

## **Delivering justice for victims: A consultation on improving victims' experiences of the justice system – Consultation response**

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### **Introduction**

Focus on Labour Exploitation (FLEX) is a research and policy organisation working towards an end to labour exploitation. FLEX seeks to achieve this vision through the prevention of labour abuses, protection of the rights of those affected or at risk of exploitation and by promoting best practice responses to labour exploitation through research and evidence-based advocacy.

FLEX's work builds on the understanding that labour exploitation is situated at the extreme end of a spectrum ranging from labour compliance through to labour law violations, culminating at extreme exploitation in the form of offences such as forced labour and human trafficking for labour exploitation. These are at once serious crimes, human rights breaches and violations of labour law.

In the UK, FLEX has conducted research on a range of issues relevant to the current consultation, including improving identification and support of victims of trafficking as well as secure reporting and the impact of migration status and immigration control measures on vulnerability to exploitation.<sup>1</sup>

FLEX welcomes the opportunity to contribute to this consultation and commends the Ministry of Justice on its stated commitments to victims' wellbeing, including in relation to robust accountability in the criminal justice process, oversight of criminal justice agencies, building an accessible complaints process as well as supporting survivors to rebuild their lives. Our response has been informed through consultation with, and contributions from Kalayaan, a specialist charity providing support and advocacy to those who enter the UK on the Overseas Domestic Worker visa and under the International Agreement Route for domestic workers employed by diplomats.

### **Scope of Response**

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<sup>1</sup> See e.g., Labour Exploitation Advisory Group, *'Opportunity Knocks: Improving responses to labour exploitation with secure reporting,'* April 2020. London: Focus on Labour Exploitation (FLEX); Taskforce on Victims of Trafficking in Immigration Detention, (2021) *'Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime.'*

# **FOCUS ON LABOUR EXPLOITATION**

FLEX's work focuses on preventing labour exploitation. This submission provides a response to all questions where our area of expertise is relevant to inform the developments of this proposal. With the recognition that adequate and robust support and protections are a key element to prevention, our response primarily looks at the plan with the aim of reducing risk of labour exploitation. FLEX's underlying position and recommendation is that all workers, regardless of employment and immigration status, should be able and supported to report abuse and access vital protections. Such an approach is necessary, not only to protect individuals and promote redress, but in order to deter labour abuse and exploitation from taking place.

As a general comment, we are concerned that the immigration enforcement-centred approach to human trafficking (in conjunction with broader 'Hostile Environment' policies) has created and exacerbated vulnerabilities that impede victims' ability to access support and exit their exploitation. National and international evidence has demonstrated that where immigration enforcement objectives are prioritised within law enforcement, their primary function of victim protection is compromised and suffers as a result.<sup>2</sup>

FLEX responds to the following critical elements for providing meaningful victim support (outlined at pp.3-4 of the consultation document), with the relevant individual questions listed below each response.

- 1. Amplifying victims' voices in the criminal justice process**
- 2. Increasing transparency of the performance of criminal justice agencies**
- 3. Ensuring clear lines of accountability for when victims do not receive the right level of service**
- 4. Supporting victims to rebuild their lives through accessible and professional services, and ensuring that criminals pay more to support these services**
- 5. Ensuring better tools to protect victims and prosecute culprits**

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<sup>2</sup> Labour Exploitation Advisory Group, *Opportunity Knocks: Improving responses to labour exploitation with secure reporting*, April 2020. London: Focus on Labour Exploitation (FLEX), p.6.

We recognise that while these ambitions are laudable, the success of their delivery will depend on the details – and the degree to which the barriers which exist in practice for victims are addressed.

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## **1. Amplifying victims' voices in the criminal justice process**

*Addressing Questions 3, 9, 11, 16, 17, 18, 19 & 23*

The inclusion and promotion of victims' voices in the criminal justice process is the cornerstone of the provision of support and protection to victims and survivors. In doing so, the real-world concerns of victims with lived experience can be better addressed, and services calibrated to the reflect their actual needs.

To ensure that victims' voices are present in the criminal justice process, however, victims must feel able to access services in the first instance. At present, the politically driven and counterproductive focus on immigration enforcement often prevents victims from engaging with the criminal justice process at all. The detrimental impacts resulting from this approach has been consistently recognised by the government,<sup>3</sup> and to date, has not been adequately resolved.

### *i. Secure reporting*

FLEX holds that a genuine amplification of victims' voices requires the establishment of secure reporting policies and procedures so that individuals with insecure immigration status feel able to engage with criminal justice agencies in the first instance. As recognised by the Home Office, victims must be '*treated first and foremost as victims*'<sup>4</sup> regardless of their immigration status.

