



Nationality and Borders Bill

Part 5: Modern Slavery

Consideration paper

Updated December 2021

This paper and the Executive Summary have been updated to reflect the chapter on Modern Slavery becoming Part 5 rather than Part 4 of the Nationality and Borders Bill and to account for the new Clause numbers post Committee Stage and the Bill's third reading in the House of Commons.

The content of the paper and the evidence base has remained the same and the sector continues to be concerned about the direction of travel of this Bill and the conflation of modern slavery within a Bill focused on immigration issues.

Only the government's own amendments to Part 5 were passed at report stage.

The Bill had its third reading in the House of Commons on the 8th of December 2021 and passed with 298 Ayes to 231 Noes.

The government have expressed a commitment that all survivors who receive a positive Conclusive Grounds Decision and need tailored support will receive appropriate individualised support for a minimum of 12 months. At this juncture it is proposed this commitment will be outlined in guidance and not enshrined within the Nationality and Borders Bill.

Authors

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Please note that names have been changed in all case studies provided by partner agencies.

About the Rights Lab

The Rights Lab delivers research to help end modern slavery. We are the world's largest group of modern slavery researchers, and home to many leading modern slavery experts. Through our five research programmes, we deliver new and cutting-edge research that provides rigorous data, evidence and discoveries for the global anti-slavery effort. More information about the Rights Lab is available at www.nottingham.ac.uk/rights-lab.



Introduction

The anti-slavery sector is concerned by the inclusion of modern slavery in the Nationality and Borders Bill and the preoccupation with viewing modern slavery through an immigration lens. This consideration paper evaluates the Clauses in Part 5 of the Bill, analysing implications and impacts of the proposed provisions considering existing evidence.

This document includes:

- An executive summary
- An in-depth overview of clauses in Part 5 of the Nationality and Borders Bill.
- An outline of potential implications and concerns in relation to reviewed clauses.
- Evidence and research basis for each clause.

This document was written to serve as an information source for MPs and Peers as they embark on the parliamentary process and Bill committee stages. It provides an evidence base for the anti-slavery sector to assist in campaigning activity, the engagement of supporters, and a basis from which amendments can be drafted.

It should be noted that this paper predominantly concerns adults. The Nationality and Borders Bill does not distinguish between adult and child victims. However, enhanced protection should be provided to children and any decision regarding their protection should be in accordance with their best interests, consistent with obligations outlined in the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (and Optional Protocols), and relevant domestic law.¹

The overview of each clause has been written using the government Explanatory Notes for the Nationality and Borders Bill as a basis.² While preferred terminology when referring to those who have experienced slavery or trafficking would be survivor, this paper uses the term victim as per the Bill and Explanatory Notes.³ It should also be noted that the Modern Slavery Statutory Guidance referred to throughout is statutory in England and Wales and non-statutory in Scotland and Northern Ireland.

This consideration paper outlines key areas of concern in relation to Part 5 of the Nationality and Borders Bill, addressing modern slavery. This includes an assessment of the implications and evidence of impact in relation to Clauses 57-68 of the Bill, as they relate to victims of modern slavery and human trafficking. This paper does not respond to the Bill in its entirety. It should be noted that other Clauses of the Bill outside Part 5—including provisions concerning nationality, asylum, and immigration—also raise issues for victims of modern slavery and trafficking. The exclusion of consideration of these provisions does not indicate any position on their content or implications for victims.



Executive summary

Overview

The UK government position is that the legislative changes presented in the Nationality and Borders Bill (the Bill) are necessary to tackle modern slavery and human trafficking. In the New Plan for Immigration Policy Statement, the government confirmed its commitment to ensuring police and courts have the necessary powers to bring perpetrators to justice, while giving victims the support they need to rebuild their lives.

What the government is seeking to achieve in offering protection to those who need it—including victims of modern slavery—is positive. However, this research shows that the proposed changes pose a risk of causing damage to the people they are intended to protect and threaten to undermine the government's stated policy objectives.

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The positioning of central modern slavery provisions within immigration legislation is a matter of general concern, as it conflates these distinct areas of policy and creates a risk of discriminatory practice within the NRM. The specific terms of the modern slavery provisions contained in the Bill also pose risks to victim protection, criminal justice, and the UK's fulfilment of its international obligations.

Note on language

The language of 'survivor' is generally preferred in the UK anti-slavery sector when referring to those who have experienced modern slavery and human trafficking. However, this report uses the language of 'victim' as per the Bill and Explanatory Notes.

The modern slavery provisions in Part 5 of the Bill

Clauses 57 and 58

Provision of information related to being a victim of slavery or human trafficking
Late compliance with slavery or trafficking information notice: damage to credibility

Clause 57 requires victims with a protection and human rights claim to provide information relating to being a victim of slavery or trafficking within a specified period when served with a 'slavery or trafficking information notice'.

Clause 58 sets out the consequences of failure to provide such information within the specified timeframe. Late disclosure must be considered damaging to the individual's credibility, unless there are 'good reasons' for the delay.

Evidence establishes that victims may be unable or unwilling to provide disclosure of their experiences of trafficking for a variety of reasons. These include trauma, ongoing impacts of manipulation by perpetrators, fear of reprisals, and lack of awareness of what constitutes trafficking—recognised by the government as barriers to self-identification.

Clauses 57 and 58 do not appear to account for the impacts of trauma on victims' willingness and ability to self-identify or make disclosures.

The process conflates immigration and modern slavery decision-making, posing risks to the effectiveness of antislavery efforts.

The provisions apply only to those who have made a protection claim or human rights claim and are therefore discriminatory between victims.

The provisions improperly assign the obligation to identify to victims rather than the state.

Clause 59

Identification of potential victims of slavery or human trafficking

Clause 59 changes the threshold for Reasonable Grounds decision-making within the NRM from reasonable grounds to believe a person 'may be a victim' to 'is a victim'. The provision also enshrines the standard of proof



for Conclusive Grounds decisions as the 'balance of probabilities' and shifts regulatory power to define 'victim of slavery' and 'victim of human trafficking' to the Nationality and Borders Act.

Clause 59 may exacerbate the problem of low NRM referrals compared to the estimated prevalence of modern slavery in the UK.

The change may deny victims support needed to enable disclosure, reducing identification, and harming criminal justice efforts.

It is unclear why regulations defining victims should be positioned under immigration law rather than the Modern Slavery Act.

Clause 60

Identified potential victims of slavery or human trafficking: recovery period

Clause 60 provides for a recovery period of at least 30 days for potential victims between the Reasonable Grounds and Conclusive Grounds decisions.

Evidence suggests that a minimum of 90 days of support is required for trafficked person to be able to make well-considered decisions about their safety and cooperation with the authorities, as well as to offer detailed evidence about past events. Evidence further suggests positive correlations between effective support and improved engagement with authorities.

The aim of accelerating decision-making is welcomed, although it cannot come at the expense of quality decision-making and proper identification.

Reducing available benefits of identification may negatively impact referrals into the NRM.

Reducing the period of support and total referrals may negatively impact criminal justice efforts.

Clause 61

No entitlement to additional recovery period

Linked to Clause 60, Clause 61 specifies that victims may receive only one recovery period unless specific circumstances require otherwise. The provision is intended to prevent misuse of the NRM and reduce barriers to removal. The provision limits additional support

for actions prior to the initial Reasonable Grounds decision, and not in cases of re-trafficking (which would be eligible for further support).

There is no evidence of significant misuse of the NRM. Evidence assessed indicates against such.

Evidence shows individuals are not always able to disclose needs for protection within set timeframes due to fear and trauma.

Clause 61 appears to contradict the identified need for individual assessment and support, as required under ECAT and captured in Recovery Needs Assessments.

Clause 62

Identified potential victims etc: disqualification from protection

Clause 62 disqualifies potential victims from protection where they are deemed a 'threat to public order' or to have claimed to be a victim in 'bad faith'. In such cases, Clause 62 ceases protection and support under the reflection and recovery period and lifts the prohibition on removal. It also removes the requirement to complete the identification process and make a Conclusive Grounds decision.

Cessation of protection and prohibition on removals risk damaging policing and prosecution efforts, reducing self-reporting, and penalising victims.

The lack of specificity in some grounds for disqualification creates a risk that victims will be denied protection where it should have been provided in accordance with ECAT.

The lack of an appeals mechanism for decisions risks increasing resort to judicial review.

Clause 63

Identified potential victims etc in England and Wales: assistance and support

Clause 63 provides for assistance and support for identified potential victims of slavery and trafficking during the recovery period. The provision creates a legal right to support in England and Wales, where previously this was



not required by statute (unlike Scotland and Northern Ireland).

