



Briefing for House of Lords Committee Stage – Nationality and Borders Bill

Taskforce on Victims of Trafficking in Immigration Detention¹

Measures dealing with identification and support for victims of crime do not belong in an immigration bill. Their inclusion risks muddling the two issues and undermining the Modern Slavery Act 2015. The Government claims it wants to end 'abuse of the UK's Modern Slavery System' without any evidence of said 'abuse'. The real issue is that individuals have been exploited but failures within the current systems and structures prevent many people from challenging this treatment and seeking help. The Nationality and Borders Bill will only worsen this situation, driving victims underground, increasing the numbers in immigration detention and playing into the hands of exploiters. The Detention Taskforce is particularly concerned about the following clauses:

- **Clauses 57 and 58** require victims to present all evidence that they have suffered human trafficking crime at the earliest stage with 'late' evidence being seen to damage credibility.
- **Clause 62** disqualifies people from the protections afforded to survivors of trafficking. Where an individual is a 'threat to public order' or is perceived by the authorities to have made a claim 'in bad faith', there will be no prohibition on forcibly removing that person from the UK and no requirement to grant them leave to remain in the UK, even if they are recognised as a victim of trafficking.
- **Clauses 65 and 66** as written will leave many survivors still unable to access legal advice. This clause needs to be amended to ensure that early specialist legal advice is available to potential victims before they have been referred into the National Referral Mechanism.
- **Clause 67** would allow the Government to disapply retained EU law derived from the EU Anti-Trafficking Directive. It is not clear which aspects of the Directive, opted into in 2011, the Government wishes to disapply. Given that the Modern Slavery Act 2015 was enacted in this context of the Directive, we are concerned that its disapplication could leave gaps in legislation.

We urge Peers to support amendments to these clauses at Committee Stage.

1. Introduction

The Government has wide powers to detain people who are subject to immigration control,² either whilst they wait for permission to enter the UK, or before they are removed or deported³ from the country. Currently the Home Office detains thousands of people for whom detention serves no purpose and causes significant harm, including to victims of slavery and trafficking.⁴ **For survivors of trafficking, immigration detention not only increases the risk of re-traumatisation and negative long-term physical and mental health outcomes. It can also prevent people from disclosing their exploitation and abuse from being identified as a victim and from receiving the support they need. It also undermines the ability of survivors to engage in legal processes, such as supporting criminal investigations.**

The Government has claimed, without providing evidence, that people who are held in immigration detention are falsely claiming to be survivors of trafficking “late in the process” in order to “frustrate immigration action” and to secure their release.⁵ These claims are being used to justify measures in the Nationality and Borders Bill which would make identification and protection as a potential victim harder. Yet, figures secured from a Freedom of Information request⁶ show that the overwhelming majority of those who *are* referred as victims of trafficking from detention to the National Referral Mechanism are found at the first stage of the identification process to have been trafficked: **83.2% of referrals in 2020 received a positive first stage trafficking decision** (representing 1,053 of 1,265 referrals who received a first stage trafficking decision).⁷

The system is not ‘being abused.’ Many survivors of trafficking end up detained either because they have been wrongly convicted for offences they were forced to commit by their traffickers and/or because they have not received adequate support, including access to legal advice, to disclose that they have been trafficked to a designated First Responder.⁸ It is well recognised, including in statutory guidance,⁹ that survivors can be highly traumatised, afraid of disclosing their situation of exploitation due to shame and fear and the control methods used by exploiters and may be fearful of authorities. In addition, a public authority may fail to investigate or pick up on indicators of trafficking. Numerous Government-commissioned or parliamentary reports and inquiries have already highlighted that the Home Office is failing to identify and release vulnerable people.¹⁰ The Independent Chief Inspectors of Borders and Immigration (ICIBI) has highlighted that the Home Office often fails to identify potential victims of trafficking as a result of “*focusing on the fact that someone was working illegally rather than that they may be a victim of abuse, exploitation and slavery*”.¹¹ Poor understanding of human trafficking indicators prior to, and at the point of consideration for immigration detention, means thousands of potential victims are being detained prior to identification.