Members of the Labour Exploitation Advisory Group (LEAG) have reported that migrant victims with insecure status frequently believe that they cannot report their abuse and exploitation to authorities, for fear of serious personal consequences where their information is shared with immigration enforcement, including arrest, detention and removal from the UK.<sup>5</sup> As a result, the absence of secure reporting pathways for victims results in individuals staying in abusive and exploitative conditions for long periods.

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<sup>3</sup> e.g., Home Office, (2021) '*Guidance - Review of data sharing: migrant victims and witnesses of crime*,' 15 December 2021, para. 20; Home Office (2014). Review of the National Referral Mechanism for victims of human trafficking. para. 4.2.9.

<sup>4</sup> Home Office, (2021) '*Guidance - Review of data sharing: migrant victims and witnesses of crime*,' para. 18.

<sup>5</sup> Labour Exploitation Advisory Group, Opportunity Knocks: Improving responses to labour exploitation with secure reporting, April 2020. London: Focus on Labour Exploitation (FLEX), p.11.

Moreover, in the current situation, exploiters are empowered to act with impunity, knowing that their victims will not come forward, often using threats of deportation as a means to prevent their victims from coming forward to criminal justice agencies.<sup>6</sup> Beyond modern slavery, such experiences are common with victims of domestic abuse with irregular status. The organisation Imkaan has previously reported that more than 90% of abused women with insecure immigration status in the UK had their abusers use the threat of their removal from the UK to dissuade them from reporting their abuse.<sup>7</sup> These findings research has been supported by the Step Up Migrant Women campaign, which identified fear of removal from the UK as the main factor which prevented women from reporting to the police.<sup>8</sup>

Whilst law enforcement does not have a legal obligation to share information about undocumented immigration status of crime victims with immigration enforcement, this has taken place on a number of occasions. LEAG has recorded a number of cases in which police failed to identify exploiters as a result of their close relationship with immigration enforcement authorities.

FLEX is disappointed by the Home Office review of data sharing of migrant victims and witnesses of crime for immigration enforcement purposes,<sup>9</sup> which fails to address the real concerns raised by victims and survivors, front line organisations and the recent Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services 'Safe to Share?' report.<sup>10</sup> The Home Office's failure to stop using data from victims and witnesses of crime for immigration enforcement purposes, despite the consistent evidence that this practice leaves those with insecure status too fearful to come forward, will prevent victims of human trafficking from reporting crimes and empower exploiters and other perpetrators of abuse.

The hidden nature of trafficking makes it difficult to gain an accurate picture of its true scale and nature. As a result, anti-trafficking responses are

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<sup>6</sup> Labour Exploitation Advisory Group, *Opportunity Knocks: Improving responses to labour exploitation with secure reporting*, April 2020. London: Focus on Labour Exploitation (FLEX), p.55.

<sup>7</sup> Thiara, Ravi K. and Sumanta Roy (2012), *Vital Statistics 2: Key findings report on Black, Minority Ethnic and Refugee Women's and Children's experiences of gender-based violence.* London: Imkaan.

<sup>8</sup> McIlwaine, Cathy, Lucila Granada and Illary Valenzuela-Oblitas. 2019. *The Right to be Believed: Migrant women facing Violence against Women and Girls (VAWG) in the 'hostile environment' in London.* London: King's College London and Latin American Women's Rights Service.

<sup>9</sup> Home Office, (2021) *'Guidance - Review of data sharing: migrant victims and witnesses of crime,'* 15 December 2021, para. 20

<sup>10</sup> HM Inspectorate of Constabulary and Fire & Rescue Services, College of Policing, and Independent Office for Police Conduct, (2020), *'Safe to Share? Report Safe to share? Report on Liberty and Southall Black Sisters' super-complaint on policing and immigration status.'*

dependent on victims coming forward about their experiences. The continued absence of secure reporting options that enable people with insecure status to come forward as victims of crime undermines our ability to address trafficking and runs counter to the UK's stated ambition to '*lead the way in defeating modern slavery*.'<sup>11</sup> Beyond instilling a fear of approaching authorities among victims, the lack of separation between law enforcement (as well as other public bodies such as the Gangmasters and Labour Abuse Authority) and immigration enforcement dissuades the public from reporting potential cases of modern slavery out of concern that it will result in negative immigration consequences for victims.<sup>12</sup>

Where secure reporting pathways do not exist for victims, the provision of support and protection will be limited by increased distrust of authorities, victims not coming forward to report crimes, reduced identification of victims and perpetrators, and ultimately, the continued empowerment of exploiters who have an additional weapon in their arsenal to coerce victims. As set out in the explanatory report to Council of Europe Convention on Action against Trafficking in Human Beings 2005 (ECAT), '*the greater victims' confidence that their rights and interests are protected, the better the information they will give*.'<sup>13</sup>

#### *ii. Overseas Domestic Workers*

The organisation Kalayaan, which provides practical advice and support to, as well as campaigns with and for, the rights of migrant domestic workers, reports that Overseas Domestic Worker visa holders (ODWs) are effectively barred from accessing support and justice through the criminal justice system due to the nature of their visa.

