Bruges Place, 15-20 Baynes Street, London, NW1 0TF (Entrance via Randolph St)
T: 020 3058 2020 | E: reception@helenbamber.org | helenbamber.org | @HelenBamber

HELEN BAMBER FOUNDATION
strength to fly

# Mental Capacity and Referral as a Victim of Human Trafficking

## Disability and Legal Protection Paper

March 2021

Sam is a survivor of human trafficking. He was kept in a flat for several years and forced to work on different building sites for a violent man who took all the money from his work. He suffers from a severe mental disorder, partly as a result of his traumatic experiences, and he also has an underlying cognitive impairment. A support worker contacts a charity First Responder to ask them to make a referral into the NRM. Sam is asked for his informed consent to make the referral, but the First Responder is not satisfied Sam has sufficient understanding of the NRM to make a capacitious decision either way. There is a positive obligation to identify and support victims of human trafficking under international and domestic law. The First Responder therefore needs to know how this duty can be met if Sam lacks the capacity to give informed consent.

This paper sets out an area where the Home Office's 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 v.2.0 ("the statutory guidance") requires amendment[1].

The statutory guidance purports to cover situations where an adult lacks mental capacity for referral into the National Referral Mechanism ("the NRM"). The NRM is the process used to identify survivors of human trafficking and modern slavery; it provides a gateway to a range of support

[1] This paper is deliberately focused on the statutory guidance. There is something of an absence of case law or other guidance on this issue and focusing on the issue of the lawfulness of the guidance should not be taken to suggest that this is the only issue arising. For example, questions may be asked as to what relevant information a person must be able to understand, retain, use and weigh, and communicate, per s.3 of the Mental Capacity Act 2005, in order to have capacity to make relevant decisions. Questions may be asked as to whether a Home Office Official or any particular first responder agency would be sufficiently qualified or in a position to make such an assessment of capacity. Neither does the paper seek to make a definitive conclusion as to whom should be undertaking capacity assessments and best interests decisions and making any necessary applications to the Court of Protection. It may be that the protected party's local authority, which can work with an independent advocacy service and can be a first responder, has the benefit of social workers to conduct assessments, and will have experience in making applications to the Court of Protection, would be best placed. Further, it could be strongly argued that the duty to consider referral could fall within the local authority's duties under the Care Act 2014. However, this paper does not seek to fully argue or consider this point albeit guidance would be useful, particularly for local authorities themselves. The key principle must be that those conducting capacity assessments and best interests assessments are sufficiently qualified and sufficiently independent to do so.

provisions, in line with the Council of Europe 'Convention on Action against Trafficking in Human Beings'.

The statutory guidance includes sections on capacity and informed consent. Section 5.30 notes that "**Adult victims need to give informed consent to enter the NRM**". The statutory guidance also states in section 5.28 that "**where an individual does not have the capacity to consent, a best interests decision should be taken**".

The fundamental points to be made here are that a best interests decision does not equate to informed consent and that the statutory guidance appears to suggest that best interests decisions can be made without defining who should take that decision and without clarifying the role or authority of the Court of Protection in the process.

Referral into the NRM can have a number of profound implications for a person. It can impact on their immigration legal status - leaving them in limbo until a final decision has been taken on their case. It is the gateway to an automatic consideration of a grant of leave to remain if the person does not have such leave. It can also impact on housing, welfare and healthcare entitlements. The NRM process can be traumatic (requiring disclosure of potentially traumatic events to additional professionals and the process can be a reminder of a traumatic past). It can be a delayed and prolonged process (which can for example delay the outcome of an asylum claim, potentially for years). It flags engagement with the police who may wish to proceed with criminal justice responses (which can have their own impacts - both positive and negative - on victims of crime) and in some circumstances it raises potential for a compensation claim against a trafficker. It is not always the case that referral into the NRM is in the best interests of a person: to ascertain this would require consideration of the positives and negatives of such action (the 'best interests balancing exercise', per s.4 of the Mental Capacity Act 2005), including taking into account the person's wishes and feelings, the views of family members and those involved in the person's care and support, and, if immigration legal issues are involved, requiring expert advice from the person's immigration lawyer.

Referral into the NRM cannot be made by just anyone. It is not possible to self-refer. A person can only be referred in by a set list of 'First Responders' (set out in the statutory guidance at section 4.10 and 4.11). The statutory guidance provides no guidance on when a First Responder might be able to make a 'best interests' decision on behalf of an incapacitious victim of human trafficking. Local authorities can act as First Responders and their social services departments, supported by legal teams, can be expected to have competence in navigating issues of decision-making and mental capacity. Other First Responders on the current list do not have an equivalent degree of expertise and would not necessarily be competent to engage in such a process. There are also numerous practical issues with a Home Office or NRM decision-maker undertaking a best interests

assessment, given they may never meet the person involved and are unlikely to have specialist expertise and professional infrastructure equivalent to that of a welfare or clinical professional. It may also be questioned whether statutory actors with their own priorities and budgetary concerns are sufficiently independent to make such decisions. There are therefore a number of serious practical concerns as to the potential negative/harmful impact the current guidance could have on vulnerable people.

