



Briefing for House of Lords Report 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 traffickers. 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. The Government claims that these changes are "underpinned by access to legal advice, under clauses 65 and 66". However, these clauses would leave many survivors who have not yet been referred into the National Referral Mechanism still unable to access legal advice.
- **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.

We urge Peers to support amendments to remove these clauses.

In addition, we urge Peers to support new clause 58A which would ensure that any survivor of trafficking with uncertain immigration status is able to approach the authorities for assistance with and to report a crime without fear of repercussions due to their information being shared with immigration enforcement.*

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 increases the risk of re-traumatisation and negative long-term physical and mental health outcomes. It can 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. At Committee Stage, the Government pointed to the “clear rise in the number of referrals to the national referral mechanism” from detention, from 3% (501) in 2017 to 16% (1,767) in 2019.⁶ But **these figures do not show misuse of the system – they simply reflect the fact that more survivors of trafficking are being placed in immigration detention.** Figures secured from a Freedom of Information request⁷ 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).⁸

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.⁹ It is well recognised, including in statutory guidance,¹⁰ 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.¹¹ 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*”.¹² 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.¹³ 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. The Government claims that these changes are “underpinned by access to legal advice, under clauses 65 and 66, to help individuals understand whether they are a potential victim of modern slavery or human trafficking”. However, these clauses would leave many survivors who have not yet been referred into the National Referral Mechanism still unable to access legal advice.
- **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.

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.¹⁴ **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.**¹⁵ **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.¹⁶ 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.¹⁷ 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, without any consultation, in order 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.¹⁸ 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 was updated only last month and 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.*¹⁹ 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.

The Home Office has been repeatedly criticised for failing to identify victims of trafficking before placing them in immigration detention. In light of this, will 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? The answer to this is improving the identification and protection of survivors, not cutting off support.

The Government has given 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.*"²⁰ There are multiple reasons for late disclosure which can be complex and often operate in combination, rather than singly. These are referred to throughout the Modern Slavery Act Statutory Guidance. In itself, the task of drafting the many reasons for partial disclosure and late disclosure to ensure coverage of all possibilities in trafficking cases begs the question as to why a Government which is significantly backlogged and delayed in its decision making and procedures for victims of trafficking, would add a further fraught layer of decision making, subsuming valuable time, tax payer's resources and the desperate lives of victims in the process.

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. Not only would this not address the various reasons for late disclosure outlined above, it is also not the case. As written these clauses 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 both individuals and legal providers.^{21,22} It is not a meaningful way to ensure access to justice.²³

Amendment

Leave out clauses 57 and 58 from the Bill (tabled by Lord Coaker)

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*".²⁴ Further criminalising victims and disqualifying those victims from accessing support will harm our efforts to bring traffickers to justice.

Given the need to protect victims of trafficking for forced criminality and support them to leave exploitation how can clause 62, which will drive victims further underground and increase their dependency on their exploiters be justified?

Amendment

Leave out Clause 62 from the Bill.

4. Secure reporting

In December 2021, the Government laid before Parliament the Home Office and police data-sharing arrangements on migrant victims and witnesses of crime with insecure immigration status review ('the Review').²⁵ The Review rejects the call made by sector representatives to establish a 'firewall' or system of secure reporting to make it safer for victims with insecure immigration status to approach the police to report crimes safely. Instead it proposes an Immigration Enforcement (IE) Migrant Victims Protocol which "will set out that no immigration enforcement action will be taken against that victim while investigation and prosecution proceedings are ongoing, and the victim is receiving support and advice to make an application to regularise their stay". Organisations working with victims have voiced strong disagreement with this response from the Government, explaining that there remains a conflict of interest so long as Immigration Enforcement is involved in receiving reports from and supporting victims of crime, given that its priority is to enforce immigration rules rather than providing a safeguarding function.

Protecting victims and enabling the police to investigate traffickers and the perpetrators of abuse and exploitation must be prioritised over compelling the police to carry out the role of immigration enforcement. Fear of arrest or removal will prevent those with insecure immigration status from reporting crime, whether as a witness or victim, and the absence of secure reporting pathways undermines the police's ability to do their jobs of protecting victims and bringing perpetrators to justice. It also benefits perpetrators or exploiters who can take advantage of the additional barriers to secure reporting and target and maintain control of people accordingly and operate with impunity.²⁶ This was highlighted in the 2018 super complaint by Southall Black Sisters and Liberty on data sharing between the Police and the Home Office: they argued that data sharing arrangements are significantly harming not only victims of crime but also the public interest, as crimes are not reported and therefore remain unpunished.²⁷

New clause 58A*

Insert the following new Clause—

"Secure reporting for victims of crime

(1) The Secretary of State must, in regulations, make provisions for the prohibition of automatic sharing of personal data of a victim or witness of crime for immigration purposes.

(2) In section 20 of the Immigration Act 1999, after subsection (2B) insert—

"(2C) This section does not apply to information held about a person as a result of the person reporting criminal behaviour which they are a victim of or a witness to.""

Member's explanatory statement

This new Clause would prevent immigration data being shared about a victim or witness of crime who reports an offence. This is to ensure victims are able to approach the authorities for assistance without fear of immigration repercussions as a result of that contact or resultant data sharing with immigration enforcement

Case study: S²⁸

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.

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

⁷ FOI reference 64607 submitted by FLEX

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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](#).

¹² 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.

¹³ [Home Office admits new immigration plans may see more trafficking victims locked up | The Independent](#)

¹⁴ See [Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime | Focus on Labour Exploitation \(FLEX\)](#)

¹⁵ Bulman, M., 'New Home Office policy risks 'driving human trafficking victims underground', [experts warn](#), *The Independent*, 12 November 2021.

¹⁶ [National referral mechanism guidance: adult \(England and Wales\) - GOV.UK \(www.gov.uk\)](#)

¹⁷ Clause 60: Identified potential victims of slavery or human trafficking: recovery period

¹⁸ [Letter to home secretary on ieca 11 november 2021.pdf \(antislaverycommissioner.co.uk\); Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime | Focus on Labour Exploitation \(FLEX\)](#)

¹⁹ [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](#)

²⁰ [Clause 47: 28 Oct 2021: Public Bill Committees - TheyWorkForYou](#)

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'

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

²⁴ [Nationality and Borders Bill - Hansard - UK Parliament](#)

²⁵ [Review of data sharing: migrant victims and witnesses of crime \(accessible version\) - GOV.UK](#)

²⁶ <https://bills.parliament.uk/publications/44307/documents/1132>

²⁷ [Liberty and Southall Black Sisters' Super-Complaint on data-sharing between the police and Home Office regarding victims and witnesses to crime - Liberty \(libertyhumanrights.org.uk\)](#)

²⁸ Case study provided by the Helen Bamber Foundation