The UK's Overseas Domestic Worker visa system restricts the options of workers on this visa. Although since 2016 ODW visa holders can theoretically change employer (though not work sector) they cannot apply to renew their six-month visa, even if they have an offer of ongoing employment. Nor does the visa allow for access to public funds. It is not realistic to find a new job in a private household, an area of work which usually requires care and trust, with only a few months left on your visa and no options to renew this. This condition creates a high risk of exploitation. The hidden nature of domestic work in a private household

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<sup>11</sup> May, T., 'My Government will Lead the Way in Defeating Modern Slavery,' *the Daily Telegraph*, 30 July 2016, accessible at: <https://www.telegraph.co.uk/news/2016/07/30/we-will-lead-the-way-in-defeating-modern-slavery/>.

<sup>12</sup> Birks, J. & Gardner, A.. 2019. "Introducing the Slave Next Door." *Anti-trafficking Review* 13: 66-81.

<sup>13</sup> Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings – CETS 197 – Action against Trafficking in Human Beings, para. 181.

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and lack of labour market enforcement in this area; the blurred boundaries around work and time off when you live in the place where you also work; and the multiple dependencies on the employer for employment, accommodation, visa status and often information about the UK and local laws, all diminish the ability of workers on this visa to leave abusive and exploitative employers. This reduces their negotiating power as workers and so their options to prevent or to address exploitation and abuse.

In cases where workers do escape from abusive employment, unless their treatment amounts to and fits the legal definition of trafficking or slavery, they are not in a position to access the protection and assistance on offer *via* the National Referral Mechanism, the UK's framework for identifying and supporting potential victims/survivors. The net result is that workers who experience other violations of their labour rights are left without status in the UK, are unable to access reporting mechanisms, and their employers go unpunished.

As stated by Kalayaan, there is a *'direct inverse correlation between the legal recognition of the migration route and rights, on the one hand, and abuse and exploitation by employers [...] on the other.'*<sup>14</sup> The return to the rights contained within the original Overseas Domestic Worker visa introduced in 1998 which provided fundamental rights including giving workers the right to change employer and apply to renew their visa (subject to ongoing employment) would enable victims who are otherwise vulnerable to abuse to leave this situation and to access support and justice. Where the UK Government seeks to offer meaningful protection and support to victims, it is essential that the structural conditions that exacerbate vulnerability and impede such protection and support are addressed across society as a whole. The original Overseas Domestic Worker visa, as introduced in 1998, offers a nationally and internationally recognised form of best practice in terms of the protection of ODWs.<sup>15</sup>

FLEX, together with Kalayaan, emphasise the need to ensure that workers' status remains legal, visible and that they are able to access employment, civil and criminal law. Such access is fundamental to prevention work in the form of ensuring options for workers to challenge mistreatment and denial

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<sup>14</sup> Kalayaan *et. al* (2019), *'The Overseas Domestic Worker visa – keeping migrant domestic workers visible, legal and able to seek assistance from the authorities.'* Accessible at: <http://www.kalayaan.org.uk/wp-content/uploads/2019/03/How-the-ODW-visa-prevents-trafficking-and-exploitation-position-statement-for-MSU.pdf>.

<sup>15</sup> Draft ILO Multilateral Framework on Labour Migration Non binding principles and guidelines for a rights-based approach to labour migration, Geneva, 31 October – 2 November 2005. Annex II 'Examples of best practice, VI Prevention of and protection against abusive migration practices', pt 82.

of rights that otherwise leads to ODW visa holders becoming victims of abuse and exploitation.

### *iii. Nationality & Borders Bill*

FLEX is concerned that the Nationality & Borders Bill undermines commitments laid out in the 'Delivering justice for victims' consultation document. Part 5 of the Bill, entitled 'Modern Slavery,' poses a direct threat to any effort to improve services and protection for victims of human trafficking. Any sincere attempt from the Government to support and protect victims must be holistic and recognise that actions of the Ministry of Justice should not be viewed in isolation from the likelihood of serious harm should the Nationality & Borders Bill pass into law. Within this response, we address key areas of concern within the Bill, without prejudice to our position that the entirety of Part 5 (and indeed the Bill as a whole) should be removed from the legislative agenda.