There is also a fundamental problem with the current guidance, in that there are only very narrow circumstances in which it is lawful to make decisions on behalf of a person who lacks capacity to make such decisions.

The power to make a decision to refer into the NRM (engaging issues of legal entitlements, regularising immigration status/making immigration applications and the potential need to instruct solicitors) could, potentially, come from one of three sources[2]:

1. Care and Treatment Decision Making

   The relevant decisions could be made (or more accurately, decision makers will not be liable for relevant decisions) without Court authority as a care and treatment decision, per s.5 of the 2005 Act.

2. Direct Order of the Court and authorisation of a Suitable Third Party

   An order could be made under s.16(2)(a) of the Mental Capacity Act 2005 that it is in the protected party's best interests to consent to referral into the NRM and to appoint a suitable third party to assist them in doing so.

3. Appointment of a deputy

   An order under s.16(2)(b) could be made to appoint a deputy to make decisions for a protected party in order for them to be referred into the NRM (and if necessary to regularise their immigration status).

There are no other lawful means of taking decisions on behalf of a person who lacks capacity. A generalised 'best interests' assessment is not such a basis.
It is important that this framework is applied lawfully, because as well as the NRM having serious implications for a person's rights and living situation, there are also significant issues around privacy of sensitive data and the effective right to access legal advice, which cannot be complied with effectively outside of this process.

---

[2] *Court of Protection Practice 2020* paragraph 1.93, which also explores the option of a capacitious person appointing an attorney, but which is not included in this article on the basis that it is unlikely that a LPA will be in place in relevant cases.

On the specific point of whether a person can take the decision (or more accurately, will not be liable for a decision in terms of s.5 of the 2005 Act) without Court authority, as appears to be suggested by the Home Office in the statutory guidance, the decision to consent to a referral into the NRM and/or related criminal justice/immigration decisions is unlikely to fall within the definition of 'care and treatment', per s.5 of the 2005 Act. The 2005 Act does not define care and treatment, except that treatment is defined as "a diagnostic or other procedure" (s.64(1) of the 2005 Act). Immigration decisions are not listed in the list of examples of care and treatment in the Mental Capacity Act 2005: Code of Practice at paragraph 6.5. Whilst paragraph 6.5 is non-exhaustive, the list appears to set out examples of health and social care and it was not intended to cover generalised NRM identification processes and related immigration, criminal justice or legal decisions. There may be exceptional circumstances which would justify the use of s.5 of the 2005 Act to cover the decision to refer a person into the NRM, but in our professional opinion this provision is not intended to cover the general situation suggested by the statutory guidance. Even a Court of Protection appointed deputy should always consider whether or not a decision they are going to take would be covered by their deputyship: for example an ordinary property and affairs deputyship does not usually allow a deputy to initiate civil legal proceedings without the permission of the Court of Protection[3].

In general (and as set out above there may be some exceptional situations) it is unlikely that the decision to consent to referral into the NRM can properly be categorised as a care and treatment decision and, in the absence of defence from liability under s.5 of the 2005 Act, and further in the absence of express reference to s.5 of the 2005 Act in the Modern Slavery Guidance, it is not clear what lawful power is relied upon to permit persons to make such decisions as suggested in the guidance, without Court authority.

It should be recognised that the need to apply to the Court of Protection will increase the time in which it takes regularise a protected party's immigration status, which is undesirable. However, such a position is based on the statutory framework and the need for lawful substituted decision making to be properly assessed and safeguarded. It may be that an expedited paper process may be appropriate once case law guidance has been obtained, but the Court's oversight is nonetheless necessary.

[3] See for example ACC and Others [2020] EWCOP 9.

## The Helen Bamber Foundation

The Helen Bamber Foundation ('HBF') is an expert clinical and human rights charity. Our multidisciplinary and clinical team works with survivors of human trafficking/modern slavery, torture, and other forms of extreme human cruelty. We provide a bespoke Model of Integrated Care for survivors which includes medico-legal documentation of physical and psychological injuries, specialist programmes of therapeutic care, a medical advisory service, a counter-trafficking programme, housing and welfare advice, legal protection advice and community integration activities and services.

This paper has been prepared on behalf of HBF and in consultation with HBF's multi-disciplinary teams by:

Jennifer Blair

Co-Head of Legal Protection, the Helen Bamber Foundation
and Barrister, No5 Chambers (London)

David C. Gardner

Barrister, No5 Chambers (Bristol)

Our thanks to Richard Alomo, Jake Rylatt, and Alison Harvey of No5 Chambers for comments on an earlier version of this paper. The legal views expressed are those of the authors.