data for all immigration purposes*" (*Hansard* HL, 13 November 2017 : Column 1913). While the Minister offered a description of the safeguards that would be set aside, there were several major omissions from her list. Moreover, when giving but two examples as to why, it is claimed, the exemption is necessary (*Hansard* HL, 13 November 2017 : Column 1914), relating to "*a suspected overstayer*" and someone it is suspected "*has provided false information*", the Minister appeared to confuse notifying someone of activity undertaken on the basis of data with giving someone notification that her or his data is held.

13. It is, at best, difficult to understand on what basis an exemption from lawfulness and fairness can ever be justified for effective immigration control; or indeed on what basis it can be asserted that duties to ensure data is accurate, kept up to date and held

[1] *S and Marper v United Kingdom* (Applications 30562/04 and 30566/04), ECtHR, 4 December 2008

securely could ever prejudice effective immigration control. Yet, it must be assumed that the legislation would enable such conclusions since it expressly sets aside these safeguards. Moreover, the concern implicit in the Minister's examples against notifying someone that their data is held (which we emphasise is itself distinct from the factual circumstances of examples she gave), cannot apply in the cases, which are expressly caught by the exemption, where the data is taken from the person to whom the data relates. (This is the distinction between similar provisions in Articles 13 & 14, GDPR in that the one relates to data obtained from the person and the other to data obtained elsewhere.) Why should there be any exemption from a duty to allow requests for the erasure of data held impermissibly or correction of inaccurate data?

14. The Minister sought to assure peers that the focus on whether the relevant safeguard or safeguards "*would be likely to prejudice... effective immigration control*" (*Hansard* HL, 13 November 2017 : Column 1913) provided adequate protection against abuse, error or other harm. Given the immigration exemption both generally and specifically removes the safeguard of transparency, any constraint on its application to be provided by the words 'likely to prejudice' would be entirely in the hands of the data controller – in most instances, the Home Office. Accordingly, the primary body against whom the safeguards are meant to protect the person to whom the data relates would wholly control whether the safeguards were applied or exempted. Moreover, the standard against which it would decide that question would be whether it considered the safeguards may prejudice its own purposes.

15. This is a grave proposition quite apart from experience of Home Office practice. A salutary example of the danger of such an approach is given by *N (Uganda) v Secretary of Statement for the Home Department* [2009] EWHC 873. In that matter, the Home Office removed a refugee from detention to Uganda, deliberately giving him no notice of the removal thereby preventing his legal representatives being alerted. In doing this, the senior official who authorised this action purported to rely upon a policy which sought to permit, in restricted circumstances, removal without notice. However, the restricted circumstances in the policy, ultimately found in themselves to be unlawful,[2] did not include the circumstances in which they were purportedly being used. The Home Office was ultimately compelled to facilitate the refugee's return to the UK, and in due course his refugee status was recognised and asylum in the UK granted.[3]

16. The Prime Minister when leading that department listed several, profound concerns including a "*lack of transparency and accountability*", "*a closed, secretive and defensive culture*", having "*IT systems* [that] *are often incompatible and not reliable enough*" and operating within "*a vicious cycle of complex law and poor enforcement of its own policies*" (*Hansard* HC, 26 March 2013 : Columns 1500-1501). Since that time, immigration legislation, rules and policies have continued to become more complex. More safeguards – including legal aid and appeal rights – have been removed or reduced. As described below, the reach of immigration functions has also be greatly extended into a wide aspect of social and public life. All of these developments significantly increase each of: concern about capacity of the Home Office to carry out all the functions demanded of it; the risk of mistaken, arbitrary,

[2] *Medical Justice v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin)
[3] http://www.independent.co.uk/news/uk/home-news/government-to-face-legal-action-by-returned-asylum-seeker-1693498.html

excessive or capricious decisions or acts; and the harm such decisions or acts may cause.

17. The Home Office has, in the name of effective immigration control, wrongly demanded people entitled to reside in this country leave it,[4] removed people entitled to be in this country from it[5] and denied citizenship of this country to people entitled to it;[6] and has, in pursuing the extensive powers that have been granted it over the years, continued to demonstrate the secretiveness and defensiveness that the Prime Minister correctly identified,[7] not to mention carelessness in handling of personal data.[8]

18. The decisions and actions that are taken by the Home Office on the basis of the data to which the exemption would apply include searching people and premises; seizing money and certain possessions; and decisions to deny someone permission to enter or stay in the country; deny someone asylum; deny someone British citizenship; take away permission to stay, a grant of asylum or citizenship from someone; detain someone indefinitely; and remove or deport someone, including where this comes with an indefinite bar on their ever being permitted to return. These decisions and actions can and do affect British citizens and other permanent residents. They do so indirectly when the subject of the decision or action is the citizen's family member; and directly when the citizen is the subject of the decision or action because the Home Office wrongly treats the person as not having British citizenship – including because their records are inaccurate or misused.

