Written evidence submitted by Liberty to the Public Bill Committee's call for evidence on the Border Security, Asylum and Immigration Bill (BSAIB29)

INTRODUCTION TO LIBERTY

1. Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.
2. Liberty welcomes the opportunity to submit evidence to the Public Bill Committee in our shared effort to strengthen the Bill and mitigate the risk of unintended consequences. This evidence submission considers the clauses that seek to introduce powers and offences that mirror existing measures in terrorism legislation. These are clauses 13-16, 19-26, and 43-44.

EXECUTIVE SUMMARY

3. Clauses 13, 14, 16, 43, and 44 directly mirror existing offences in terrorism legislation. The parallel terrorism offences (S57 and 58 of the Terrorism Act 2000 and S2 and S5 of the Terrorism Act 2006) are exceptionally broad and capture a wide range of activities. As such, key scrutiny processes exist to minimise the risk that these and other counter-terror measures do not unjustly and disproportionately criminalise people not engaged in terrorist acts (such as the statutory functions of the Independent Reviewer of Terrorism Legislation). Further, terrorism offences contain key safeguards such as high *mens rea* thresholds to mitigate the risk of unintended consequences.
4. The organised immigration crime (OIC) context requires comparable or increased safeguards to protect people whom the Bill does not intend to criminalise, from committing the offences proposed by clauses 13-16 and 43-44. Liberty supports the clear efforts made in drafting this legislation to ensure these clauses contain robust safeguards. However, as currently constituted, these clauses would criminalise actions that span far beyond assisting unlawful immigration, and as such beyond the policy intentions of the Bill. This would undermine those policy intentions and jeopardise the Bill's ability to achieve its intended outcomes. Liberty has a series of recommendations to strengthen these clauses and reduce the risk of unintended harms, as outlined in **paragraphs 9-21 (clauses 13-16)** and **paragraphs 29-33 (clauses 43-44)**.
5. Further, clauses 19(2-4) and 20(1) are constituted in such a way that it is unlikely the associated powers could be applied in any other way than as a blanket policy for every person arriving to the UK by small boat. As such, these powers would carry significant risk of breaching data protection and human rights requirements and obligations unless they are amended to allow application of these powers in a more targeted manner. This is outlined in **paragraphs 22-28**.
6. The Committee's assessment of the proportionality of the relevant proposed measures should take into account the available evidence related to the operation and growth of organised crime groups engaged in OIC, and related to the operation of S24 and S25 of the Immigration Act 1971. This evidence indicates that the effectiveness of utilising counterterror-style measures to disrupt and prevent OIC may be limited, and that there are unintended consequences related to the risk to life of Channel crossing attempts that should be considered when scrutinising this Bill. This evidence is outlined in **paragraphs 34-40**.

7. **Liberty recommends the Public Bill Committee consider the following as they seek to reduce the risk of unintended consequences arising from clauses 13-16, 19-26, and 43-44:**
    a. Clauses 13 and 14 should be amended to bring their *mens rea* thresholds in line with comparable criminal offences, including the terrorism offences from which they have been modelled. This would involve an element of intention.
    b. Clause 15 should be amended to include, at minimum, mobile phones, SIM cards, data packs, and power banks. Liberty encourages the Committee to engage with people with lived experience of irregular crossing of the France-UK border and with civil society organisations to identify additional necessary articles to mitigate the risk of people not engaged in organised immigration crime (OIC) from committing offences under clauses 13 and 14.
    c. Clause 16(6) should be amended such that:
        i. "a journey made only by them" becomes "a journey made by them" in order to provide an adequate defence for people seeking protection in the UK who are not engaged in OIC.
        ii. people who support one another along their journey to the UK due to close family ties or in situations of mutual assistance are protected from prosecution, in alignment with the aims of the Bill. This could be done by requiring that the action is committed 'for gain' for an offence to be committed or by adding language that refers specifically to close family ties or situations of mutual assistance.
    d. Clause 16(5) should be amended such that a 'for gain' element is added to the current definition of a relevant journey, to focus the offence on OIC carried out by organised crime groups in line with the Bill's policy intentions.
    e. Clause 16 should be amended such that subsections 2 and 7-9 (reasonable suspicion and reasonable excuse elements) are replaced with an intention element (intention to facilitate OIC for gain) to ensure the breadth of the offence is balanced with clear, targeted safeguards. This would ensure it operates in a just and predictable way, is clear and foreseeable, and fulfils its policy intentions.
        i. If clause 16 is not amended as above, at minimum clause 16(8) should be amended to ensure that the provision of legal services is fully protected from criminalisation under this offence.
    f. Clauses 19-26 should be constituted in a way that means the conferred powers will not be operationalised as a de facto blanket policy, to remain in accordance with data protection and human rights requirements and obligations. If this is not possible, these clauses should be removed.
    g. Clause 43(4) should be amended to more tightly define possession to reduce the risk of people with no intent to do harm unknowingly committing this offence.
    h. Clause 43 should be amended to increase the *mens rea* threshold by including the requirement for intent, to reduce the risk of people with no intent to do harm unknowingly committing this offence.
    i. Clause 44(3-5) should be removed, such that amending the list of relevant articles in Clause 44 requires primary legislation to ensure that the process is subject to appropriate Parliamentary scrutiny in future.