Recent changes to Home Office policy have already increased the likelihood of survivors of trafficking being detained, as the Government has itself admitted.¹² The Detention Taskforce is extremely concerned that changes proposed in the Nationality and Borders Bill will worsen the situation further, and dramatically reduce the rights and protections afforded to survivors of trafficking:

- **Clauses 57 and 58** require victims to present all evidence that they have suffered human trafficking crime at the earliest stage with ‘late’ evidence being seen to damage credibility.
- **Clause 62** seeks to disqualify people from the protections afforded to survivors of trafficking. It states that where an individual is a ‘threat to public order’ or is perceived by the authorities to have made a claim ‘in bad faith’, there will be no prohibition on forcibly removing that person from the UK and no requirement to grant them leave to remain in the UK, even if they are recognised as a victim of trafficking.
- **Clauses 65 and 66** aims to introduce legal aid for survivors of trafficking before they have been referred to the National Referral Mechanism but, as written, will leave many survivors still unable to access legal advice.
- **Clause 67** would allow the Government to disapply retained EU law deriving from the EU Anti Trafficking Directive. It is not clear which aspects of the Directive, opted into in 2011, the Government wishes to disapply. Given that the Modern Slavery Act 2015 was enacted in this context of the Directive, we are concerned that its disapplication could leave gaps in legislation.

These clauses are all the more concerning in light of the Government's recent decision, made without any consultation, to introduce a new trafficking decision-making body: the Immigration Enforcement Competent Authority (IECA). The IECA now has the responsibility for making the identification decisions on trafficking referrals from nearly all non-British nationals.¹³ **Part 5 of the Nationality and Borders Bill and the introduction of the new IECA will mean that fewer people are identified and recognised as victims of trafficking and more are detained and removed from the UK.¹⁴ This undermines the whole system of protection for victims of modern slavery in the UK, leaving many at risk of further harm and re-trafficking.**

Identifying survivors of trafficking in detention

The National Referral Mechanism (NRM) is the UK's framework for recognising and supporting survivors of modern slavery and trafficking. No one can apply to enter the NRM. To be referred into the NRM, an individual must be identified as having trafficking indicators by a designated 'First Responder' such as the police, Home Office or a specified charity.¹⁵ The Home Office is the *only* First Responder available in immigration detention centres – that is, the only body that can decide whether an individual is a potential victim of trafficking and refer them to the NRM. Once an individual has been referred to the NRM they should receive a decision from the Competent Authority (the decision-making body that sits within the Home Office) within 5 working days stating whether there are 'reasonable grounds' to believe they are a victim of trafficking.

If someone receives a positive reasonable grounds decision, the individual should be given a 'recovery and reflection' period for a minimum of 45 days – the Bill seeks to reduce this to 30 days.¹⁶ During that period, the Competent Authority must decide whether there are conclusive grounds to accept that the individual is a victim of trafficking. At present, the individual cannot be removed from the UK until a conclusive grounds decision (a final trafficking decision) has been made.

The new decision maker, the Immigration Enforcement Competent Authority (IECA), was created in November 2021 to make identification decisions for a "specific cohort" of adult NRM cases, including people in immigration removal centres and foreign national offenders who are subject to deportation. The Independent Anti-Slavery Commissioner and other experts have highlighted concerns that reverting to two decision making bodies, one with a clear immigration focus, will lead to differences in decision making, undermining trust in the system.¹⁷ The increased focus on immigration enforcement will further increase many victims' anxiety in disclosing their exploitation to the authorities, and could be used as a further coercive measure by traffickers.

2. Interpretation of 'late' evidence (clauses 57 and 58)

Under clause 57 of the Bill, survivors may be served with Trafficking Information Notices requiring them to produce information relevant to their case within a specified period. Under clause 58, providing information "late" and "without good reason", would give the Home Office grounds to refuse their trafficking claim on the basis of damaged credibility. These provisions increase the likelihood of survivors not being recognised as victims of trafficking and not receiving the support and protection that comes with such recognition.

This is despite the fact that the Home Office recognises the barriers to disclosure in its Modern Slavery statutory guidance, which states that "*victims' early accounts may be affected by the impact of trauma. This can result in delayed disclosure, difficulty recalling facts, or symptoms of post-traumatic stress disorder.*"¹⁸ Those who are unable to report

that they were trafficked at the point of arrest or detention can find they are not subsequently identified as trafficking victims, with late disclosure being taken as a credibility issue rather than an aspect of many victims' trauma. Lack of self-identification can also result from victims' having not received information or advice to explain that there is a system to protect people who have experienced exploitation.

During the Committee Stage reading of the Bill, the Government gave the unequivocal assurance that "if there are reasonable grounds to believe that someone is a victim, they will get positive identification even if the information is provided late."¹⁹ Given the many reasons why survivors might disclose 'late', it is unclear why the Government is committing to legislation that a person who provides information after the specified deadline will have their credibility damaged when later referred to the NRM.