### *Clauses 57 & 58 - Identification*

The provision of support to victims of trafficking is dependent on the ability to recognise victim status through formal referral and identification through the National Referral Mechanism for identifying victims of trafficking (NRM). This is particularly difficult where an individual is a victim or survivor of human trafficking. The NRM is the system for identifying and providing support to victims of modern slavery and trafficking in the UK. A victim is not able to enter the NRM independently and therefore is reliant on a designated 'First Responder' such as the police, Home Office or a specified charity to identify them as a victim.<sup>16</sup> Nevertheless, groups such as After Exploitation<sup>17</sup> and the Anti-Trafficking Monitoring Group<sup>18</sup> have identified that potential victims of human trafficking face a 'referral lottery', with many identified by first responders not being referred to the NRM.

Clauses 57 & 58 of the current Nationality & Border Bill, which in effect set out 'trauma deadlines' pose a significant threat to the ability to identify victims of human trafficking. By demanding that victims present all

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<sup>16</sup> Home Office (2021), *Guidance - National referral mechanism guidance: adult (England and Wales)*. Accessible at: [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#:~:text=The%20National%20Referral%20Mechanism%20\(%20NRM,human%20trafficking](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#:~:text=The%20National%20Referral%20Mechanism%20(%20NRM,human%20trafficking)

<sup>17</sup> After Exploitation (2020). *The Referral 'Lottery'*. Available at <https://afterexploitation.com/national-referral-mechanism/>

<sup>18</sup> The Anti-Trafficking Monitoring Group (2021). *A Review of the National Referral Mechanism Multi-Agency Assurance Panels*. Available at: [https://www.antislavery.org/wp-content/uploads/2021/02/MAAPs\\_report\\_final.pdf](https://www.antislavery.org/wp-content/uploads/2021/02/MAAPs_report_final.pdf)

evidence that they have suffered human trafficking crime at the earliest stage and holding that late disclosure evidence will damage credibility, the government is acting against best evidence, and its own understanding of the difficulties that many face in disclosing evidence.<sup>19</sup>

Clauses 57 and 58 are unfair to victims, as they undermine trafficking victims' credibility due to unrealistic expectations around disclosure and their ability to process and speak about serious trauma. This risks the UK failing to meet its obligations to combat slavery and human trafficking. The clauses reveal clear gaps in understanding and ignores existing evidence around identification of people as victims of trafficking and on the reality of the process of disclosure, particularly, in relation to trauma.<sup>20</sup>

#### *Clause 62 – Public Order & 'Bad Faith' Exclusion*

FLEX is concerned that Clause 62 of the Nationality & Borders Bill will empower traffickers and facilitate the targeting of people with criminal records for exploitation. Clause 62 seeks to restrict support for survivors where they have a criminal sentence of 12 months or more. The 'public order' threshold in Clause 62 is low, applying to broad non-violent offences which carry a 12-month (or higher) sentence, including possession with intent to supply. It also acts to exclude those perceived by the authorities to have made a claim 'in bad faith', and resultantly that 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. FLEX are keen to highlight the fact that victims of trafficking should never be refused the support necessary to exit their exploitation, and that victims of criminal exploitation will be severely impacted by this clause as their supposed criminal activity is often not recognised as coerced. Moreover, the systems necessary to implement this provision and verify criminal histories (including in third countries) may result in considerable delays to a system which is already severely backlogged.<sup>21</sup> Additionally, the clauses within the Bill that, through their misunderstanding of the nature of asylum claims and trafficking, criminalise arrival in the UK risks posing individuals as public order threats through

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<sup>19</sup> "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." - 8 Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and NonStatutory Guidance for Scotland and Northern Ireland

<sup>20</sup> Witkin, R. & Robjant, K, (2022) 'The Trauma-Informed Code of Conduct: for all professionals working with survivors of human trafficking and slavery,' *Helen Bamber Foundation*, p. 44. Accessed at: <https://www.helenbamber.org/resources/best-practiseguidelines/trauma-informed-code-conduct-ticc>.

<sup>21</sup> ITV (2020), Suspected modern slavery victims wait around 450 days on average for decision – report. Accessed at: <https://www.itv.com/news/2020-09-17/suspected-modern-slavery-victims-wait-around-450-days-on-average-for-decision-report>.

their legitimate access, and thereby denying them the support and protection that they are entitled to under international law.