APPLICATION OF COUNTERTERROR-STYLE MEASURES TO THE OIC CONTEXT

8. **Counter terror measures are exceptionally broad and capture a wide range of activities. As such, key scrutiny processes exist to minimise the risk that terrorism measures do not unjustly and disproportionately criminalise people not engaged in terrorist acts (such as the statutory functions of the Independent Reviewer of Terrorism Legislation). Further, terrorism offences contain key safeguards such as high *mens rea* thresholds to mitigate the risk of unintended consequences.** The organised immigration crime (OIC) context requires comparable or increased safeguards to protect people whom the Bill does not intend to criminalise, from committing the offences proposed by clauses 13-16 and 43-44. Liberty supports the clear efforts made in drafting this legislation to ensure these clauses contain robust safeguards. However, as currently constituted, these clauses would criminalise actions that span far beyond assisting unlawful immigration, and as such beyond the policy intentions of the Bill. Further, they effectively use counterterror-style measures as a prosecutorial strategy in that they would likely be selectively applied in line with how the current S24 and S25 offences in the Immigration Act 1971[1] are applied, as discussed below in paragraphs 38-39.

CLAUSES 13-15

9. **Preparatory offences are already well-established in counter-terrorism legislation.** See, for instance, S2 and S5 of the Terrorism Act 2006 and S57 of the Terrorism Act 2000. [2]
10. **While the exceptions listed in Clause 15 are welcome and provide key safeguards, they do not include some articles commonly possessed, supplied by, and received by people seeking protection who are not engaged in organised immigration crime (OIC).** Clause 15 should be amended to include, at minimum, mobile phones, SIM cards, data packs, and power banks. If clause 15 is not amended in this way, clauses 13 and 14 risk unintentionally exposing people who are not engaged in people smuggling to prosecution and imprisonment of up to 14 years. This includes, for instance, UK citizens and lawful residents who travel to mainland Europe to provide articles (such as a mobile phone) to support the safety and survival of family members and loved ones who intend to seek protection in the UK. It also could include those who top up their loved ones' mobile data packs to enable them to continue communicating with them and to access humanitarian assistance, including to make a distress call while at sea or in a lorry container. Power banks are commonly traded and handled by people preparing to make journeys by sea or lorry, and are used during that journey as a safety precaution to ensure they have enough power in their phones to keep track of their route and the time, and to alert family members when they have arrived safely in the UK.
11. **The threshold for criminal liability in clauses 13 and 14 is exceptionally low. Given the breadth of the actions (*actus reus*) that could constitute the commission of these offences, the low state of mind (*mens rea*) threshold is concerning in that it contains fewer safeguards against misuse and disproportionality than current terrorism offences.** Clauses 13 and 14 draw from S2 and S5 of the Terrorism Act 2006 (but do not directly mirror their language). Offences under these sections require the prosecution to prove that

[1] Section 24, *Immigration Act 1971, c.77*; Section 25, *Immigration Act 1971, c.77*
[2] Section 2 *Terrorism Act 2006, c.11*; Section 5 *Terrorism Act 2006, c.11*; Section 57 *Terrorism Act 2000, c.11*

the accused had criminal intention or acted with recklessness. For instance, a person commits an S5 offence if they intend to either commit an act of terrorism or assist someone to commit an act of terrorism, and they engage in any conduct in preparation to fulfil those intentions.[3] The intention element of these offences is a key mechanism by which their unintended consequences are mitigated. However, a person would commit an offence under clause 13 if they *suspect* that the relevant article will be used by anyone arrive in the UK irregularly, or smuggling someone to the UK, and under clause 14 if they *suspect* it has been, is being, or will be used for these purposes.

12. **The 'suspicion' threshold included in clauses 13 and 14 is exceptional and unusual in criminal law because such a low threshold risks a disproportionate and unjust response to a person who did not intend to commit a crime or do harm.** Currently used solely in fraud offences,[4] the 'suspicion' threshold significantly exacerbates the risk that clause 13 and 14 offences would unduly criminalise people who the Bill does not intend to criminalise (i.e., those not engaged in OIC). Higher, far more commonly used thresholds such as intent or recklessness are key mechanisms by which to ensure that the law is proportionately and consistently applied. Clauses 13 and 14 should be amended to bring the thresholds in line with comparable criminal offences, including the terrorism offences from which they have been modelled.

CLAUSE 16[5]

13. **Clause 16 directly mirrors the S58 offence of the Terrorism Act 2000[6] and introduces an element from S57 of the 2000 Act.[7]** Subsections 1, 3, 7, 8, and 11 of clause 16 directly lift from subsections 1-3A of S58. The clause also introduces the requirement for circumstances in which there is a 'reasonable suspicion' that the record, document, or information contained therein will be used by themselves or someone else to organise or prepare for a border crossing. This is similar to S57(1): "A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism".[8]
14. **S58 has been criticised extensively for its vague and broad definitions,[9] yet clause 16(4) renders this proposed new offence even broader than its counter-terror equivalent.** Clause 16(4) clarifies that information can be useful for the general public and yet still be relevant for the offence. Caselaw dictates that relevant information for S58, on the other hand, must be designed specifically to help prepare for a terrorist act even if it could be used for other acts (such as bomb-making instructions, which could also be used to prepare for carrying out a robbery).[10] Given the differing nature of the types of information that may be useful for OIC versus preparing an act of terrorism, the clause's broader definition of relevant

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[3] Section 5 *Terrorism Act 2006, c.11*

[4] *See, e.g.,* S329 of the Proceeds of Crime Act 2002.

[5] This section draws from analysis conducted by Dr Kajsa Dinesson, a lecturer and researcher at the University of York with expertise in preventive terrorism legislation and their operation in practice.

[6] Section 58 *Terrorism Act 2000, c.11*

[7] Section 57 *Terrorism Act 2000, c.11*

[8] *Ibid.*

[9] *See, e.g.,* Dinesson, K. E. (2022) '(Un)reasonable excuses – On *R v Dunleavy, R v Copeland*, and Section 58' *The Modern Law Review* and Hodgson, J. and V. Tadros (2009) 'How to Make a Terrorist out of Nothing' *The Modern Law Review*.