The proposal to place assistance for victims into primary legislation is positive and aligns with recommendations in the evidence base.

The lack of specification of measures of support victims are entitled to creates a risk of inadequate support without legal recourse for victims.

Clause 64

Leave to remain for victims of slavery or human trafficking

Clause 64 establishes the circumstances in which 'limited leave to remain' will be granted to those conclusively identified as victims of slavery or trafficking. The proposed provision appears to:

- Narrow the scope of the personal circumstances ground;
- Limit the compensation ground if the victim can seek compensation from outside the UK; and
- Overlook the connection between police cooperation and other aspects of the support system in relation to the police assistance ground.

The narrowing of grounds for the granting of temporary leave raises a risk of non-compliance with obligations under ECAT, the ECHR, and domestic law.

It also poses a risk to UK criminal justice efforts against trafficking and sacrifices potential benefits for the UK economy.

Clauses 65 and 66

Civil legal aid under Section 9 of LASPO: add-on services in relation to the National Referral Mechanism

Civil legal services under Section 10 of LASPO: add-on services in relation to National Referral Mechanism

Under Clauses 65 and 66, legal advice on referral into the NRM is to be provided as 'add-on' advice where individuals are in receipt of civil legal services for certain immigration and asylum matters. Evidence shows early legal advice to be pivotal in supporting victims to

achieve positive outcomes and access justice. However, significant issues are identified in current legal aid provision in the UK.

The inclusion of legal aid only as an 'add on' leaves a significant gap in provision of legal advice and support for victims.

Clause 67

Disapplication of retained EU law deriving from Trafficking Directive

Clause 67 disapplies the EU Trafficking Directive in so far as it is incompatible with provisions in the Nationality and Borders Bill. The Directive has a stronger enforcement mechanism than ECAT and direct effect in UK law, providing an important avenue for justice for victims. Existing UK legislation does not enshrine specific assistance and support measures included in the Directive.

The loss of the direct effect of the Directive in UK law limits victims' rights and opportunities for redress within the UK legal system.

Clause 68

Part 5: interpretation

Clause 68 provides the definitions of terms used in Part 5 of the Bill and confers power to the Secretary of State to set the meaning of 'victim of slavery' and 'victim of trafficking' in regulations. Definitions of these terms are already established under Section 56 of the Modern Slavery Act.

It is unclear why the definitions of victims should be established through regulations under the Nationality and Borders Bill when the Modern Slavery Act already defines these terms.

The proposals in Part 5 Bill risk undermining the government's claimed status as a leader on the global stage. Part 5 presents a number of regressive steps in the identification and support of victims, contrary to the principle of non-regression of human rights standards as well as the UK's obligations under international law. Evidence indicates long-term impacts being reduction in victim protection, ability to break trafficking cycles, and prosecution of perpetrators.



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An overview of the National Referral Mechanism

- [1] The National Referral Mechanism (NRM) is the UK government's system for determining whether they believe a person is a victim of trafficking.⁴ The NRM was first implemented on 1 April 2009 and was designed to fulfil the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), ratified by the UK in 2009.⁵ The NRM operates mainly through statutory and non-statutory guidance.
- [2] The NRM follows a three-stage process. First Responders who encounter cases with indicators of modern slavery or trafficking make a referral to the Single Competent Authority (SCA) that is part of the Home Office. Adults must consent to this process.
- [3] The SCA then embark on a two-stage decision-making process as follows:
 - Reasonable Grounds (RG) decision:** applies the threshold of 'I suspect but cannot prove' that the individual is a potential victim of modern slavery.
 - Conclusive Grounds (CG) decision:** the test at this stage is 'whether, on the balance of probabilities, there is sufficient information to conclude the individual is, more likely than not, a victim of trafficking'. At this point a decision should also be made on whether a victim is entitled to a residence permit (or discretionary leave to remain – DLR).
- [4] The timeframes outlined in guidance indicate the RG decision should be made within five days and CG decision within 45 days. Where the SCA considers that there are reasonable grounds to believe that someone may be a victim of modern slavery (positive RG decision), the person will be granted a 30-day (minimum) reflection and recovery period, per the obligations outlined in ECAT Article 13.⁶ To note: 45-days is currently applied in England and Wales and Northern Ireland, and 90 days in Scotland.

Note: The statement of compatibility with the ECHR under Section 19 (1)(a) Human Rights Act by the Home Secretary at the outset of the Bill, fails to take account of the risks to human rights of victims of trafficking, and the other groups affected by the proposals. Though this paper concerns victims of trafficking specifically, concerns have been raised generally that the Bill is fundamentally at odds with the government's avowed commitment to upholding the United Kingdom's international obligations. This is not just under ECAT, the Trafficking Directive, the ECHR, the Convention on the Rights of the Child, but also under the Refugee Convention.⁷



Nationality and Borders Bill Part 5: modern slavery clauses

Clauses 57 and 58. Provision of information relating to being a victim of slavery or human trafficking & late compliance with slavery or trafficking information notice: damage to credibility

Overview of the Clauses

- [5] Clause 57 requires individuals with protection or human rights claims to provide relevant information relating to being a victim of slavery or human trafficking within a specified period.⁸ Individuals will be required to provide relevant information via a slavery or trafficking information notice (STIN), served by the Secretary of State. Information submitted will then be considered alongside other claims for protection. If an individual provides information outside of the specified time frames set, they must provide a statement setting out the reasons for late submission.
- [6] It is proposed that Clause 57 will:
- (1) Identify individuals subject to immigration control who may be potential victims of trafficking and modern slavery.
 - (2) Enable grounds for trafficking to be considered alongside protection or human rights claims as a mechanism to expedite the process and stop lengthy appeals processes as it is proposed all the information will be available at the earliest point.
 - (3) Reduce costs to the government by more efficiently considering protection or human rights claims and referrals in the NRM concurrently rather than sequentially.
- [7] Clause 58 sets out the consequences for an individual within the NRM should they provide information relating to being a victim of modern slavery after the timeframe given within the STIN without good reason.
- [8] The requirement for information relating to an individual's experience of trafficking to be provided within a specified period, on the basis that all matters should be considered at once and not separately, relates to the late notice provisions in Part 2 of the Bill (Clauses 18-20, Priority Removal Notices – damages to credibility and expedited appeals processes).⁹

Implications and evidence of impact

- [9] Clauses 57 and 58 require information about trafficking to be provided within a specified period and unexplained delay or failure to provide such information must be taken into account as '*damaging the credibility*' of the information supplied.¹⁰ This has the effect of punishing delayed disclosure. It is contrary to the government's acceptance to date that victims may be unable to provide disclosure of their experiences of trafficking and/or may not recognise themselves as victims. In addition, missing the specified timeframes damages



credibility and may lead to victims not being identified, being refused protection, and in some cases enforcement action and the removal of vulnerable victims from the UK.

Case Study: Provided by Kalayaan for the purpose of this report

R was brought to the UK having been deceived as to the nature of the job she would do, her salary and a false promise that she could bring her daughter to the UK and both would be able to settle here. In fact, she was ordered to do domestic work, worked long hours, at times was virtually imprisoned and humiliated by her employer, who made her watch porn and made lewd suggestions to her. She has (some six months after the positive RG decision) made further allegations of serious violence (three cigarette burns and another burn mark deliberately inflicted by her employer). When asked why she did not mention these at earlier meetings (over about eight to nine hours), she said that at the time she was under severe stress and anxiety for her family in her native country, whom she felt was at risk of reprisals by her powerful and influential employers, she was suffering from high blood pressure, which made her feel tired and ill, and she was also in the early stages of pregnancy.