By disqualifying victims from protection, the clause will encourage traffickers to exploit those with criminal records who will no longer be able to access protection and support provided by the NRM framework. As highlighted in research from the University of Nottingham, Clause 62 “denies the police and prosecution of simple crime reporting and the most important witness in most cases—the victim.”<sup>22</sup> Further, it “sends a message to Organised Criminal Networks and criminals that their crimes and activities carry little or no risk.”<sup>23</sup> FLEX also echoes the concerns raised by a number of UN Special Rapporteurs in a letter to the UK Government, that “Clause 62 would be in violation of the State’s obligation to identify victims of trafficking or contemporary forms of slavery and note that this obligation applies in all situations of trafficking and exploitation, and in respect of all victims, without exception.”<sup>24</sup> Furthermore, they state, “we are concerned that Clause 62(3) would be in violation of the State’s obligation to ensure non-punishment of victims of trafficking or contemporary forms of slavery for any unlawful acts that that are a direct consequence of trafficking.”<sup>25</sup> In order to ensure that the UK respects its obligations under international law, the Government must ensure that victims are not disqualified from accessing necessary protection and support.

### *Unrealistic Standards for Victims*

Initial identification as a victim is key to accessing even the most basic government funded support, such as safe accommodation. The UK currently provides no pre-NRM accommodation or legal advice to inform consent to a referral and support disclosure. It is vital that the initial threshold (Reasonable Grounds) for identification as trafficked is not set too high. It is essential that victim protection and support is not the preserve of a select few but is designed to identify as many victims as possible to help them exit their exploitative conditions and provide them with support. The ‘It Still Happens Here’ report by the Centre for Social

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<sup>22</sup> Rights Lab, Nottingham University, Consideration Paper; Nationality and Borders Bill, 18 October 2021, para. 179. Accessed at: <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-andbriefings/2021/october/consideration-paper-nationality-and-borders-bill.pdf>

<sup>23</sup> *Ibid.*

<sup>24</sup> Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Letter, 5 Nov 2021, OL GBR 11/202.

<sup>25</sup> *Ibid.*

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Justice estimates that there are 'at least 100,000' victims of modern slavery offences in the UK, compared to the 2017 Government estimate of 10-13,000. This strongly suggests that we are massively under-identifying victims and therefore need to increase rather than narrow access to identification and support.<sup>26</sup>

International law places an obligation on states to identify victims of trafficking.<sup>27</sup> This obligation does not permit exceptions and therefore the creation of unrealistic standards of behaviour for victims as set out in Part 5 of the Nationality and Borders Bill risks prejudicing the UK's compliance with its legal obligations. The UK must adopt a trauma-informed approach to facilitate disclosure, including in relation to victims prior to and during detention. The Independent Chief Inspectors of Borders and Immigration (ICIBI) has previously 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*".<sup>28</sup> The Nationality & Borders Bill, by increasing the risk of detention, prioritising immigration enforcement, and failing to recognise the hierarchy of needs, presents a considerable threat to victims' ability to come forward and receive support and protection.

Different forms of exploitation are frequently mixed and interrelated. Victims of all forms of modern slavery offences often struggle to recognise themselves as victims and have difficulties in disclosing some or all of the abuse they have suffered as a result of trauma, low self-esteem, as well as the fear of stigmatisation. It is important to note that human trafficking has been held to amount to torture and ill treatment,<sup>29</sup> and sexual and other forms of violence are used separately and in conjunction by traffickers as an effective weapon. Unfortunately, this applies to people of all genders and ages, FLEX therefore warns against creating an unintended hierarchy of victimhood. Creating exceptions for victims of specific forms of exploitation rather than all exploitation is problematic: the process of disclosure is agreed to be complex and late disclosure is common for many reasons and histories of sexual exploitation, and sexual violence may not be apparent from the outset of contact.

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<sup>26</sup> The Centre for Social Justice & Justice and Care, (2020), 'It Still Happens Here: fighting UK slavery in the 2020s,' p. 6.

<sup>27</sup> Article 10, Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

<sup>28</sup> 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.

<sup>29</sup> OSCE, (2013), *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment*.

FLEX holds that it is important to ensure that no victims of trafficking are penalised for late disclosures.

Case study: **Agatha**

Agatha was referred to Hope for Justice after she presented at a homeless centre with indicators of being a victim of human trafficking and she subsequently disclosed an account of being exploited for forced labour in the UK. Hope for Justice assisted with her referral into the NRM and continued to provide socio-legal advocacy to Agatha post-NRM, building a relationship of trust and support with her. After 17 months of working with Agatha she disclosed to Hope for Justice that she had also been trafficked into Europe for sexual exploitation before arriving to the UK with more detailed disclosures made over time. Overall disclosures were made over a period of 22 months.