[10] *R v G; R v J [2009] UKHL 13*

information is arguably necessary for the proposed offence to function effectively. However, this leaves the breadth of clause 16 extremely wide, and as such the link between the harm the offence intends to address and the conduct constituting commission of the offence is far more tenuous than it is in S58. It would arguably be impossible in some cases for people who go on to commit an offence under clause 16 to have foreseen that their actions would constitute the commission of an offence. As such, clause 16 requires clear, robust, and comprehensive safeguards to ensure that it does not criminalise action beyond that which the Bill intends to address.

15. **Clause 16 also goes beyond S58 by introducing the element of 'reasonable suspicion' (drawn from S57 of the 2000 Act). This may aim to put on statutory footing caselaw which clarified the scope of relevant information under S58 as that which 'calls for an explanation'[11] however it does not seem to do this effectively as it counterintuitively creates further scope for confusion and a lack of clarity.** Risks posed by the introduction of a 'reasonable suspicion' element include that the threshold for suspicion is low and that it could be influenced by subjective factors such as prejudice. This creates the risk of discretionary interpretation and selective application of the law. This lack of clarity and ensuing risk may be an unnecessary complication; the prosecution of S57 offences shows that the higher *mens rea* threshold of intention is met in those cases where intervention via criminal law is justified as a proportionate response to the actions undertaken.
16. **The provision for defences in clause 16(6-8) is highly welcome, especially as they (appropriately) provide more protection against disproportionality than those included in S58. However subsection 6 (which states that it is a defence if a person can show that their action or possession of relevant information or documents was for the purposes of a journey "made only by them") does not currently provide an adequate defence for people not engaged in OIC from prosecution.** A journey in a dinghy will never be made by a single person, and as such someone who is not a people smuggler, who is seeking protection in the UK, and arrives on a dinghy with other individuals may not be able to make use of this defence. This clause should be amended to say for the purposes of a journey "made by them". Empirical evidence collected via research with alleged people smugglers and people with lived experience of Channel crossings indicates that people smugglers do not regularly board small boats or lorries in order to enter the UK.[12] As such, this amendment would provide a key defence against the criminalisation of people seeking protection, while not significantly reducing clause 16's effectiveness at meeting its stated policy intentions.
17. **Further, clause 16(6) does not currently provide an adequate defence for people travelling with their family members or in situations of mutual assistance, who would be treated under this clause as smugglers where they are facilitating e.g., their child's entry to the UK alongside their own.** Take, for example, a mother and child travelling together. If the mother or child screenshots on their phone a weather report that records anticipated height of waves in the Channel in order to help them make a decision about whether they feel it is safe enough to attempt a journey to the UK by small boat that evening, they would not have a defence and would be at risk of prosecution under clause 16 and imprisonment of up to 5 years. This is despite that they are not engaged in OIC. Clause 16(6) should be

[11] *R v G; R v J [2009] UKHL 13*

[12] *See, e.g.,* Tecca, V. (2022) 'To Where the Clock Changes: Migrant Illegalisation and its Consequences Along the France-UK Border' *University College London*.

amended to protect people from prosecution who support one another due to close family ties or in situations of mutual assistance, in alignment with the aims of the Bill and with how organised criminal groups are constituted in the UN Convention Against Transnational Organised Crime.[13] For instance, this could be done by requiring that the action is committed 'for gain' in order to commit the offence or by including language related to family ties and mutual assistance.

18. **The proposed offence could be more directly targeted to organised crime groups engaged in OIC by ensuring that the definition of a relevant journey in clause 16(5) includes a 'for gain' element, which would reduce the need to provide adequate safeguards and protections via tests such as reasonable suspicion and excuse.** This would ensure that the proposed offence aligns with the Bill's intended aims by specifying the target harm, reducing the risk of people not engaged in OIC as part of an organised crime group being unduly criminalised under this offence.
19. **Clause 16(7) provides a defence if the accused shows they had a 'reasonable excuse' for the actions constituting the offence, which is mirrored from S58(3). Using a 'reasonable excuse' rather than an intention element sets a different standard than assessing whether an action was lawful – it instead asks whether an excuse is reasonable. Further, what constitutes a reasonable defence under S58(3) has thus far been narrowly interpreted, and as such has been criticised for being an insufficient safeguard.[14]** Because clause 16 is even broader in scope than S58, it is necessary to provide an equally broad and robust system of safeguards to balance the risk of undue criminalisation and the prosecution of people whom the Bill does not intend to target. While clause 16(8) sets out a non-exhaustive list of the circumstances that could constitute a reasonable excuse defence, the operationalisation of S57 demonstrates that this is, on its own, insufficient and the proposed offence could be appropriately narrowed and targeted to align with its policy intentions by raising the *mens rea* threshold to include intent to organise other peoples' journeys for gain. This would further ensure that law enforcement officials have a clearer understanding of how to operationalise clause 16, ensuring it is applied appropriately, strong cases are brought, and it fulfils its policy intentions. Clause 16(2) and 16(7-9) should be replaced to include this intention requirement and remove elements of reasonable suspicion and reasonable excuses, in addition to the suggestions above.
20. **Further, the reverse evidential burden of proof intrinsic to the reasonable excuse defence raises concerns related to the balance of power and due process, particularly given the breadth of actions covered by this offence and its low *mens rea* threshold.** While the bar for what evidence is needed to raise an issue that the prosecution must then disprove is low, in the context of the wider offence as discussed throughout this section it would provide more adequate safeguards were the prosecution required to prove intent than to disprove the excuse or its reasonableness. Given how S57 has operated in practice this is unlikely to reduce the effectiveness of the clause at achieving the Bill's policy intentions.