The case worker providing this case study offered further comment: *There is plausible research that victims can have delayed recall, are likely to be more concerned about their families than their own well-being and suffer shame which means that disclosure may not be made in the first instance. While we do not know how the Home Office will treat these allegations at the Conclusive Grounds stage, the scope of the Nationality and Borders Bill means in this case R's credibility would have been called into question without consideration of the findings of valid research into the impact of trafficking on a witness' ability to recount a history in complete or comprehensive detail.*

- [10] The government propose the introduction of STIN's on the purported basis that it will reduce alleged misuse of the NRM system. It also proposes the process will ensure victims are identified early and given the support needed. While the government has stated commitment to 'minimising misuse' of the NRM, no evidence or data has been provided or published to support claims that the NRM system is currently being misused.¹¹
- [11] The STIN is premised on the notion that potential victims should act in 'good faith' and inform the authorities of pertinent information at the earliest opportunity. This premise fails to consider the well-established barriers to disclosure by victims including the complexities of trauma and its impact on a person's willingness or ability to self-identify or make disclosures, and other reasons such as fear of reprisals. It also fails to acknowledge the fact that people may not know that what has happened to them amounts to trafficking and may not be able to self-identify or disclose all elements of their experiences to professionals—still less the authorities—within a set timeframe. The government itself has long accepted that disclosure is likely to be delayed in trafficking cases as a result of trauma, reprisals, and other factors. The proposed STIN process contradicts this.¹²
- [12] Existing research establishes that victims' narratives are likely to emerge in a piecemeal fashion and become more coherent as trust and relationships are established.¹³ It has also been observed that during the reflection and recovery period, many victims initially recall their experiences with contradictions or inconsistencies.¹⁴



- [13] As outlined in the Centre for Social Justice's submission for the National Immigration Plan, the principle that people seeking protection should 'always tell the truth' is insufficiently nuanced to take account of the impact of trauma on victims of modern slavery that may result in confused and inconsistent narratives.¹⁵
- [14] Clauses 57 and 58 do not apply to all victims. They are relevant only to those who (a) have made a protection or human rights claim and (b) have been trafficked. UK nationals or other classes of individual identified as potential victims of trafficking via the NRM who do not have a protection or human rights claim (and/or have no need for a claim) would not be legally obliged to complete a STIN

Completion of a STIN will only apply to victims with a protection or human rights claim and therefore places this cohort at a disproportionate disadvantage and is discriminatory.

- [15] The STIN therefore creates a distinction in treatment and obligations between different groups of victims.
- [16] Those who are submitting a protection or human rights claim who have also been trafficked (regardless of whether the claim relates to trafficking) will be required to complete a STIN. This clause, if enacted, will equate to different processes being in place for different victims based on their nationality. This practice of requiring 'early' or 'extra information' from some victims is discriminatory and directly contravenes the prohibition of discrimination in Article 14 of the ECHR and Article 3 ECAT.¹⁶
- [17] This clause will disproportionately affect third country national victims and those who are not UK nationals. As noted in the US State Department Trafficking in Persons Report (TIP) on the United Kingdom, those from the European Economic Area (EEA) have become more vulnerable to trafficking due to confusion around changes to the UK's immigration rules.¹⁷
- [18] Government evidence shows non-UK nationals to be a significant proportion of victims referred into the NRM. Of the 10,613 potential victims referred in 2020, 5,087 were adults. 4,453 (87%) were non-UK nationals and under Modern Slavery Statutory Guidance are eligible for consideration of discretionary leave to remain (DLR) upon receipt of a positive CG decision.¹⁸ Some confirmed victims of trafficking will also have made protection or human rights claims. However, as identified in a recent Rights Lab report, data on the number of individuals both claiming asylum and in the NRM is not collated as standard and is therefore not currently publicly available.¹⁹
- [19] NRM Statistics for 2020 show 3,788 identified victims were UK Nationals.²⁰ This number has been steadily increasing since 2015. For those UK nationals being identified (both adults and children) and referred into the NRM, the STIN process will not apply.
- [20] Using data obtained through a Freedom of Information request, the table below shows the number of potential victims with a positive CG decision between 2016 and March 2020 and the subsequent grants of leave and protection granted.²¹



	2016 - March 2020
Individuals receiving a positive CG decision who did not have the right to remain in the UK	5,662
Protection via Refugee Status	2,159
Protection via Humanitarian Protection	174
Protection via Discretionary Leave to Remain (DLR)	557
Refusals	5
Not granted	2,721 ²²

[21] 41% of individuals receiving a positive CG decision were granted protection under the asylum system (refugee status or humanitarian protection), with a further 10% granted DLR as victims of modern slavery and trafficking. It should be noted that DLR for victims is time limited and ‘not considered to be on a route to indefinite leave to remain in the UK’ unlike refugee and humanitarian protection or other forms of leave.²³ The UK did not grant protection via the asylum system to 49% of individuals identified as having been trafficked.²⁴

The NRM decision is not an immigration decision and STIN conflates the two processes.

[22] Reviews of the NRM lead to the creation of the SCA in 2019.²⁵ This was a positive step that saw the NRM process change from a system in which someone’s nationality dictated which authority would process their claim—with third country nationals being assessed by UK Visa and Immigration (UKVI), whose primary focus was on controlling immigration leading to poor recognition and British and EU nationals being assessed by the National Crime Agency Modern Slavery Human Trafficking Unit (MSHTU) with higher victim recognition rates—to a centralised system for all victims regardless of nationality.²⁶

[23] As identified by the Anti-Trafficking Monitoring Group (ATMG), immigration status inappropriately influences NRM decision-making.²⁷ Rights Lab research further revealed differences in CG and asylum decision-making in the UK related to victims’ nationalities.²⁸ In relation to the support offered to potential victims of trafficking, differential treatment of different nationalities has been a long-standing issue identified by the sector.

[24] Research conducted by St Mary’s University identified the ongoing conflation of immigration priorities with trafficking decisions as a significant barrier to change. Participants reported a primary focus from law enforcement on an individual’s immigration status rather than their potential status as a victim of trafficking (and as a victim of crime), resulting in bias and judgments based on nationality.²⁹

[25] As outlined in the Rights Lab Immigration Plan Submission, the NRM is not—nor should it be—an immigration process or immigration policy area. Where a victim has made a protection or human rights claim, immigration processes should take place separately from NRM processes.³⁰

[26] For those in the NRM who have protection or human rights claims (i.e., non-UK nationals) the STIN adds another layer of bureaucracy. Administrative unworkability will potentially



increase the time decisions take to make in an already complex process. It is therefore likely to defeat the government's intention of expediting the process.

- [27] The STIN appears to conflate immigration and modern slavery decision-making, penalising people if they do not (or are unable to) comply within a specified period. The introduction of the STIN appears to place greater emphasis on the immigration status of a potentially trafficked person, rather than focussing on the crime(s) committed against them and the impact of this on their ability to make disclosures.
- [28] Information about an individual's status in the UK is included in a section of the current NRM referral form. Why a STIN will be required in addition is unclear.³¹
- [29] A STIN complicates an already difficult process to the potential disadvantage of victims, penalising them if they do not identify themselves at the earliest opportunity. It penalises vulnerable individuals should they not complete the STIN correctly or within the timeframe dictated, by damaging their credibility. This will impact negatively on individuals' protection or human rights claims as well as their trafficking claims. It could lead to claims being dismissed and individuals being liable to detention and removal, as well as not receiving the support they require and are entitled to. This is problematic as legal cases affirm that it can take victims a long time to come forward after their trafficking experience.³²
- [30] NRM statistics for 2020 show that at 01 February 2021, 18,112 people were awaiting a Conclusive Grounds Decision, 9,447 of whom were referred before the beginning of the 2020 year.³³ The Home Office reported the average (median) time taken from referral to CG decision as 339 days.³⁴ The government also reported via the TIP Report that of the 10,613 referrals in 2020, 8,665 (82%) were still waiting for a CG decision.³⁵ The Independent Anti-Slavery Commissioner's Annual Report states that 12,259 NRM decisions were outstanding at the end of quarter four in 2019 and that RG decisions took on average 12 days to make and CG decisions 452 days.³⁶ This is already significantly longer than the five and 45 days respectively that these processes are intended to take. The TIP Report identifies the wait times as problematic and recommends NRM reforms that ensure timelier determinations of victim status.³⁷ It is not thought that the STIN process will achieve this.
- [31] As identified by a Rights Lab report, long waiting times leave victims in limbo impacting their ability to recover and plan for the future.³⁸ A key aim of ECAT and the NRM is to encourage victims to come forward, so they can be protected and perpetrators prosecuted. These key aims, and prosecutions, are likely to be undermined by the STIN.
- [32] Regardless of immigration status, victims need to know and trust that the NRM is a system designed to identify and support them to access justice and support to rebuild their lives. Conflating immigration and NRM processes is likely to deny or undermine that trust. It may mean victims do not consent to a referral to the NRM process at all. This in turn is likely to impact and undermine trafficking prevention attempts and prosecutions further.

An individual's protection or human rights claim may not actually arise as a result of human trafficking; it may be an ancillary or non-related issue, so completion of a STIN should not be required.