19. However, the decisions and actions taken on the basis of this data are not restricted to decisions and actions of the Home Office. Particularly with the extension of what the Prime Minister first styled a 'hostile environment', largely implemented through the passage of the Immigration Acts 2014 and 2016, there are a wide range of decisions and actions taken by other public and private bodies and persons on the basis of this data. These include decisions and actions to refuse employment, healthcare, rented accommodation, banking facilities, driving licenses, student loans, home student fees, social welfare support and, at least to delay, marriage.

20. It will be readily apparent that there are a wide range of human rights concerns if any of the decisions or actions described in either of the preceding two paragraphs are taken on the basis of data that is inaccurate or improperly held. That is particularly so

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[4] e.g. as reported by *The Financial Times*: https://www.ft.com/content/edfbcb46-8810-11e7-bf50-e1c239b45787

[5] As e.g. was the case with Mr Nyombi (see footnote 2, above); and as it sought to do in the case of Paulette Wilson: http://www.bbc.co.uk/news/uk-england-41749426

[6] Such as in the case of Cynsha Best, referred to by *The Independent*: http://www.independent.co.uk/voices/home-office-deportation-british-citizens-told-to-leave-theresa-may-a7923696.html - but also note the experience of the Project for the Registration of Children as British Citizens (PRCBC), see https://prcbc.wordpress.com/reference-materials-and-useful-links/

[7] The Home Office has been found to have unlawfully operated unpublished policies relating to detention and curfew restrictions: *Abdi & Ors v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin); and *Luppe v Secretary of State for the Home Department* [2017] EWHC 2690 (Admin).

[8] This has been a cross-Government concern over many years, most recently highlighted by the National Audit Office: https://www.theguardian.com/uk-news/2016/sep/14/government-breached-personal-data-security-9000-times-in-a-year-nao-watchdog-reveals; and this is something on which the Committee has previously reported: *Data Protection and Human Rights*, Fourteenth Report of Session 2007-08, HL Paper 72, HC 132

where the inaccuracy or impropriety is not known to, and cannot be corrected by, the person against whom the decision or action is taken because, for example, it is withheld from that person that the data is held, what its contents are and that it has been used.

21. We have sought in this submission to dispel the myth sometimes associated with immigration powers and policy, including with what has been styled the 'hostile environment' that those subjected to these powers and policies, and the decisions and actions taken in their name, are limited to people who have immigrated to the UK, or people who are without permission (or grounds for permission) to be in the UK. The people affected are not limited in these ways. Anyone can be affected – either because they are wrongly treated as e.g. being without permission to be in the UK or having immigrated to the UK; or because their family member is directly affected. The immigration exemption from safeguards contained in this Bill would significantly increase the risk that people – including British citizens, people entitled to that citizenship, permanent residents and other people entitled to be in the UK or with good claims to being granted such an entitlement – are harmed. This may be because decisions and actions are taken based on information that is inaccurate, improperly held or used, and in circumstances that effectively deprive the person of any opportunity to remedy that harm because they are denied any knowledge regarding the information on which the decision or action is based.

22. More than three decades ago, some of these concerns were debated in the House of Lords during the passage of what became the Data Protection Act 1984. A particular concern expressed by peers at that time was the inevitable disproportionate impact of a proposed immigration exemption from data protection safeguards upon black people and other ethnic minorities (e.g. *Hansard* HL, 21 July 1983 : Columns 1275, 1279 & 1294). The current proposed immigration exemption would similarly have disproportionate impact for much the same reasons as were then feared. However, the impact itself would undoubtedly be much greater than was then envisaged due to the considerable expansion of immigration powers and extension of immigration functions, as briefly described in this submission, since that time. Immigration policy cannot be divorced from race relations and discrimination. Yet these wider concerns appear to be passed over by inclusion of the immigration exemption in this Bill. That sits very uneasily with, for example, the apparent motivation underlying the commissioning of the Lammy Review and the Prime Minister's race disparity audit.

23. We have sought to emphasise the extent of the human rights implications of the immigration exemption in this Bill, in part, by highlighting that among those affected would be e.g. British citizens, other people born in the UK (and not British but entitled to that citizenship) and long and/or permanent residents in the UK. However, our concerns regarding these human rights implications extend to all persons who would be affected by the exemption, whatever their status, length of residence or entry into the country.

24. For these reasons, AIUK supports Amendment 80 moved at Lords' Committee stage for the removal of the immigration exemption.

17 November 2017