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[13] *See, e.g., '*Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions; Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto', UN doc A/55/383/Add.1 (3 Nov 2000) (Interpretative Notes), para 88.

[14] *See, e.g.,* Dinesson, K. E. (2022) '(Un)reasonable excuses – On *R v Dunleavy, R v Copeland*, and Section 58' *The Modern Law Review* and Hodgson, J. and V. Tadros (2009) 'How to Make a Terrorist out of Nothing' *The Modern Law Review*.

21. **Lastly, clause 16(8) does not currently provide a defence for legal aid firms providing immigration services, as identified by the Immigration Law Practitioners' Association during their Legal Director's oral evidence session with the Public Bill Committee on 27 February 2025.**[15] If the reasonable suspicion and reasonable excuse elements are not replaced with an intention element or clause 16(5) is not amended to clarify that a relevant journey must be one in which the accused is involved in OIC as part of an organised crime group, clause 16(8) should, at minimum, be amended to ensure that the provision of legal services is not unduly criminalised under this offence.

CLAUSES 19-26

22. **Examining officers operating in border areas and ports are already conferred expansive powers to stop, question, and detain people entering or departing the UK without reasonable suspicion**, under S22 and Schedule 3 of the Counter-Terrorism and Border Security Act 2019[16] and under Schedule 7 of the Terrorism Act 2000.[17] Search powers are conferred by S37 and detailed in Schedule 5 of the Terrorism Act 2000, which allow for a search warrant application for the purposes of a terrorist investigation,[18] regardless of if an offence has been committed. The powers that would be conferred by clauses 19 – 26, however, vary from existing counter-terror powers in that they would not allow for the questioning and detention of the person in question, nor do they grant search powers via provision for search warrant applications. Instead, an officer would need to be on a premises lawfully before conducting a search of a premises (among other requirements).
23. **Every individual who newly arrives via irregular routes would be subject to these powers regardless of whether they have engaged in or planned to engage in organised immigration crime (OIC)** because their mobile phones may contain evidence related to how they were smuggled to the UK and they will not receive leave to enter or remain until their protection claim is processed.
24. **Due to how clauses 19(2-4) and 20(1) are constituted, these powers would almost certainly be applied to every person who arrives by small boat (an effective 'blanket policy').** The Government has assessed these powers to be compatible with Article 8 (the right to private and family life, home, and correspondence)[19] in large part because "officers will only be seizing phones where there is a reasonable suspicion that a relevant person is in possession of a relevant article" or an article which appears to an officer to contain information relating to an act of people smuggling.[20] Government states that, due to this specificity, the power will not be implemented as a blanket policy. However, it is reasonable to suspect that every migrant who arrives in the UK by small boat has been smuggled, and as such their phones are likely to contain e.g., correspondence with their people smuggler. It is unclear how the new power would

[15] Bantleman, Z. (2025) 'Border Security, Asylum and Immigration Bill (First Sitting)' HC Deb 27 February 2025 col.16.
[16] Schedule 3 *Counter-Terrorism and Border Security Act 2019, c.3*
[17] Schedule 7 *Terrorism Act 2007, c.11*
[18] Section 37 and Schedule 5 *Terrorism Act 2000, c.11*
[19] Article 8, *Human Rights Act 1998, c.42*
[20] UK Government (2025) 'Border Security, Immigration and Asylum Bill: European Convention on Human Rights Memorandum' para. 71.

not be applied as a blanket policy to all new small boat arrivals given the way clauses 19(2-4) and 20(1) are currently constituted.[21]

25. **As such, the powers provided for by clauses 19-26 would likely contravene GDPR and the Data Protection Act 2018:[22]**
    a. It is likely that the technology available to those conferred powers by these clauses (e.g., police and immigration officers) cannot reliably selectively extract data from mobile phones. Even where technology companies have developed platforms that allow for 'Selective Extraction', there is evidence that police forces who use this technology still extract all data and sift through it by applying search parameters.[23] The Code of Practice relating to the exercise of powers in the Police, Crime, Sentencing and Courts Act 2022 states: "In all cases, the authorised person must use the least intrusive means of processing the information as possible in the circumstances. This may be by selectively extracting the relevant information, or where this is not technically possible, by restricting the review of the excess information obtained".[24]
    b. As a result, if the necessary technology is not yet widely available to all authorities authorised to exercise the powers conferred by clauses 19-26, special category data will inevitably be extracted during the exercise of these powers. Under data protection legislation, the Home Office would, as such, be required to evidence that the processing of this data (including e.g., internet search history extracted as part of copying data from a mobile phone) is strictly necessary for the relevant law enforcement purpose in order for its extraction to be lawful. However, given the vast amount of data on mobile phones, it is very unlikely that all data extracted would be necessary, and as such it would be unlawful to extract this data unless these clauses are more narrowly constituted and are targeted towards specific individuals in more narrow circumstances such that it is not operated as a blanket policy.
    c. Even where that data is not special category data, S37 of the 2018 Act requires that personal data processed for law enforcement purposes is adequate, relevant, and not excessive.[25] Where there is no lawful basis for processing this data, its retention and potential sharing with other agencies would breach both the 2018 Act and Article 8 rights.
26. **The powers provided for by clauses 19-26 would also likely result in disproportionate interferences with the Article 8 rights of people subjected to these powers:**
    a. An interference with Article 8 must satisfy certain conditions for it to be lawful, including the condition of being "in accordance with the law". To be in accordance with the law, a measure must be accessible to the person subject to it (i.e., that it is "published and comprehensible") and foreseeable (i.e., that "it must be possible for a person to foresee its consequences for them").[26]

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[21] Clause 19(2-3) defines a relevant person in such a way as to include anyone who has arrived by small boat, Clause 19(4) provides for an incredibly broad definition of a relevant article, and Clause 20(1) provides the power to search a relevant person for a relevant article if they have reasonable grounds to suspect that the relevant person is in possession of a relevant article.