Questions for the Minister:

- **Given the established evidence that trauma and abuse frequently results in delayed disclosure from survivors of trafficking, how can the Government justify clauses 57 and 58 on late evidence?**
- **The Home Office has been repeatedly criticised for failing to identify victims of trafficking before placing them in immigration detention. In light of this, does the Government recognise that high numbers of victims being referred to the NRM from detention is not reflective of 'abuse of the system' but rather the Home Office's own failings in identification?**

Amendment

Clause 58 should not stand part of the Bill.

3. Public order exemption (clause 62)

Under clause 62, if the Home Office is satisfied that the potential victim is a "threat to public order" (the definition of which includes those who are sentenced to a period of imprisonment of 12 months or more) or has made a claim in "bad faith" then there will be no prohibition on forcibly removing that person from the UK and no requirement to grant them leave to remain in the UK. The term 'bad faith' is worryingly vague and the exclusion of those with a conviction of 12 months or more is far too wide. It is likely to further penalise many victims who have already been through the criminal justice system and wrongly convicted of offences they were compelled to commit as a result of their experience of exploitation.

We know from our work with survivors that one of the most effective ways to keep victims in fear is to force them to commit crimes, so they will be criminalised if they come forward to the authorities. If vulnerable adults and children are denied access to the NRM system on the basis of previous convictions they are unlikely to come forward in the first place and their exploitation will not be addressed.

This clause will also make it harder for the state to prosecute traffickers and therefore prevent further cases of people being exploited. Those who are able to access adequate support can be empowered to support criminal investigations. As Richard Fuller MP stated in the Report Stage debate: "*The public interest is in enabling sufficient evidence to be collated to bring successful prosecutions against the co-ordinators of those crimes, which is where I fear this clause falls short*".²⁰ Further criminalising victims and disqualifying those victims from accessing support will harm our efforts to bring traffickers to justice.

Questions for the Minister:

- **Given the need to protect victims of trafficking for forced criminality and support them to leave exploitation how can clause 67, which will drive victims further underground increasing their dependency on their exploiters be justified?**
- **Exploiters are experts in creating vulnerabilities and using these to control their victims. Why is clause 67 still included in the Bill, given it will encourage traffickers to target people with criminal records, knowing that they will find it hard to come forward for help and assistance?**

Tabled amendment

Leave out Clause 62 and insert the following new Clause—

"Identified potential victims etc: disqualification from protection

(1) This section applies to the construction and application of Article 13 of the Trafficking Convention.

(2) The competent authority may determine that it is not bound to observe the minimum recovery period under section 60(2) of this Act in respect of a person in relation to whom a positive reasonable grounds decision has been made, if the authority is satisfied that—
(a) it is prevented from doing so as a result of an immediate, genuine, present and serious threat to public order; or
(b) the person is claiming to be a victim of modern slavery improperly.

(3) Any determination under subsection (2) must only be made—
(a) in exceptional circumstances;
(b) where necessary and proportionate to the threat posed; and
(c) following an assessment of all the circumstances of the case.

(4) A determination under subsection (2) must not be made where it would breach—
(a) a person's Human Rights Convention rights; 14 Nationality and Borders Bill Clause 62 - continued
(b) the United Kingdom's obligations under the Trafficking Convention; or
(c) the United Kingdom's obligations under the Refugee Convention.

(5) For the purposes of a determination under subsection 2(b), victim status is being claimed improperly if the person knowingly and dishonestly makes a false statement without good reason, and intends by making the false statement to make a gain for themselves. (6) A good reason for making a false statement includes, but is not limited to, circumstances where—
(a) the false statement is attributable to the person being or having been a victim of modern slavery; or
(b) any means of trafficking were used to compel the person into making a false statement.

(7) This section does not apply where the person is under 18.

(8) Nothing in this section affects the application of section 60(3) of this Act."

Member's explanatory statement

This amendment maintains the spirit of clause 62 but ensures that the power is exercised in line with the UK's obligations under Article 13 of the Trafficking Convention. This

amendment also protects child victims of modern slavery from disqualification from protection

4. Access to legal advice (clauses 65 and 66)

In light of potential changes to the identification of survivors of trafficking outlined above, it is all the more vital that they are able to access legal advice. The Government has been clear that it wishes to prevent matters such as trafficking being raised at a late stage; the best way to do this is to facilitate access to legal advice at as early a stage as possible.

The Government has claimed that clauses 65 and 66 of the Bill will ensure that potential victims of modern slavery or human trafficking receive advice on referral into the NRM to understand what it does, how it could help them and to provide informed consent to be referred into it. This is not the case. As written these clauses would not achieve that aim. They would ensure only that an individual who is *already receiving* legally-aided advice on their asylum, immigration or public law matter (either because it is in scope or because Exceptional Case Funding (ECF) has successfully been applied for) could receive advice on referral into the NRM as an 'add on'.