*General messaging of the Bill*

While the Ministry of Justice is seeking to bolster its support for victims of crime, the government has repeatedly asserted that the UK's modern slavery system is being 'abused', for instance using this allegation as the justification for measures within the Nationality & Borders Bill.<sup>30</sup> No evidence has been made available in support of these claims which, as set out above, are inconsistent with our understanding of the challenge, namely that too many victims are still not being identified. This framing is both unevidenced and dangerous, with potentially serious repercussions for the victims of human trafficking that the UK is obliged to protect.<sup>31</sup> Establishing an increased burden of proof and impediments regarding disclosure of status are at odds with victims' reality and the government's own knowledge about victims of human trafficking. It is FLEX's view that more must be done to facilitate identification and disclosure rather than limiting recourse to protection and support for those who do not fit the narrow conditions set by the Government. The Nationality & Borders Bill, through its narrowing of identification and support, is a significant

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<sup>30</sup> The Sun (2021). Child rapists and terrorists will be stopped from using modern slavery loophole to stay in UK. Accessible: <https://www.thesun.co.uk/news/14397127/uk-clampdown-deportation-law-firms-criminals/>

<sup>31</sup> After Exploitation (2021). *The Nationality & Borders Bill: Impact on survivors of modern slavery*, p.4.

backwards step that runs against evidence. Combined with the Government's rhetoric, this cuts against the stated determination 'to improve the service and support that victims receive.'<sup>32</sup> Beyond this, the Nationality & Borders Bill conflates human trafficking with immigration, muddling the two issues and undermining the Modern Slavery Act 2015 and much of the good work to prevent and address slavery over the last decade. As explained above, FLEX's position remains that centring immigration enforcement within responses to human trafficking is detrimental to victims' wellbeing and is ultimately ineffective. Victim support must be uncoupled from immigration enforcement. As a number of UN Special Rapporteurs have powerfully put, 'the bill instrumentalises national security concerns, increasing risks of discrimination and of serious human rights violations, in particular against minorities, migrants and refugees.'<sup>33</sup> Our experience is that there is a real need to do more to facilitate identification and disclosure. The Nationality & Borders Bill and the narrowing of identification, support, and protection is a significant backwards step.

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. The new 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.<sup>34</sup> 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.

As a whole, the Bill would make it more difficult for vulnerable people, including trafficking victims, to disclose their experiences of abuse or access meaningful help, for instance due to its penalties for asylum seekers and offshoring plans.

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<sup>32</sup> Ministry of Justice (2021), *Delivering justice for victims: A consultation on improving victims' experiences of the justice system - Consultation*, p. 3.

<sup>33</sup> OHCHR, 'United Kingdom Nationality and Borders Bill undermines rights of victims of trafficking and modern slavery, UN experts say,' 14 January 2022. Accessible at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28027&LangID=E>

<sup>34</sup> Independent Anti-Slavery Commissioner (2021), *Letter to the Home Secretary*, 4 November 2021. Accessible at: <https://www.antislaverycommissioner.co.uk/media/1717/iasc-and-hs-exchange-of-letters-december-2021.pdf>

## **2. Increasing transparency of the performance of criminal justice agencies**

*Addressing Questions 16, 17, 18, 19 & 23*

FLEX is concerned about the lack of transparency surrounding victims of human trafficking and government decision-making. Such concerns have been echoed by others in the anti-human trafficking sector, such as the Anti-Trafficking Monitoring Group<sup>35</sup> and Independent Anti-Slavery Commissioner.<sup>36</sup>

This is particularly apparent in the context of the Government's justification for the detrimental measures for victims of modern slavery offences in the Nationality & Borders Bill. The Government has relied upon broad claims of misuse of the NRM system without providing evidence to substantiate this claim,<sup>37</sup> nor to justify the upturning of the measures designed to identify, support and protect victims of modern slavery offences in the UK. FLEX maintains that the Home Office, and wider government, must make publicly available the evidentiary basis for their decision-making, as well as any findings, in a timely and accessible manner.

The Home Office's serious failings in NRM data collection<sup>38</sup> impedes our ability to conclusively determine the causal factors for the increase in positive reasonable grounds decision-making for potential victims of human trafficking in immigration detention. Indeed, the National Audit Office have previously held that the errors in NRM data make it '*difficult to use to understand modern slavery crime*' and that as a result the Home Office itself has an '*incomplete picture of the crime*.'<sup>39</sup> Improvements in data collection and data transparency are therefore necessary to move beyond hypothesising towards a meaningful assessment grounded in empirical evidence. Among these concerns is that published data is at a very high level and requires greater disaggregation to improve its utility. For instance, the absence of demographic information such as ethnicity as well as the lack of information on criminal justice outcomes impedes its use.

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<sup>35</sup> The Anti-Trafficking Monitoring Group (2018). *Before the Harm is Done Examining the UK's response to the prevention of trafficking*. Available at: <https://www.antislavery.org/wp-content/uploads/2018/09/Before-the-Harm-is-Done-report.pdf>

<sup>36</sup> Independent Anti-Slavery Commissioner (2020), *Annual Report 2019-2020*, 4.4.5.