[22] Liberty's analysis incorporates legal advice obtained via Counsel.

[23] *See, e.g.,* Privacy International (2019) 'Old Law, New Tech and Continued Opacity: Police Scotland's use of mobile phone extraction' *Privacy International*.

[24] UK Government (2023) 'Extraction of information from electronic devices: code of practice'

[25] Section 37, *Data Protection Act 2018, c.12*

[26] *R (on the application of Edward Bridges) v The Chief Constable of South Wales Police [2020] EWCA Civ 1058*

Without policies and processes in place that inform individuals of their rights (such as adequate translators or translated documents) and an ability to raise complaints before their device is seized, this policy would be unlikely to meet the test of accessibility. Even if these powers are operationalised in a way that renders them accessible, they would be very unlikely to meet the test of foreseeability, given that someone who arrives in the UK irregularly would not reasonably be likely to have foreseen that their personal photographs, internet history, messages, and more could be seized, copied, retained, and shared between agencies in the UK.

b. Further, Article 8 rights may be breached where seizing an individual's phones will remove their ability to communicate with their families and loved ones (not least to indicate to them that they are not in danger and have arrived safely in the UK).

27. **The powers provided for by clauses 19-26 may also raise concerns about discrimination and accessibility:**
    a. People subjected to these powers may have evidence of, for instance, disability or torture on their mobile phones that are subsequently seized. This may lead to an unlawful failure to make reasonable adjustments where, for instance, the individual is detained. This may also interfere with Government's ability to fulfil its positive obligations under Article 3 (the prohibition of torture and inhuman or degrading treatment).[27]
28. **Clauses 19-26 should either be removed or constituted in a way that means the conferred powers will not be operationalised as a de facto blanket policy, to remain in accordance with human rights and data protection obligations.**

CLAUSES 43-44[28]

29. **Clause 43(1-4) nearly identically mirror S57(1-3) of the Terrorism Act 2000.[29]**
30. **The way that clause 43(4) constitutes 'possession' is extremely broad and reverses the burden of proof such that the defendant must show that they did not possess or control the article in question.** This is identical to S57(3). While a broad definition of possession may be useful to address evasion techniques (e.g., where someone who has committed the offence stores the relevant article in such a way that it is difficult for the prosecution to prove that the person did indeed have control over or possession of it), it is still possible to evade in relation to the definition of possession in clause 43(4). For instance, a perpetrator could take advantage of this broad definition by storing a relevant article somewhere where it would be mistaken as possessed or controlled by another person. That person would then be required to prove that they did not possess or control it. As such, possession could be defined more narrowly without compromising the effectiveness of this proposed offence. Further, the absence of a requirement for the prosecution to show 'intent' (rather than reasonable suspicion arising from the circumstances) exacerbates the risks posed by the reverse evidential burden as well as the breadth of the possession definition.
31. **Clause 44(3-5) would introduce a Henry VIII power allowing the Secretary of State to, by regulation, amend the list of objects whose possession becomes an offence. The current list of objects includes**

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[27] Article 3, *Human Rights Act 1998, c.42*

[28] This section draws from analysis conducted by Dr Kajsa Dinesson, a lecturer and researcher at the University of York with expertise in preventive terrorism legislation and their operation in practice.

[29] Section 57, *Terrorism Act 2000, c.11*

articles that are restricted in general utility to serious crime, however this may not be the case for future additions, particularly in the absence of the appropriate level of Parliamentary scrutiny. As the list of serious offences spans far beyond assisting illegal immigration, and as such the potential articles that could be added by regulation to Clause 44 are numerous. While the list of relevant articles are, at the moment, tightly defined, these clauses are constituted in a way that renders them extremely malleable. Adding objects to this list would have significant and serious implications for UK citizens, residents, and new arrivals. This raises concerns given the breadth of the 'possession' definition, lack of intention requirement, and the reverse burden of proof, as outlined above. Removing the Henry VIII power would ensure that clause 44 is clear, foreseeable, and proportionate.

32. **In the context of cross-border Channel crossing, given that people who have been smuggled arrive in the UK in or near articles used for assisting unlawful immigration (a dinghy, motor, etc), clauses 43(4) and 44(3-5) could together create acute risk of criminalising every person who arrives by small boat under this offence in future:** if the list of relevant articles is expanded to include articles commonly used in the serious offence of assisting unlawful immigration (such as a boat motor), people who are being smuggled would be at high risk of criminalisation under these provisions despite not being engaged in the serious offence of assisting unlawful immigration themselves. They would be unable to make use of the defence provided for by clause 43(3) as they would likely know that the article in question was being used for smuggling. For this reason, it is inappropriate to use the S57 definition of possession for serious crimes in which innocent people are involved but not committing the specific crime in question – such as assisting unlawful immigration.
33. **To mitigate the significant risk of unintended consequences arising from Clauses 43-44, Clause 43(4) should be amended to more tightly define possession, and to introduce a requirement of intent to commit a serious offence. Further, Clause 44(3-5) should be removed, such that amending the list of relevant articles in Clause 44 requires primary legislation.**

POTENTIAL EFFECTIVENESS AT MEETING POLICY OBJECTIVES

34. **This section[30] outlines what evidence indicates about the relevant clauses' potential effectiveness at meeting their intended aims of supporting "law enforcement to go after the dangerous criminals that undermine our border security, that profit from putting lives at risk".[31]** This is, in part, a key component of evaluating the proposed measures' necessity and consequently making an informed assessment of whether counterterror-style powers and offences are an appropriate, proportionate mechanism through which to disrupt and prevent organised immigration crime (OIC). This section examines evidence related to the clauses' potential effectiveness at disrupting and dismantling OIC networks. It examines:
    a. Evidence related to the growth and operation of people smuggling networks and
    b. Evidence related to the operation of the existing offences under S24 and S25 of the Immigration Act 1971 (illegal entry etc and assisting unlawful immigration).