- [33] It should be noted that an individual who has been trafficked and has a protection or human rights claim may or may not base those claims directly on issues arising because of their trafficking experience.
- [34] It is concerning that Clause 58 provides for penalisation for non-compliance and non or late disclosure of trafficking experiences. The negative assessment of credibility of trafficking claims, and the weight attached to evidence, are already difficult issues and frequently successfully challenged.³⁹ Once someone is deemed 'legally non-credible', this would appear to be a difficult position to change in the eyes of the Home Office. The STIN may lead to more legal challenges and undermine the objectives of protection and human rights claims, as well as placing a potentially damaging burden on victims who do not wish to, or cannot, disclose their trafficking experiences.
- [35] Research led by the University of Liverpool highlights early legal advice as a key component to ensure potential victims are recognised as victims and ensuring rights and entitlements are met and understood.⁴⁰ Access to early legal advice becomes even more pertinent if Clause 68 is enacted and STIN's become a legal requirement. Consideration would need to be given to how an individual seeks advice in relation to completing a STIN and access to free legal advice as early as possible would be a necessary element of support.
- [36] The Home Office already requires an individual to set out their protection or human rights claim as soon as possible in the asylum system. Failing to do so may potentially damage credibility and cause the authorities to question the claims being made. There are already ways in which the Home Office asks those with protection and human rights claims to provide information, including the use of one stop powers and notices under Section 120 of the Nationality and Immigration Act (2002).⁴¹ Section 120 notices require an individual to set out all the grounds on which they say they are entitled to remain in the UK. Currently, the failure to comply prevents an applicant relying on grounds of appeal not raised in response to the notice, absent a satisfactory reason.⁴² Therefore, the STIN appears to replicate immigration powers and processes already in place and is arguably unnecessary.
- [37] Further, it would be unfair for victims with protection and human rights claims to be forced to bring their trafficking claim and have that claim determined irrespective of whether there is sufficient or reasonable time to do so, to make disclosure, or gather and provide evidence.⁴³ That disproportionate and unmanageable burden on a victim would be compounded further in protection claims, given the defects in the Home Office's own processes that may result in individuals being incorrectly and unfairly penalised.
- [38] The Home Office have introduced Preliminary Information Questionnaires (PIQ) as part of the asylum process. These forms must be completed by the individual claiming protection and reach the Home Office within 20 working days from the date of a protection claim being made. Claims can be automatically withdrawn if applicants fail to complete the PIQ.⁴⁴
- [39] The Right to Remain forum shows issues within the PIQ process, including claimants not receiving their form and lawyers raising concerns that information provided ahead of an interview may be used to challenge credibility and discredit any differences in narrative between a written submission and an interview.⁴⁵ The issues with the PIQ process, especially the withdrawal of claims, needs to be considered and learned from ahead of instigating STINs.



- [40] In the cases of *MN & IXU*, the Court of Appeal overturned decisions made by the Home Office that found both MN & IXU to not be victims. This decision was overturned on the basis that the Home Office adopted an unlawful approach to assessing credibility and did not consider the medical and other expert evidence in support of their claims to be victims of trafficking.⁴⁶
- [41] Accordingly, the STIN may result in various forms of discrimination in terms of the disproportionate impact on different classes of victims and on the basis of protected characteristics. The government's Equality Impact Assessment fails to address inequalities likely to impact victims of trafficking.⁴⁷
- [42] The aim of accelerating decision-making is to be welcomed. However, it cannot be at the expense of the quality of decision-making or carry a risk that victims will not be identified if they do not self-identify or make disclosures at the earliest opportunity. An unintended consequence of this would be individuals unable to access their basic rights and entitlements as potential or confirmed victims.
- [43] Non-identification would have implications for policing and criminal justice. Fewer positive NRM decisions result in fewer crime reports, either by the victim themselves or by the SCA. This will undermine measures aimed at prevention and the criminal justice response, with ultimately fewer investigations and prosecutions. Traffickers would thereby go free, and their assets and proceeds of crime remain unseized. This would undermine the primary aims and purposes of the national anti-slavery strategy, which is currently being reviewed, and the aims of ECAT.⁴⁸
- [44] The importance of identification and protection is made clear from the ECAT explanatory report:

Paragraph 127: 'To protect and assist trafficking victims it is of paramount importance to identify them correctly. Article 10 seeks to allow such identification so that victims can be given the benefit of the measures provided for in Chapter III. Identification of victims is crucial, is often tricky and necessitates detailed enquiries. Failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings. Through the identification process, competent authorities seek and evaluate different circumstances, according to which they can consider a person to be a victim of trafficking'.⁴⁹

States have a duty to identify potential victims as per ECAT Article 10. Putting the burden upon a potential victim to identify themselves and disclose information via the STIN process contravenes the states' duty under Article 10.⁵⁰

Self-Identification and Disclosure

- [45] ECAT Article 10 (Identification of the Victim) requires state authorities to identify victims within a process specially designed for this purpose; not for victims to identify themselves.⁵¹ There is no STIN concept in ECAT and the concept appears contrary to ECAT obligations, as outlined by the Council of Europe in its Explanatory Report:



Paragraph 128: *‘Paragraph 1 places obligations on Parties so as to make it possible to identify victims and, in appropriate cases, issue residence permits in the manner laid down in Article 14 of the Convention. Paragraph 1 addresses the fact that national authorities are often insufficiently aware of the problem of trafficking in human beings. Victims frequently have their passports or identity documents taken away from them or destroyed by the traffickers. In such cases they risk being treated primarily as illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help. To avoid that, Article 10, paragraph 1, requires that Parties provide their competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings and in identifying and helping victims, including children, and that they ensure that those authorities cooperate with one other as well as with relevant support organisations’.*⁵²

- [46] A recently published evidence review of 175 reports and studies prepared by the Rights Lab for the United Nations University Centre for Policy Research highlights several studies that find the fear of sanctions prevented victims from self-reporting. It highlighted that exploiters often used the threat of deportation to control victims and prevent them from reporting to authorities. One study included found that not having immigration status and fear of deportation were the primary factors impacting non-disclosure of trafficking for respondents.⁵³
- [47] As reported by a collaboration of non-governmental organisations, potential victims often do not want to enter the NRM as they are fearful and concerned about:
- Involvement of immigration services and that they may be detained;
 - Additional delays it may cause in obtaining an asylum decision;
 - Likely dispersal away from any legal representatives and other support providers and networks;
 - Lack of impact of a positive decision; and
 - Detrimental impact of a negative decision.⁵⁴
- [48] As documented in a report by the Organisation for Security and Co-Operation in Europe (OSCE) victims are often only able to disclose (fully or partially) once a relationship of trust has been established, as shame, stigma, and honour preclude *‘full revelation’*. Obstacles to memory, recall, and victims being able to provide a chronological account are also outlined.⁵⁵
- [49] A report prepared by Flex and The Labour Exploitation Advisory Group cites insecurity in relation to immigration status and fear of removal and detention as barriers victims face when reporting their exploitation. It further notes that for those within a detention setting, the expectation from professionals that victims will voluntarily disclose experiences does not constitute the required proactive approach required.⁵⁶
- [50] A range of research reports on how trauma impacts memory recall and the ability of victims to verbalise what has happened to them. The Helen Bamber Foundation proposes that without mutual trust being developed, full, detailed, and accurate accounts of trafficking histories will not happen.⁵⁷ The Survivor Care Standards reiterate that service providers and officials need to establish a relationship of trust before they can be expected to discuss issues of assault, shame, stigma, or intricate family details.⁵⁸
- [51] Delays in disclosure for those who have experienced trauma as a result of trafficking are not unusual. A joint briefing paper prepared by Kings College London and The Helen Bamber



Foundation identifies four key themes that impact on the ability of traumatised people to provide evidence and include the:

- Effect of trauma on memory;
- Effect of shame on disclosure;
- Narrative dilemmas that victims of trafficking often face; and
- Often-false assumptions made by decision makers regarding the credibility and reliability of testimony.⁵⁹

[52] The control mechanisms used by perpetrators directly impact victims' ability to disclose what has happened to them. For instance, a report published by GLA Conservatives identifies cases that took over two years for victims to trust the authorities and relay their experiences as a result of being subjected to Juju rituals prior to their exploitation.⁶⁰

[53] The report also highlights problems faced by police in gaining victims' trust as individuals often believe the authorities are linked to trafficking networks and corrupt.⁶¹ A lack of trust in the authorities who are responsible for identification and protection will impact disclosure.