<sup>37</sup> After Exploitation (2021). *The Nationality & Borders Bill: Impact on survivors of modern slavery*,

<sup>38</sup> The Anti-Trafficking Monitoring Group (2018). *Before the Harm is Done Examining the UK's response to the prevention of trafficking*. Available at: <https://www.antislavery.org/wp-content/uploads/2018/09/Before-the-Harm-is-Done-report.pdf>

<sup>39</sup> National Audit Office (2017). *Reducing Modern Slavery*. Available at: <https://www.nao.org.uk/report/reducing-modern-slavery/>

Additionally, criminal justice agency data on outcomes are difficult to access as it is not published in one place and therefore requires considerable trawling to identify relevant information. As well as this, to identify criminal justice outcomes, offences must be flagged as having a modern slavery component. Where individuals are convicted of non-modern slavery offences for ease of prosecution, it is impossible to identify the relevant information necessary for research.

Further, undertaking serious policy shifts without consultation, including with the Independent Anti-Slavery Commissioner, Statutory Guidance Reference Group and the various Modern Slavery Strategy Implementation Groups or the anti-trafficking sector as a whole, results in a concerning lack of transparency regarding Government decision-making. Such a lack of engagement was seen with the creation of the Immigration Enforcement Competent Authority in November 2021, which the Government's own Independent Anti-Slavery Commissioner, said posed "*significant risk that those victims of modern slavery whose cases are assessed by Immigration Enforcement will have their cases judged by considerations about their immigration status rather than their rights to protection as victims of serious crime.*"

Damaging decisions have been taken by government officials without meaningful transparency as to the reasoning and evidence base used to ground the decision-making process. Not only does this undermine trust in governmental bodies, but it inhibits opportunities to improve victim support and protection. Recent actions such as the extension of the Seasonal Workers Scheme before the release of the Government's own review on the issues within the pilot, runs against the principles of transparency necessary to ensure that any concerns are adequately addressed in a timely manner.<sup>40</sup>

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### **3. Ensuring clear lines of accountability for when victims do not receive the right level of service**

*Addressing Questions 16, 17, 18, 19 & 23*

Government-funded support for victims of trafficking is provided through the Modern Slavery Victim Care Contract and currently delivered through the Salvation Army together with subcontracted organisations. However, in practice, support for victims is also heavily reliant on the voluntary sector, as well as statutory organisations who have a statutory duty on top of their

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<sup>40</sup> See: Focus on Labour Exploitation (2022), FLEX response to the Government's review of the first year of the Seasonal Workers Pilot.

regular role and may not have specialist expertise or training. For example, in the UK it is only possible to be formally identified as a victim of trafficking if you are referred into the National Referral Mechanism by a designated First Responder. There is no specific funding, training or qualification for this role, despite it being crucial for victims gaining support and access to entitlements. A poor quality NRM referral can mean a potential victim receives a negative decision and as a result is shut out of support with their credibility damaged. There is a lack of data on the experiences and outcomes for survivors who go through the NRM or their access to their article 12 entitlements.<sup>41</sup> It is important to note that an NRM referral does not give special access to services which are part of a victim's article 12 entitlements such as legal advice or healthcare and access is affected by local availability and capacity. The absence of accountability on outcomes for victims means that over 4 years after the National Audit Office criticised the Home Office for not having effective oversight of the modern slavery system,<sup>42</sup> it is not clear that this has been addressed. This makes it very hard to know that there is accountability for victims when they do not receive the right level of service.

After Exploitation's Hidden Futures report<sup>43</sup> sets out data gaps. This includes data on the number of accepted, rejected, and failed safe house referrals, data on the deportation and voluntary return of potential or recognised victims of trafficking, and data on access to legal aid provisions for trafficking victims.

As set out above, there is a lack of oversight and accountability for when victims are not properly identified and supported. An accessible and responsible accountability mechanism informed by lived experience would do much to address the gaps in the system and improve outcomes for survivors.

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#### **4. Supporting victims to rebuild their lives through accessible and professional services, and ensuring that criminals pay more to support these services**

*Addressing Questions 3, 9, 16, 23 & 26*

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<sup>41</sup> Article 10, Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

<sup>42</sup> 'Reducing Modern Slavery' (2017) National Audit Office

<sup>43</sup> After Exploitation, (2020) *Hidden Figures: How Data Denial Threatens the Fight Against Slavery*. Accessed at: <https://afterexploitation.files.wordpress.com/2020/09/hidden-futures-how-data-denial-threatens-the-fight-against-slavery-after-exploitation-4.pdf>