[30] Liberty is grateful to Victoria Taylor, DPhil Candidate at the Centre for Criminology, University of Oxford and Associate Director at Border Criminologies, for peer reviewing this section.
[31] Cooper, Y. (2025) 'Border Security, Asylum and Immigration Bill [Second Reading]' HC Deb vol.762 col.58. 10 February 2025.

It does so in order to support the Committee's assessment of the proportionality of applying to the OIC context broad powers and offences without the safeguards and scrutiny processes that exist in terrorism legislation.

35. **There is a consensus in the research – and the Home Office has stated – that the professionalisation of OIC and the increasing sophistication of organised crime groups result directly from border security measures implemented by the state.[32]** These measures include, for instance, the expansion of border security infrastructure and technologies which have, in the France-UK border and in similar border zones around the world, created the need for people migrating to pay for professional assistance as they are unable to cross the border themselves.[33] Indeed, while Home Secretary in 2019, Sajid Javid partly attributed the professionalisation of the sea route to increased securitisation of the France-UK border, in that it made the lorry route increasingly untenable.[34] As the Independent Chief Inspector of Borders and Immigration (ICIBI) stated:[35]

> "The Home Office told inspectors that it regarded the emergence in 2018 of small boats as an established modus operandi for migrants looking to enter the UK illegally as a consequence of the success of the extensive work done by the UK and its European partners, in particular the French, in making other methods of illegal entry more difficult."

This is corroborated by the Institute for Public Policy Research (IPPR),[36] and UNHCR.[37] Empirical long-term research conducted in northern France with alleged people smugglers and people migrating in 2018 and 2019 supports this assertion, indicating that smugglers' increasing rate of failure for lorry crossing attempts in this period led them to seriously consider small boats in order to ensure clients crossed quickly, generating more income (which is paid per successful crossing) and leading to increased referrals from clients.[38] Additional researchers have also traced the proliferation and 'industrialisation' of smuggling groups operating along the France-UK border directly to increased securitisation of the border, increasingly restrictive immigration policies, and a surge in outmigration between 2015 and 2018.[39] As such, the available evidence indicates that expanding border security measures – including by expanding offences and powers designed to target OIC – may not reduce the demand for the smuggling services provided by organised crime groups along the border.

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[32] See, e.g., Kyle, D. and R. Koslowski (2011) 'Global Human Smuggling: Comparative Perspectives' *The Johns Hopkins University Press*; Triandafyllidou, A. (2018) 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' *The ANNALS of the American Academy of Political and Social Science*; Monzini, P. et al (2015) 'The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean' *Istituto Affari Internazionali*; Stone-Cadena, V. and Velasco, S. A. (2018) 'Historicizing Mobility: *Coyoterismo* in the Indigenous Ecuadorian Migration Industry' *The ANNALS of the American Academy of Political and Social Science.*

[33] *Ibid.*

[34] Javid, S. (2019) 'Statement: migrant crossings' *UK Government.* 7 January 2019.

[35] ICIBI (2020) 'An inspection of the Home Office's response to in-country clandestine arrivals ('lorry drops') and to irregular migrants arriving via 'small boats'' *UK Government*, p. 55.

[36] IPPR (2022) 'Understanding the rise in Channel crossings' *IPPR.*

[37] UNHCR (2021) 'Joint Committee on Human Rights oral evidence: Legislative Scrutiny Nationality and Borders Bill' HC 588 *UK Parliament.*

[38] Tecca, V. (2022) 'To Where the Clock Changes: Migrant Illegalisation and its Consequences Along the France-UK Border' *University College London*.

[39] Global Initiative Against Transnational Organized Crime (2024) 'Small Boats, Big Business: the Industrialization of Cross-Channel Migrant Smuggling' February 2024.

36. **Further, research with smugglers indicates that when a smuggling group is dismantled it is quickly reshaped and restaffed, or another group takes its place due to the extremely high demand for smuggling services along borders that migrants are unable to cross without assistance.[40]** Research conducted by the Global Initiative Against Transnational Organized Crime with people migrating and alleged smugglers along the France-UK border found that Kurdish smuggling networks in northern France are highly adaptable and not centrally coordinated.[41] Qualitative anthropological research conducted with alleged Kurdish smugglers and people migrating described the following impact when smugglers were arrested and incarcerated by targeted operations carried out by French police in 2018 and 2019:[42]

> "While some police operations may lead to the incarceration of several dozens of smugglers in quick succession (this usually occurs annually at summer's end), this generally slows smuggling operations for only around six weeks, as was observable during fieldwork […] and confirmed by research participants. Smuggling operations continue despite the annual arrest of thousands (and incarceration of hundreds) of individual smugglers and the dismantling of dozens of smuggling networks each year (Caulcutt, 2021; UK Home Office, Border Force, and Patel, 2020). The profitability of smuggling, combined with constant incoming migration from Kurdistan and an ever-increasing demand for smuggling, means that as smugglers are incapacitated by police operations they are quickly replaced by fresh faces."
>
> Caulcutt, C. (2021) 'French police face 'titanic task' as smugglers up their game' *Politico*.
>
> UK Home Office, Border Force, and P. Patel (2020) 'Priti Patel and new French Interior Minister agree action on Channel crossings' *UK Government*.