[54] Modern Slavery Statutory Guidance recognises people may be reluctant to self-identify, may not be aware they have been exploited, or may be unable to disclose due to a variety of reasons including debt, dependency, immigration status, fear of deportation, threats towards them and/or their family, distrust of authorities and the systems that are in place to help them, and ongoing control by the trafficker.⁶²

[55] Even when professionals identify cases of trafficking and modern slavery, victims are not always ready and able to immediately disclose what has happened to them. In some instances, this includes situations where victims do not recognise perpetrators as such. The GLA Conservatives report highlights examples where victims have refused to leave situations of exploitation believing those exploiting them are friends.⁶³

Institutionalisation can create a 'situation where captives psychologically identify with their captors'⁶⁴

[56] Modern Slavery Statutory Guidance identifies that accounts may be impacted by trauma and that this can '*result in delayed disclosure, difficulty recalling facts, or symptoms of posttraumatic stress disorder*'.⁶⁵ It further identifies that: '*It is not uncommon for traffickers and exploiters to provide stories for victims to tell if approached by the authorities. Errors, omissions and inconsistencies may be because their initial stories are composed by others and they are acting under instruction. They can also arise due to the impact of trauma, which can, for example, lead to delayed disclosure or difficulty recalling facts.*'⁶⁶

[57] Annex E of the Modern Slavery Statutory Guidance provides guidance for the SCA in relation to decision-making processes, emphasising that '*good practice in working with victims who have experienced trauma should be observed*' and references Section 6 and Annex D of the Guidance in relation to how to approach and work with vulnerable persons.⁶⁷ There is an acceptance within the guidance that disclosure of experiences may be inconsistent, may not be clear, may lack detail and may not be told in their entirety.



The requirement for victims to self-identify within the STIN process is therefore out of line with evidence on effective victim identification and protection.

Late Submissions

- [58] The Clause 58 Explanatory Note states that ‘the competent authority must take account, as damaging the individual's credibility the late provision of evidence unless there are good reasons why the information was provided late’.⁶⁸
- [59] Clauses 57 and 58 directly contradict the research and evidence set out in the section above, which demonstrates that disclosure is multi-faceted, takes time, and often comes from a position of trust and stability. These issues are relevant to Clauses 57 and 58 as without completion and full disclosure of trafficking events as part of the STIN, victims’ credibility will be improperly and unfairly undermined. Clauses 57 and 58 may therefore set potential victims up to fail an arbitrary credibility threshold, which fails to reflect current evidence and knowledge.
- [60] As stated above (paragraphs 54 and 56) the Modern Slavery Statutory Guidance recognises that a range of factors operate to prevent immediate disclosure of trafficking experiences by victims.⁶⁹ These are all good reasons in themselves for late disclosure. However, what the authorities will consider to be a ‘good reason’ for a late submission for a STIN is not defined in the Bill or Explanatory Notes and requires elaboration.
- [61] In addition to the barriers to disclosure and late submissions, there is a fear that non-compliance with the STIN may also occur as a result of victims receiving requests for extra information from authorities in English and in a written format and being unable to respond. This will compound the difficulties faced by victims with limited or no English language and literacy skills—a common position for non-UK victims of modern slavery in the UK. If victims do not have legal representation and/or a support agency, they may not actually understand what they need to do and could very easily miss deadlines or not even know what information is relevant. Victims may also remain in an exploitative or controlling situation and may not receive or be aware of the notice. Consideration should also be made for victims suffering from a disability of lack mental capacity.



Clause 59. Identification of potential victims of slavery or human trafficking

Overview of the Clause

- [62] Clause 59 changes or 'clarifies' the threshold of the RG decision in Section 49 of the Modern Slavery Act (2015) from the current language of '*having reason to believe someone may be a victim*' to '*is a victim*'. The clause will also confirm the '*balance of probabilities*' threshold for the CG decision and outline this within guidance.
- [63] The government in the Explanatory Notes claims Clause 59 '*will bring the Modern Slavery Act in line with ECAT*' specifically Article 10, which obliges states to identify potential victims and Article 13, which requires a reflection and recovery period to be enshrined in domestic law (see discussion below on Clause 60 of this Bill).

Case Study: Provided by Salvation Army for the purpose of this report and submitted as part their Immigration Plan consultation response

Mohamed was criminally exploited from the age of 12. Taken from Mauritania to Spain, he was forced to move and sell drugs by criminal gangs across Europe, during this time Mohamed was homeless and often slept on the street. Mohamed escaped his exploiters by begging for money and fleeing via train. Following his arrival in the UK, Mohamed was detained unlawfully in a detention centre for four years. During this time Mohamed's behaviour became aggressive and he was charged with assault. Importantly he has a history of chronically poor mental health. His criminal history of aggression and a charge of breaking and entering are linked to periods of poor mental health when he was unable to access his medication. Following his release, Mohamed experienced 18 months of homelessness before being assessed and referred to the NRM through a Community Mental Health Team. Since entering the NRM Mohamed has been working towards independence. He adheres to his medication regime and has had no further incidents of aggressive behaviour.

Implications and evidence of impact

- [64] Clause 59 changes the RG threshold and puts the burden of proof at the CG stage on a statutory footing, both of which are likely to lead to increased difficulties around victim identification, not clarify them. This is a regressive step, which runs counter to the principle of non-regression of human rights standards.
- [65] The Modern Slavery Act (2015) provides for statutory guidance and regulations on identification and support of potential victims and gives the Secretary of State the power to make regulations regarding victims of modern slavery.⁷⁰ The Nationality and Borders Bill proposes identification (Clause 59) and protection (Clause 60) of victims, and the regulation of these elements by the Secretary of State (Clause 68).
- [66] Clause 59(7) enables those matters to be contained in regulations under the National and Borders Bill (Clause 68), rather than the Modern Slavery Act (2015) or Modern Slavery Statutory or Non-Statutory Guidance.



- [67] As the Modern Slavery Act (2015) already provides for regulations to be issued independently of immigration processes, it is unclear why it is necessary to include sections pertaining to the identification and support of victims within immigration regulations of the Nationality and Borders Bill. Given that identification covers both UK and non-UK nationals, it is inappropriate that identification should be regulated under the Nationality and Borders Bill and not the Modern Slavery Act (2015).
- [68] Instigating changes to the Modern Slavery Act (2015) via the Nationality and Borders Bill means the NRM and the associated decision-making process are being linked to a process designed for immigration purposes when the NRM is not an immigration decision. Not only is this inappropriate in terms of subject matter, but evidence suggests that this is ineffective in improving decision-making.
- [69] A report published by ATMG reported linking NRM decisions and immigration processes resulted in poorer decision-making.⁷¹ Similar findings were reported by Home Office in its own Review of the National Referral Mechanism in their assessment of the NRM process.⁷²
- [70] A key problem of the NRM is that too few victims are referred compared to the estimated numbers of victims present in the UK. Many do not wish to enter the NRM because they fear the hostile environment and/or understand the limited benefits and inevitable delays and ultimately that they will gain no durable leave to remain in the UK as a result of the process. Changing the RG threshold is likely to mean that the already small number of victims who enter the NRM will reduce even further. This will subsequently impact and undermine policing and prosecutions.

The threshold for the CG decision is to be included in statute, but the RG threshold is not.

- [71] As outlined in the New Plan for Immigration Policy Statement, the government believes there is a need to act now to build a resilient system to *'Identify victims as quickly as possible and enhance the support they receive, while distinguishing more effectively between genuine and vexatious accounts of modern slavery'*.⁷³
- [72] The government asserts that the reason for inclusion of this clause, as stated above and throughout the Immigration Plan Policy Statement, is that the current NRM system is being misused and too many individuals currently receive access to support via the low threshold RG decision who, in their opinion, should not.⁷⁴

The threshold and use of indicators of trafficking

- [73] The government asserts that Clause 59 will bring the wording of Section 49 of the Modern Slavery Act (which uses the term 'may be' a victim) into line with ECAT (which uses the term 'is' or 'has been' a victim) and places the standard of proof for a CG decision as the *'balance of probabilities'*. This is misinterpreting ECAT and creating a risk that the thresholds will be raised in a way which is not supported by ECAT, or international or domestic law. The RG decision is purely an initial decision that a person is, or may be, a potential victim of trafficking.
- [74] Under ECAT, the assessment of whether there are reasonable grounds to believe a person has been a victim of trafficking is based on a reasonable grounds indication, or the presence of indicators of trafficking. The government has accepted this very low threshold for well over



a decade, after signing ECAT (23 March 2007), ratification (17 December 2008), the entry into force in the UK (1 April 2009), the date of commencement of the NRM and the enactment of the Modern Slavery Act (2015). Hence the guidance to decision-makers that the RG threshold is 'very low' and '*I suspect but cannot prove*'.⁷⁵ It is unclear why the decision is being taken to 'clarify' the threshold now.