This does not address the crux of the problem. Nearly all immigration advice is no longer covered by legal aid and the ECF scheme has been shown to be complex, lengthy and unworkable for many legal providers. Few individuals are able to make their own applications and lawyers have to undertake work with the risk that they will have received no payment if the application is unsuccessful. As a consequence, they submit that it is not financially viable for some firms to make applications. In 2019, the organisation Rights of Women held that *'the ECF application process disadvantages people with vulnerabilities who are navigating the process alone.'*²¹ Moreover, in 2020, the Public Law Project conducted a survey of legal aid providers and found that *'only 5% of respondents strongly believed the scheme operates effectively to ensure clients can access legal aid.'*²² The ECF scheme is not a meaningful way to ensure access to justice.²³

The Government has the opportunity to make a significant positive change for survivors of trafficking but with clauses 55 and 56 as worded gaps will continue to exist for those without a lawyer already. Advice on referral to the NRM should be covered by legal aid regardless of the immigration status of the individual and without them already having to be eligible for legal aid - it should be brought into scope not as an 'add on' to an immigration/asylum matter or ECF application.

Questions for the Minister:

- **Does the Government recognise the challenges in applying for Exceptional Case Funding and that if advice on referral into the NRM is an 'add-on' for those who have a lawyer already that this will fail to address the gap in legal advice provision?**
- **Given that in 2017, the Government recognised the need for pre-NRM advice and support to inform consent for an NRM referral,²⁴ will it amend clauses 65 and 66 to ensure that all potential victims of trafficking can secure legal advice prior to an NRM referral?**

Tabled amendment

Leave out Clause 65 and insert the following new Clause—

"Civil legal aid under section 9 of LASPO: add-on services in relation to the national referral mechanism

(1) In Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (civil legal services qualifying for legal aid), after paragraph 32A insert— "Pre-national referral mechanism advice 32B(1) Civil legal services provided to an individual in relation to referral into the national referral mechanism and connected immigration advice.

General exclusions

(2) Sub-paragraph (1) is subject to the exclusions in Part 2 of this Schedule.

Specific exclusions

(3) The civil legal services described in sub-paragraph (1) do not include—

(a) advocacy, or

(b) attendance at an interview conducted by the competent authority under the national referral mechanism for the purposes of a reasonable grounds decision or a conclusive grounds decision."

(2) In regulation 5(1) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480) (exceptions from requirement to make a determination in respect of an individual's financial resources), after paragraph (l) insert— "(m) civil legal services described in paragraph 32B of Part 1 of Schedule 1 to the Act (civil legal services provided to an individual in relation to referral into the national referral mechanism)."

Member's explanatory statement

This amendment facilitates access to legal advice at as early a stage as possible in trafficking cases, by removing the requirement for it to be attached to an existing immigration or asylum matter.

5. Disapplication of retained EU law derived from the EU Anti Trafficking Directive (clause 67)

It is unclear what the Government is hoping to achieve from this clause, which would reverse the decision made in 2011 to opt into the Anti Trafficking Directive. It has not made clear which parts of the Directive it wishes to disapply. This could leave gaps in the Modern Slavery Act which was enacted on 2015 on the assumption that the UK would also be able to rely on the Directive. The retention of the Trafficking Directive is especially important following the UK's exit from the EU and the UK retaining its position and commitment to drive up standards internationally, as well as to continue cooperation, including around criminal prosecutions and to be world leading in the fight against slavery.

Questions for the Minister:

- **What is the reason for seeking to disapply the EU Anti-Trafficking Directive and how is opting out of the Directive compatible with the UK's continued commitment to address the international crimes slavery and trafficking and to protect its victims?**

Case study: S²⁵

S is a male Vietnamese survivor of trafficking who arrived in the UK aged 16. He was exploited and beaten for two years in a locked warehouse under the control of his traffickers who brought him to the UK under the promise of a 'better life'. He was convicted for cannabis production and sentenced to 20 months, trafficking indicators having not been identified when his case went to court.

Having served his criminal sentence, S was then transferred to immigration detention where his mental health suffered to the point that he was placed on suicide watch. Eventually he was referred into the National Referral Mechanism. He received a positive reasonable grounds decision and granted a period of reflection and recovery, before finally receiving a positive conclusive grounds decision and subsequently being granted refugee status.

Under the late evidence changes in the Bill, S may not have been recognised as a victim of trafficking because of delayed disclosure. Under the public order exemption in the Bill, S may also have been excluded from support. S would have likely remained in detention and his mental health would have deteriorated. This is despite the fact that S's crimes were committed whilst he was under the control of his trafficker, and that he is therefore entitled to care and support rather than further detention, where recovery is not possible.