The same research suggests that smuggling groups are made up of actors in France, the UK, and across Europe (working with partners in Kurdistan) with lower-level members of these groups most likely to be based in France and to handle articles and share information necessary to organised smuggling journeys.[43] It can be inferred from the stated policy objectives of the Bill that the relevant clauses seek to increase the arrests and prosecutions of people smugglers in order to disrupt and dismantle organised crime groups, to increase border security. Given that the existing publicly-available evidence examining smuggling networks indicates that these networks are not centralised, are flexible and adaptable, and either are quickly reformed or replaced when smugglers are incarcerated it is unclear that the clauses will meet their stated aims unless the factors that have led to the proliferation of organised crime groups are adequately addressed. While research with high-level smugglers along the France-UK border (i.e., those at the 'top' of a group, usually residing as citizens elsewhere in the UK and Europe) does not yet exist, research along securitised borders around the world indicates that the vacuum of power – created through either the incarceration of someone at the 'top' or through the dismantling of an entire group – is very quickly filled by newcomers.[44] Further, empirical research consistently shows that smugglers raise prices in response to

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[40] Ibid.; Kyle, D. and R. Koslowski (2011) 'Global Human Smuggling: Comparative Perspectives' *The Johns Hopkins University Press*; Tecca, V. (2022) 'To Where the Clock Changes: Migrant Illegalisation and its Consequences Along the France-UK Border' *University College London*.

[41] Global Initiative Against Transnational Organized Crime (2024) 'Small Boats, Big Business: the Industrialization of Cross-Channel Migrant Smuggling' February 2024, p. 13.

[42] Tecca, V. (2022) 'To Where the Clock Changes: Migrant Illegalisation and its Consequences Along the France-UK Border' *University College London*, p. 131.

[43] *Ibid,* p. 129-132.

[44] Kyle, D. and R. Koslowski (2011) 'Global Human Smuggling: Comparative Perspectives' *The Johns Hopkins University Press;* Tinti, P. and T. Reitano (2017) 'Migrant, Refugee, Smuggler, Savior' *Oxford University Press.*

measures designed to either expand border security infrastructure and technology or to disrupt smuggling networks, increasing their resources and the profitability of the business.[45]

37. **Evidence indicates that some measures intending to disrupt OIC unintentionally increase the risk to life of border crossings**. Research consistently shows that improved border security technologies, a lack of government- or humanitarian-administered routes of entry, and the criminalisation of migration funnel people into increasingly dangerous crossing routes.[46] As is outlined in paragraph 35, some measures introduced aiming to increase the security of the France-UK border have led to a shift in dominant crossing route from lorry to the (deadlier) small boat route. Further, organisations operating along this border have collated evidence that indicates that a scarcity of dinghies exacerbates issues of overcrowding on small boats:[47]

> "It has been observed that, with fewer boats reaching the shores on a crossing day, people who are expecting to travel try to force their way onto any dinghy that has been delivered and inflated. This has led to one person being crushed to death inside a dinghy as well as others being pushed out into the sea."

In addition, evidence indicates that since receiving increased funding for patrols and technologies such as drone surveillance and dune buggies, police operations on French beaches have increasingly sought to intervene during embarkation in an attempt to prevent boats from launching.[48] Alarm Phone refers to a French police officer's bodycam video to show that police sometimes use tear gas in attempts to disperse people on beaches, and relays testimony received from people who have attempted small boat crossings that police slash dinghies with knives either on the beach or in shallow waters once people have boarded.[49] This leads to increased chaos and, as the Home Office puts it, "tension on French beaches"[50] which, Alarm Phone states, "[create] panicked and dangerous situations in which dinghies launch before they are fully inflated and in which people have to scramble on board whilst in water up to their necks".[51] Measures that seek to disrupt supply chains used by those engaged in OIC may continue to unintentionally risk increasing the deadliness of this crossing route unless this risk is accounted for and mitigated effectively.

38. **Evidence related to the operation of the existing offences under S24 and S25 of the Immigration Act 1971 indicates that people who are not engaged in OIC are already selectively arrested and prosecuted.** Research conducted at the Centre for Criminology at the University of Oxford examines the scale of criminalisation of people who have arrived in the UK by small boat since the introduction of these offences (as they are constituted today) through the Nationality and Borders Act 2022.[52] It examines the use of these offences to prosecute people identified as steering a small boat during their Channel crossing. The

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[45] *Ibid.*

[46] Andersson, R. (2014) 'Illegality, Inc' *University of California Press*; Chambers, S. N. et al., (2021) 'Mortality, Surveillance and the Tertiary "Funnel Effect" on the U.S.-Mexico Border: A Geospatial Modeling of the Geography of Deterrence' *Journal of Borderland Studies*; De León, J. (2015) 'The Land of Open Graves: Living and Dying on the Migrant Trail' *University of California Press*.

[47] Alarm Phone (2024) 'The deadly consequences of the new deal to 'Stop the Boats'' *Alarm Phone*.

[48] *Ibid.*

[49] *Ibid.*

[50] UK Home Office (2023) 'Migrants involved in violence against French officers jailed' *UK Government.*

[51] Alarm Phone (2024) 'The deadly consequences of the new deal to 'Stop the Boats'' *Alarm Phone*.