- [75] The low threshold to identify potential victims so that they can benefit from basic support is found across all relevant trafficking instruments and case law and guidance. Article 10(2) ECAT requires measures be adopted to identify victims 'in collaboration' with other parties and 'support organisations' and to:

*'...ensure that, if the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.'*⁷⁶

- [76] Under Article 11(2) of the EU Trafficking Directive 2011/36/EU, necessary measures are outlined and the state must ensure that a person is:

*'provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to offences of trafficking defined in Articles 2 and 3'. This is illuminated by recital 18: 'A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness.'*⁷⁷

- [77] As the Joint UN Commentary on the EU Directive provides⁷⁸:

*'As the identification of victims by the criminal justice system may be a lengthy and difficult process, a human rights-based approach would encourage States to overcome the multiple challenges of victim identification through procedures that **foster the referral of persons for whom there are reasonable grounds to believe that they have been trafficked** to specialized services as soon as indicators or a suspicion of trafficking are noted.'*⁷⁹

*'Law enforcement officials, labour inspectors, or other officials may have **reasonable grounds to suspect** that a person might be a (potential) victim of trafficking or at risk of trafficking, when the presence of indicators of trafficking in persons is found. Although the presence or absence of indicators in itself neither proves nor disproves that human trafficking is taking place or may take place, their presence should always lead to further investigation.'*⁸⁰

- [78] International instruments deliberately use a low threshold so that potential victims may be provided with basic support and a reflection and recovery period where they can consider cooperating with the police and prosecuting authorities.

- [79] It is well-established that standardised indicators should be used when identifying victims. These indicator lists are not only contained in domestic policy but are internationally recognised by the United Nations Office on Drugs and Crime (UNODC), International Labour Organisation (ILO), and European Commission documentation (including the Delphi



indicators)⁸¹ as well as the Group of Experts on Action Against Trafficking in Human Beings (GRETA).⁸² These standardised indicators have long been accepted by the government's own policy and are referenced in the Modern Slavery Statutory Guidance (Section 3) and the NRM referral form, as well as in numerous cases decided by European and UK Courts.⁸³

[80] This low threshold was recognised by the Court of Appeal in the case of *TDT*. The Court determined on the facts of the case and considering the indicators present (as per those outlined in Home Office guidance) that it was '*fully sufficient to raise a credible suspicion that TDT had been trafficked*'.⁸⁴

[81] The use of a low or relatively low threshold is uncontroversial. It is used in other countries, including the Netherlands—whose policies and processes (including on immigration) often mirror the UK's. There, the initial RG decision is made on the '*slightest indication*' that trafficking has occurred.⁸⁵ The ECAT Explanatory Report outlines the following in relation to the purpose of the identification of potential victims, the RG decision and its thresholds:

Paragraph 131: '*Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State. Identifying a trafficking victim is a process which takes time. It may require an exchange of information with other countries or Parties or with victim-support organisations, and this may well lengthen the identification process. Many victims, however, are illegally present in the country where they are being exploited. Paragraph 2 seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible*'.

Paragraph 132: '*The Convention does not require absolute certainty – by definition impossible before the identification process has been completed – for not removing the person concerned from the Party's territory. Under the Convention, if there are "reasonable" grounds for believing someone to be a victim, then that is sufficient reason not to remove them until completion of the identification process establishes conclusively whether or not they are victims of trafficking*'.

Paragraph 173: '*One of the purposes of this period is to allow victims to recover and escape the influence of traffickers*'.

Paragraph 174: '*[the reflection process is] to allow victims to come to a decision on cooperating with the competent authorities*'.⁸⁶

Gathering the evidence

[82] ECAT envisages that support is given at the earliest stage—when someone is identified as a potential victim—and considers the importance of prevention of re-trafficking and therefore deliberately uses a low initial threshold as a gateway to basic support. After the initial RG threshold, there is an information gathering stage for the purposes of making a conclusive victim determination. If positive, this provides an entitlement to enhanced support. This makes practical and administrative sense.



- [83] In relation to Clauses 46 and 46, evidence presented shows the challenges of proper evidence gathering from victims in the early stages of identification, and the importance of establishing security and trust with potential victims before they might be comfortable, willing, and able to share their experiences fully.
- [84] The concern has been identified that the change to the RG threshold from 'may be a victim' to 'is/are a victim' will in practice raise the burden and need for evidence to satisfy the higher standard of proof at the CG stage (especially when taken with Clauses 57 and 58), and/or the distinct steps will be condensed.
- [85] First Responders in the NRM are not responsible for RG decision-making, the SCA is. The threshold for referral is currently considered to be lower than the RG threshold based on indicators for which there are no minimum or set number. As noted in the case of *TDT* the threshold for referral is 'very low'.⁸⁷ However, the threshold change in primary legislation may give rise to an unacceptable risk that the standard of proof and what is required is raised in practice, which therefore shuts victims out of identification and support. In turn, it may deter victims coming forward or being referred to the NRM at all.
- [86] The RG threshold is intentionally set low. How this is practically applied needs to be monitored in relation to the number of potential victims being referred to the NRM and the number of positive and negative RG decisions victims receive.
- [87] Barriers to positive identification by First Responders are already reported in relation to the current RG threshold. For instance, the Constabulary, Fire and Rescue Inspectorate Service highlights instances where police officers have not recognised victims of trafficking listing delays in identification, poor safeguarding approaches, reluctance to identify (due to workload), and viewing victims as offenders as issues uncovered by their inspections.⁸⁸
- [88] The Home Office at both stages of NRM decision-making make incorrect and faulty decisions. This is shown by the high rate of success in challenging faulty NRM decisions. Information received by After Exploitation, via a Freedom of Information request, showed that:
- 27% of negative NRM decisions were reconsidered (325 of 1,213).
 - 188 decisions were negative at RG stage and when reviewed 81% were over-turned.
 - 137 decisions were negative at CG stage and when reviewed 75% were over-turned.
 - 152 individuals who originally were not thought to meet the RG threshold upon reconsideration were given a positive RG decision. This means potential victims who should have been granted safe housing and support may have faced delays in getting help.⁸⁹
- [89] Increasing the threshold for RG decision-making or creating the false impression that the threshold has been raised (not merely changed) presents a risk of increasing faulty decisions at the initial stages, preventing victims from being able to access critical immediate support and care. The changes to the RG threshold and placing the CG threshold on a statutory footing may individually or cumulatively give rise to the misleading impression of the thresholds being raised, not merely changed.
- [90] Enacting Clause 59 will ensure the threshold for the CG decision is enshrined in primary legislation. However, the RG threshold would remain absent from primary legislation and continue to be dealt with in a policy context via the Modern Slavery Statutory Guidance.⁹⁰



- [91] Placing the CG threshold as the balance of probabilities on a statutory footing appears unnecessary as it is already contained in the Modern Slavery Statutory Guidance. The Guidance states that *'the CG decision should be based on whether there is sufficient evidence to decide on the 'balance of probabilities' that the individual is a confirmed victim of modern slavery'*. It is an unnecessary and surprising step to legislate on the standard of proof or weight to be afforded to evidence by decision-makers (or the Courts).

Data shows that the process is not being misused and that the thresholds are not too high.

- [92] There are no known government statistics to support there being misuse or a need to combat misuse by raising the thresholds for decisions.

Case Study: Provided by Kalayaan for the purpose of this report

This case study is in relation to 'L', an overseas domestic worker repeatedly trafficked to the UK by an abusive employer. L received a negative RG decision that was eventually reversed.

L escaped and reported to the police that her passport had been stolen. They did complete a NRM referral for her, however they later stated that they had received 'contradictory' evidence to what she had claimed. This was evidence provided by the trafficker which was said to show L had access to a bank account and wages being paid in. This was all a cover. L had no knowledge of a bank account and had no access to wages. L was issued a negative RG decision solely based on evidence the police provided to the SCA and which they had failed to interrogate or put to L. She received no opportunity to give her version of events or reply to these findings. This negative RG decision was withdrawn following threat of judicial review proceedings but was then followed again by another negative decision. After Kalayaan's second reconsideration request, she was issued a positive Reasonable Grounds. It took 11 months from the NRM referral to the positive RG decision.