5. Conclusion

The Nationality and Borders Bill is an immigration bill which should not contain a section on modern slavery. It narrows the opportunities for trafficked people to be identified and access support to recover, undermining years of progress. The Government should instead be working to ensure survivors of trafficking are provided with the support that they are entitled to under international and domestic law in the community, including secure accommodation, psychological assistance as well as legal information and support. This is crucial to enable them to recover and rebuild their lives.

7. Endnotes

¹ The Taskforce on Victims of Human Trafficking in Immigration Detention is comprised of 13 expert organisations working ensure that no victim of trafficking is detained under immigration powers.

² Schedule 2, paragraph 16 (2), Immigration Act 1971 (as amended); section 62, Nationality, Immigration and Asylum Act 2002; schedule 3, para 2, Immigration Act 1971; and section 36 of the UK Borders Act 2007.

³ Often confused with 'removal', deportation can be ordered when an individual commits a criminal offence, is sentenced for more than 12 months, and their deportation is "conducive to the public good and in the public interest".

⁴ In March 2021, the Government published a report on the [issues raised by individuals in detention](#). It shows that 16% of people detained within the UK following immigration offences in 2019 were referred as potential victims of modern slavery (up from 3% in 2017), and that 99% of these detentions ended in release.

⁵ See [NEW PLAN FOR IMMIGRATION - Consultation on the New Plan for Immigration: Government Response](#).

⁶ FOI reference 64607 submitted by FLEX

⁷ The same FOI shows data for a total of only 43 Conclusive Grounds decisions during 2020. Despite the low overall number of decisions the indication is that these are overwhelmingly positive with just over 81% (or 35 of the 43 decisions shown as granted) being positive.

⁸ A referral into the National Referral Mechanism can only be made by a designated First Responder. At the time of writing there is no process by which organisations can apply to become a First Responder. <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales#first-responder-organisations>

⁹ The Modern Slavery Act 2015 section 49 Statutory Guidance on Identification and Care recognises the impact of trauma lists the reasons why a person may not self-identify and/or be reluctant to disclose their situation of exploitation.

¹⁰ These include the [2016 Shaw Report](#), the [2018 progress report also undertaken by Stephen Shaw](#), and the 2019 reports by the [Joint Committee on Human Rights](#) and by the [Home Affairs Select Committee](#).

¹¹ Independent Chief Inspector of Borders and Immigration, An inspection of the Home Office's approach to Illegal Working (August – December 2018), May 2019, p.47.

¹² [Home Office admits new immigration plans may see more trafficking victims locked up | The Independent](#)

¹³ See [Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime | Focus on Labour Exploitation \(FLEX\)](#)

¹⁴ Bulman, M., '[New Home Office policy risks 'driving human trafficking victims underground', experts warn](#)', *The Independent*, 12 November 2021.

¹⁵ <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales>

¹⁶ Clause 60: Identified potential victims of slavery or human trafficking: recovery period

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https://www.antislaverycommissioner.co.uk/media/1695/letter_to_home_secretary_on_ieca_11_november_2021.pdf; <https://www.labourexploitation.org/publications/bad-decisions-creation-immigration-enforcement-competent-authority-will-undermine>

¹⁸ [Modern Slavery: Statutory Guidance for England and Wales \(under s49 of the Modern Slavery Act 2015\) and Non-Statutory Guidance for Scotland and Northern Ireland](#)

¹⁹ [Clause 47: 28 Oct 2021: Public Bill Committees - TheyWorkForYou](#)

²⁰ [Nationality and Borders Bill - Hansard - UK Parliament](#)

²¹ Rights of Women (2019), Accessible or beyond reach?: Navigating the Exceptional Case Funding Scheme without a lawyer, p.10. Accessible at: <https://rightsofwomen.org.uk/wp-content/uploads/2019/02/Accessible-or-beyond-reach.pdf>.

²² Public Law Project (2020), 'PLP Survey Shows Lack of Faith in Legal Aid Scheme'. Accessible at: <https://publiclawproject.org.uk/uncategorized/improving-exceptional-case-funding-providers-perspectives/>

²³ [Nationality and Borders Bill publications - Parliamentary Bills - UK Parliament \(publiclawproject.org.uk\)](#)

²⁴ 'Government-funded 'places of safety' will be created so that adult victims leaving immediate situations of exploitation can be given assistance and advice for up to 3 days before deciding on whether to enter the NRM.' <https://www.gov.uk/government/news/modern-slavery-victims-to-receive-longer-period-of-support>

²⁵ Case study provided by the Helen Bamber Foundation