[52] Taylor, V. and C. Götz (2025) '"Security at the heart": Criminalisation and Labour's Border Security, Asylum and Immigration Bill 2025' *Border Criminologies*

research includes arrest and charging data from 2022 through 2024 (this data is not routinely published by Government; the researcher obtained this via Freedom of Information Act requests):

Time period	People charged for illegal arrival (N)	Of (N), those identified as steering a small boat
28 June 2022 until end-2022	162	79
2023	244	88
First half of 2024	64	38
1 July 2024 until end-2024	86	48

The researchers state:[53]

> "This data shows an overrepresentation of certain nationalities among those arrested for steering, including most notably people from Sudan and South Sudan, as they are less likely to have the resources to pay to travel. Those identified as steering are rarely convicted of the higher 'facilitation' offence, due to lack of evidence that they were involved any further in organising the journey. Instead, they are convicted of 'illegal arrival'".

39. **Further evidence on the operation of S24 and S25 offences indicates that they are selectively applied and are unlikely to have had an impact on OIC or the number of small boat crossings.[54]** Researchers and practitioners at the University of Oxford and civil society organisations operating in the UK and along the France-UK border have identified that in 2023, 1 person in every 7 boats arriving in the UK was arrested for their alleged role in steering.[55] This is despite, their research indicates, that steering a dinghy is usually a result of "having boating experience, steering in return for discounted passage, taking it in turns, or being under duress" rather than being engaged in OIC for gain.[56] Further, "the vast majority of those convicted of both 'illegal arrival' [S24] and 'facilitation' [S25] had ongoing asylum claims. Victims of torture and trafficking, as well as children with ongoing age disputes, have also been prosecuted".[57] Their evidence indicates that those prosecuted were not engaged in OIC, and as such it can be assumed that their targeting via these offences did not have a significant impact on smuggling operations along the France-UK border. Indeed, in *R* v *Ginar* the Court of Appeal considered whether criminal sanctions deter people seeking protection from making irregular journeys to the UK:[58]

> "Deterrence can, in our view, carry only limited weight as a distinct aim in the sentencing of those who have travelled as passengers in a crossing such as that upon which the applicant embarked. The circumstances of those who commit offences of that kind, as opposed to those who organise them, will usually be such that they are unlikely to be deterred by the prospect of a custodial sentence if caught. We know of no evidence of research which indicates the contrary".

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[53] *Ibid.*
[54] Taylor, V. (2024) '"No Such Thing as Justice Here": The criminalisation of people arriving to the UK on small boats' *University of Oxford*.
[55] *Ibid.*
[56] Taylor, V. (2024) 'Summary: "No Such Thing as Justice Here": The criminalisation of people arriving to the UK on small boats' *University of Oxford*.
[57] *Ibid.*
[58] *R v Ginar [2023] EWCA Crim 1121*

For further information, see the joint written evidence submitted to the Committee by Humans for Rights Network and Border Criminologies.

40. **In sum, the available evidence related to the growth and operation of people smuggling networks – both along the France-UK border and abroad – and on the operation of S24 and S25 suggests that the relevant clauses' potential effectiveness at achieving their intended policy objectives may be limited.** Further, they may exacerbate the growth and professionalisation of OIC, and there is evidence that similar measures already have unintended consequences related to the risk to life of border crossing attempts and the criminalisation of groups of people not engaged in OIC. Assessments of the proportionality of the proposed new offences and powers in the Bill should take this evidence into consideration, and mitigations of these risks should be considered.

SUMMARY OF RECOMMENDATIONS

41. **Liberty recommends the Public Bill Committee consider the following as they seek to reduce the risk of unintended consequences arising from clauses 13-16, 19-26, and 43-44:**
    a. Clauses 13 and 14 should be amended to bring their *mens rea* thresholds in line with comparable criminal offences, including the terrorism offences from which they have been modelled. This would involve an element of intention.
    b. Clause 15 should be amended to include, at minimum, mobile phones, SIM cards, data packs, and power banks. Liberty encourages the Committee to engage with people with lived experience of irregular crossing of the France-UK border and with civil society organisations to identify additional necessary articles to mitigate the risk of people not engaged in organised immigration crime (OIC) from committing offences under clauses 13 and 14.
    c. Clause 16(5) should be amended such that a 'for gain' element is added to the current definition of a relevant journey, to focus the offence on OIC carried out by organised crime groups in line with the Bill's policy intentions.
    d. Clause 16(6) should be amended such that:
        i. "a journey made only by them" becomes "a journey made by them" in order to provide an adequate defence for people seeking protection in the UK who are not engaged in OIC.
        ii. people who support one another along their journey to the UK due to close family ties or in situations of mutual assistance are protected from prosecution, in alignment with the aims of the Bill. This could be done by requiring that the action is committed 'for gain' for an offence to be committed or by adding language that refers specifically to close family ties or situations of mutual assistance.
    e. Clause 16 should be amended such that subsections 2 and 7-9 (reasonable suspicion and reasonable excuse elements) are replaced with an intention element to ensure the breadth of the offence is balanced with clear, targeted safeguards rather than its current roundabout, insufficient protections.
        i. If clause 16 is not amended as above, at minimum clause 16(8) should be amended to ensure that the provision of legal services is fully protected from criminalisation under this offence.

f. Clauses 19-26 should be constituted in a way that means the conferred powers will not be operationalised as a de facto blanket policy, to remain in accordance with data protection and human rights requirements and obligations. If this is not possible, these clauses should be removed.
g. Clause 43(4) should be amended to more tightly define possession to reduce the risk of people with no intent to do harm unknowingly committing this offence.
h. Clause 43 should be amended to increase the *mens rea* threshold, by including the requirement for intent to reduce the risk of people with no intent to do harm unknowingly committing this offence.
i. Clause 44(3-5) should be removed, such that amending the list of relevant articles in Clause 44 requires primary legislation to ensure that the process is subject to appropriate Parliamentary scrutiny in future.

Liberty is available to provide further detail on any element of this submission if the Committee would find this useful.

March 2025