- [93] Official NRM statistics show a disparity between the number of positive RG and CG decisions depending on nationality. Fewer victims who are third country nationals are positively identified than British, Irish, or EEA nationals. Rights Lab research based on Home Office data obtained through Freedom of Information requests shows significant differences in CG decision outcomes by nationality and region of origin, supported by the observations of service providers who note differential treatment.⁹¹ This, combined with the high number of negative NRM decisions that are overturned (paragraph 88), shows that the existing threshold test is already failing to recognise victims promptly or correctly. Increasing the threshold does not address current shortcomings, and risks exacerbating them.
- [94] Data produced by the Home Office and outlined in the Rights Lab submission to the National Immigration Plan consultation indicates that there is not currently misuse of the NRM system. End of Year NRM statistics show that in 2020, 92% (9,765) of RG decisions and 89% (3,084) of CG decisions made by the SCA were positive.⁹² Data from the Independent Anti-Slavery Commissioner's Annual Report showed out of 10,576 RG and 3,438 CG decisions 78% and



90% were positive respectively.⁹³ At both RG and CG stages, it was more common to see negative decisions given to non-EEA and non-UK victims.

	UK nationals	EEA nationals	Non-UK/EEA nationals
Negative RG decision	1.5%	10%	11%
Negative CG decision	2%	11%	16%

Information sourced from Independent Anti-Slavery Commissioner's Annual Report (p.68)

- [95] In addition to this data, a comparative study published by the Rights Lab shows the proportion of NRM referrals resulting in a positive CG decision across 20 countries increasing annually since 2015. It further found that the proportion of referrals receiving negative RG decisions decreased in 2019 and 2020, as did cases that were suspended or withdrawn. The data also showed that there is a clear difference in positive decisions based upon the nationality of the individual, also evident in the table above.⁹⁴
- [96] In addition to the 10,613 potential victims identified via the NRM, 6,411 were adults. A further 2,178 duty to notify forms were submitted in 2020.⁹⁵ This process captures information about potential exploitation and trafficking occurrences when a potential victim (adult) does not want to enter the NRM. These figures indicate 12,791 potential victims (8,589 adults) were encountered by first responders in 2020. Those identified, as adults, in England and Wales are eligible for support under the Modern Slavery Victim Care Contract (MSVCC).⁹⁶
- [97] Once an individual has been granted an RG decision, they are eligible for support under the MSVCC until a CG decision is made. The Salvation Army Annual Report records 2,592 potential victims entering support under the MSVCC. A further 2,450 referred were recorded as not entering support—133 individuals declined support, 386 were on hold and awaiting an outcome on their RG decision, and 1,374 recorded as non-contactable, with 557 deemed ineligible for support as they did not show indicators of modern slavery.⁹⁷
- [98] The report does not record the numbers of potential victims who go on to receive a positive CG decision and it is possible that this data is not held within the MSVCC as individuals may leave the support service before a decision has been reached.
- [99] Adults identified via the Duty to Notify process have opted not to enter the NRM and associated support processes and nearly half of those referred to the Salvation Army support, for a range of reasons, do not end up entering or receiving support. It is therefore proposed that the NRM system and the support it offers are not being misused.
- [100] In addition to these figures, a report released by Crisis shows only 41% of homeless victims of modern slavery were referred into the NRM (77 out of 187) and therefore were not officially recognised as a victim of modern slavery. Of those that entered the NRM (n=77), 80% received a positive RG decision. Nearly half (45%) explicitly refused to be referred to the NRM and the data shows that only 8% of individuals identified as potential victims were officially recognised as a victim of modern slavery by the government.⁹⁸
- [101] From the reports and data identified there is no evidence that the NRM is being misused or that there is any need to change (or raise) the RG threshold or place the CG standard of proof on a statutory footing.



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

Overview of the Clause

- [102] Clause 60 provides for a recovery period of at least 30 days for potential victims between the RG and CG decisions. It excludes from the entitlement those receiving a ‘further RG decision’ in line with Clause 61 (see further discussion on Clause 61).
- [103] The government asserts that Clause 60 implements ECAT obligations under Article 13 to provide a recovery period to potential victims of modern slavery, during which the victim must not be removed from the UK. ECAT states that a ‘reflection and recovery’ period should be offered to potential victims in the period between the RG and CG decisions being made and should last at least 30 days. A ‘reflection and recovery’ period will not be given to those potential victims who are deemed to be disqualified from protection.

Implications and evidence of impact

- [104] Clause 60 shortens the recovery and reflection period from the current minimum of 45 days to ‘at least 30 days’ (Clause 60(2)). Clause 60(1) restricts the scope application of RG decision-making and the recovery and reflection period to only potential victims with a first positive RG decision. Further RG decisions where the SCA has ‘*reasonable grounds for believing that the person is a victim of slavery or human trafficking arise from things done wholly before the first RG decision was made*’ are not in scope. The limiting of decision making for ‘further’ RG decisions is dealt with in Clause 61.
- [105] Clauses 60 and 61(1) need to be read together. This section looks specifically at the cut to the minimum number of ‘recovery’ days. The restriction of the RG decision-making and recovery and reflection period is addressed comprehensively in the following section.
- [106] Reducing minimum standards for victim support is a regressive step. If the government is serious about victim protection and its claimed status as a world leader on trafficking, it should provide more rather than less support.
- [107] The government does not claim direct support from ECAT for Clause 60. To the contrary, they assert that the government’s approach to implementing ECAT is set out in guidance and Clause 60 puts some of the key principles of the guidance into primary legislation.⁹⁹ However, ECAT says nothing about restricting its scope depending on when or how many times a person may have been trafficked.¹⁰⁰
- [108] There is no legal basis or reason in principle or practice to limit NRM decision-making, identification or support, to first time decisions in the circumstances of Clause 61(1), particularly where many victims are subjected to complex, multiple, and/or repeated cycles of trafficking experiences (and is well documented in reports and caselaw, e.g., *TDT*).

NRM decision-making must not leave victims in limbo or shut them out of their basic rights.

- [109] ECAT provides for a recovery and reflection period to be granted ‘*when there are reasonable grounds to believe that the person concerned is a victim of trafficking*’—before the



identification procedure is completed. The primary aim of the recovery and reflection period is to distance presumed victims of trafficking from the influence of the perpetrators and to give them sufficient time to make decisions on whether to co-operate with the authorities. During the recovery and reflection period, individuals receive support and must not be removed from the country's territory and must be able to receive the assistance measures contained in Article 12 (paragraphs 1 and 2) of ECAT.¹⁰¹

- [110] ECAT provides for a reflection and recovery period for potential victims for a *minimum* of 30 days. However, the period is not just about days—it must be sufficient to ensure cooperation with the authorities and recovery. The reflection and recovery period in England and Wales is currently a minimum of 45 days.
- [111] In 2017, the length of time confirmed victims had access to 'move-on' support was extended from 14 days to 45 days (in addition to the existing minimum 45 days). Increasing the total support period to at least 90 days (with a positive CG decision).¹⁰²
- [112] In Scotland a minimum reflection and recovery period of 90 days is offered.¹⁰³
- [113] In Northern Ireland victims of slavery receive a statutory 45 day 'reflection and recovery' period during the process of determining their status as a victim. This is followed by further support being granted (on a discretionary basis) upon receipt of a positive CG decision or if the CG decision has not been made within the 45 days.¹⁰⁴
- [114] The National Audit Office states that the 'NRM process is inefficient and potential victims are caught up in the system waiting for a decision for a long time':
- 6% of cases referred between 2016-2017 received a CG decision within 45 days.
 - 33% received a decision within 90 days.
 - 46% had been waiting for a CG decision for over a year.¹⁰⁵
- [115] In 2016, it took an average of 134 days to make a CG decision.¹⁰⁶ The situation has not changed; CG decisions are still not being made within 45 days. The Independent Anti-Slavery Commissioner's Annual Report identifies RG decisions taking average of 14 days and CG decisions 465 days.¹⁰⁷
- [116] The National Audit Office reported victims being supported in NRM safe houses and via NRM outreach services had been supported for 136 and 312 days respectively.¹⁰⁸ The length of time in support has not declined over recent years. In 2021, the Salvation Army reported the average number of days of support, under the MSVCC, as 170 in accommodation services and 625 in outreach.¹⁰⁹
- [117] Irrespective of the minimum number of days assigned to the NRM, the current overall timeframes involved are problematic for individuals because of endemic delays. The delays leave victims in a detrimental state of limbo, leaving people unable to access appropriate housing or employment. The inability to move-on from their experiences impacts negatively on mental health. The slow pace of decision-making within the NRM, backlogs of cases, and the significant deviation from intended timelines leave victims in a state of uncertainty and instability for long periods of time. These delays have negative psychological impacts on victims, causing anxiety and uncertainty.¹¹⁰
- [118] For those without legal right to remain in the UK, the lack of access to employment opportunities in this period of limbo creates a situation in which they are forced to put their



lives on hold, delaying the possibility to rebuild their lives, thereby hindering recovery and reintegration.¹¹¹ Delays in NRM decision-making also have other knock-on effects for victims. Until recently, the Home Office refused to make decisions on asylum claims while a person was awaiting a CG decision. Delays in decision-making, which also result in delays in victims being able to access support, have been noted to result in victims 'going missing'.¹¹²