Ensuring access to identification, early specialist legal advice and support systems is necessary to ensure that victims are able to rebuild their lives. In contrast to suggestions set out in the government's New Plan for Immigration, which suggested that the UK's Modern Slavery support systems are being 'abused,' it is our experience that too many victims are still not being identified and supported. Data received from a recent freedom of information request<sup>44</sup> shows a high number of positive trafficking referrals from immigration detention.<sup>45</sup> This suggests an ongoing lack of screening for trafficking or opportunities for victims to disclose prior to immigration detention. It is also essential that the UK Government funds independent specialist organisations working in immigration detention to facilitate disclosure, informed consent and make referrals into the NRM in order to address high numbers of trafficked people being detained. The large numbers of victims being identified in detention is of considerable concern and points towards the need for concerted efforts to ensure that victims of modern slavery offences are identified and receive meaningful support.<sup>46</sup>

The recent creation of the Immigration Enforcement Competent Authority (IECA) will only further complicate these issues rather than 'streamline' decision-making as claimed.<sup>47</sup> As set out above, already many victims are being treated as immigration offenders rather than victims of trafficking. Knowing that their identification will depend on a decision-making body with an immigration remit is likely to deter many victims from consenting to an NRM referral in the first place. It is also likely that the creation of a second decision-making body in the form of the IECA will mean a return to the differences in decision-making seen pre-Single Competent Authority and highlighted in the Home Office's 2014 review of the NRM.<sup>48</sup>

Whilst conclusive grounds decisions can be made in 45 days, in practice decisions often take a year or more,<sup>49</sup> during which time victims in the NRM are waiting in limbo, not knowing if they will be believed and unable to move on with their lives, increasing the impact of their trafficking and

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<sup>44</sup> Freedom of Information Request reference: 64607.

<sup>45</sup> An increase in positive reasonable grounds decisions is evident since 2017, rising from 14% of cases, to 44% in 2018, before stabilising at 80.4% in 2019 and 83.2% in 2020.

<sup>46</sup> Labour Exploitation Advisory Group (2019) *Detaining Victims: human trafficking and the UK immigration detention system*, p.13.

<sup>47</sup> Written Answer by Baroness Williams of Trafford on 13 December 2021 (HL4899) to Baroness Lister's written question (HL4901).

<sup>48</sup> See: Taskforce on Victims of Trafficking in Immigration Detention, (2021) *'Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime.'*; Anti-Trafficking Monitoring Group (2014), *The National Referral Mechanism: A Five-Year Review*.

<sup>49</sup> Beddoe, C., (2021), *Into The Arms Of Traffickers: An examination of how delays in asylum and trafficking decision-making increase the risks of trafficking for young asylum-seekers*, p.9.

compounding the trauma of their abuse. It is essential that the UK addresses the concerning waiting time for conclusive grounds decisions.

Potential victims of trafficking who are in the NRM should not be required to report to the Home Office while awaiting a conclusive grounds decision on their case. Reporting can be traumatic for victims, and both interferes with and undermines the recovery period to which victims in the NRM are entitled.

To ensure that victims have proper support, it is important that they are offered specialist early legal advice prior to an NRM referral. This would ultimately inform consent, ensure access to the victim assistance entitlements under article 12 of the ECAT and lead to better outcomes for victims. There is currently a postcode lottery of legal advice with massive gaps in coverage leaving victims unsupported to deal with complex legal matters directly related to their trafficking.

## **5. Ensuring better tools to protect victims and prosecute culprits**

*Addressing Questions 9, 16 & 26*

The aforementioned points ranging from secure reporting and early specialist legal advice to the improved disaggregation of NRM data and transparency around outcomes for survivors can help to ensure that victims are protected and that culprits are held to account. FLEX's position is that such efforts to protect and support victims must be embedded across Government as a whole. Poor mechanisms in one department will impact the efficacy of another. The immigration enforcement approach taken by the UK Government has already undermined victim protection and criminal justice agencies, leaving victims unsupported and empowering perpetrators to act with impunity. This situation will worsen unless there are significant changes to the Nationality & Borders Bill. As such, the proposals highlighted in the consultation document cannot be uncoupled from the implications for victims' rights in the form of the impact of the hostile environment on immigration and the proposals set out in the Nationality & Borders Bill, both of which will do much to undermine trust, prevent victims from coming forward, and enable perpetrators to act with impunity.

FLEX's position is that victim protection rests on creating the structural conditions whereby victims of modern slavery offences can come forward and exit situations of exploitation, and receive the support that they require. After-the-fact prosecutions can only be of limited utility for tackling human trafficking and should not be the focus of Government efforts to the exclusion of attention to providing conditions that can prevent modern slavery offences from occurring in the first instance. This is of particular

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concern, given that this approach will hinder victims' ability to exit exploitative situations without third party intervention, unless it has deteriorated to an extreme form of abuse and exploitation.

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