- [119] The Independent Anti-Slavery Commissioner has expressed concern over decision-making timeframes, noting that victims often wait two to three years for decisions, combined with an additional wait if claiming asylum. She described this period as an '*agonising wait*' for victims, during which their '*lives are on hold*'—further compounded when victims are prevented from seeking work by immigration restrictions, and where they are not supported to access education and training that would support them into employment.¹¹³
- [120] Actual time spent in the NRM depends on a number of variables outside the control of the victim; principally delays by the SCA or Home Office, lack of resources, as well as parallel police investigations or prosecutions which may be lengthy. None of these issues are new, and all are likely to emerge in practice, which is why ECAT provides for a minimum reflection and recovery period—to achieve an appropriate balance between prompt victim identification and support and flexibility. It is therefore unclear why the government would legislate on the duration of the recovery and reflection period, or the benefit of the proposed provision. To the contrary, it is likely to be counterproductive. Enacting a statutory time limit for the recovery and reflection period will not tackle delays, and therefore the reduction of the timescale appears peripheral and/or self-defeating because there will be increased legal challenges if the statutory time limit is exceeded by the SCA in practice.
- [121] Existing evidence on effective modern slavery and trafficking policy consistently calls for improved and increased victim care and support. Rather than decreasing the minimum period as the Nationality and Borders Bill proposes, other countries have been increasing it. For example: Iceland has increased the recovery period from six to nine months whilst Spain has increased its minimum duration to 90 days.¹¹⁴ Opportunities for positive legislative change are available to the UK. For example, by making provision for safehouse accommodation and support following a referral to the NRM, as proposed in the Modern Slavery (Victim Support) Bill by Lord McColl.¹¹⁵
- [122] In 2017 the government announced their intention to fund 'Places of Safety' as part of the NRM transformation programme, providing victims of trafficking leaving immediate situations of exploitation assistance and advice for up to three days before deciding whether to enter the NRM.¹¹⁶ This announcement was well-received by the anti-slavery sector and showed the government's acknowledgement that early support was needed for potential victims.¹¹⁷ However, when the new MSVCC was launched in January 2021, places of safety were not part of the contract and their implementation appears to have stalled. This Clause appears to overlook those opportunities for reforms based on evidence in favour of restricting victims' entitlements.
- [123] Protection and support prior to an RG decision is not currently included in the Nationality and Borders Bill. The duty to protect an individual prior to an RG decision needs to be considered, especially in relation to potential victims who may not have recourse to public funds upon identification and who may not have been able to access legal advice at the point of identification.



- [124] Homelessness Guidance places an obligation upon local authorities to provide safe accommodation between referral to the NRM and an RG decision for individuals with recourse to public funds.¹¹⁸ For those without recourse, emergency accommodation is available under the MSVCC and again can be provided prior to an RG decision being made.¹¹⁹
- [125] Increasing victim protection and the minimum period available to coincide with the realities of the NRM on the ground as well as victim needs would be a welcomed approach and is supported by evidence.

Support provided—or the lack of support—will impact on prosecution rates.

- [126] The recovery and reflection period is designed to enable victims a period in which they are provided with assistance and support, at a minimum, to enable them to escape from their traffickers and recover from their experiences.¹²⁰ Empirical evidence suggests a minimum period of **90 days** is required for the cognitive functioning and emotional strength of a trafficked person to increase to a level at which they are able to make well-considered decisions about their safety and cooperation with the authorities against the traffickers, as well as to offer detailed evidence about past events.¹²¹ The EU Group of Experts on trafficking in human beings also recommended that access to a reflection delay of no less than three months be granted.¹²² This point is further highlighted by Lord Coaker:

*'If victims are not looked after and do not feel safe, they either won't come forward in the first place, they are too frightened to disclose and give evidence, or they disappear. In contrast, in the instances where support for victims depends on the individual victim's needs, rather than arbitrary time frames, the outcomes for prosecutions are far better.'*¹²³

- [127] The UK government has announced its ongoing commitment to ensuring perpetrators are brought to justice and that victims are given the support they need to rebuild their lives.¹²⁴ However, there has been wide-spread criticism of the lack of long-term support and options for identified victims. Reports, highlight that a lack of support can lead to destitution, homelessness and further exploitation as a result of not having access to public funds, secure immigration status, or employment.¹²⁵
- [128] The government says that it aims to employ a criminal justice approach to modern slavery. Yet, evidence shows that without victim testimony prosecutions are difficult if not impossible to secure. Therefore, there is a need to ensure effective and long-term support for victims to enable their assistance with prosecutions. As identified by Wilsons Solicitors, building trust is a key for potential victims to seek help and work with the authorities, which takes time and support.¹²⁶ Cutting the time and support will reduce the ability and willingness of victims to cooperate with the authorities.
- [129] The risk of undermining criminal justice responses to trafficking are real; successful prosecutions remain relatively low. In 2019, 256 individuals were prosecuted for a Modern Slavery Offence. Of those, 72 (28%) were convicted. Modern Slavery was a principal offence in 68 cases in 2019, and in 36 cases resulted in a conviction (53% conviction rate). Across all crime types recorded by the Ministry of Justice, the conviction rate for 2019 was 86%.¹²⁷



- [130] Data collated from two support organisations (Bakhita House and Hope for Justice) suggests positive correlations between effective support and higher rates of engagement with the authorities with 67%–73% of victims being supported (outside of the NRM) engaging with police and prosecution cases.¹²⁸ Further, Uddin highlights that fear of deportation, of removal from the UK, and of traffickers make victims reluctant to report modern slavery crimes in the first place.¹²⁹

Conclusive identification as a victim at the end of the recovery period does not equate to a right to remain in the UK.

- [131] Conclusive identification as a victim at the end of the recovery period does not equate to a right to remain in the UK.
- [132] Clause 60(3) prohibits removal from the UK during the recovery and reflection period, which should apply to all potential victims, not only those with a first RG (under Clause 60(1)(b)). Once the recovery period is concluded, unless an individual has any outstanding immigration applications, an individual may have to leave the UK.
- [133] Currently, in the UK, there is no specialised returns programme in place for conclusively identified victims in accordance with Article 16 ECAT.¹³⁰
- [134] Article 16 of ECAT makes it clear that returns should preferably be voluntary not enforced, and that any return should be with due regard for the rights, safety, and dignity of that person. Article 16(5) requires repatriation programmes to be put in place aimed at avoiding re-victimisation. There is a requirement to ensure due diligence and checks as to what treatment, return arrangements, accommodation, education, and social programmes are available and accessible, in practice, and to obtain individual specific assurances if there are any doubts.¹³¹
- [135] The protections of an individual end upon receipt of a CG decision and there have been issues with victims being issued with removal notices when they are waiting for legal advice post a CG decision, in relation to their status in the UK.

Case Study: *PK (Ghana) v The Secretary of State for the Home Department*

In the case of PK (Ghana) v The Secretary of State for the Home Department, PK was a victim of trafficking from Ghana who was exploited repeatedly in Ghana as a child and in the UK. He was identified as a victim of trafficking by an NGO visiting the detention centre in which he was held, referred to the NRM, and subsequently issued with positive RG and CG decisions. However, he was refused any discretionary leave alongside his CG decision and issued quickly with a removal notice. His lawyers had to issue an application for judicial review with an urgent application to suspend removal. After lengthy proceedings challenging the refusal of a residence permit the Court of Appeal agreed it was unlawful, and PK was eventually granted DLR.



- [136] There are potential victims who may not be correctly identified or will be viewed as criminals rather than victims and will be unable and ineligible to access the reflection and recovery period to which they should be entitled.
- [137] Clause 60(4) refers to Clause 62(2) of the Nationality and Borders Bill and specifies that some potential victims of modern slavery will be disqualified from protection and access to support under the NRM will cease.
- [138] The operation of Clauses 49-51 is particularly concerning and inconsistent with the aims of achieving the protection and support of victims as ECAT requires. Further, it is regressive, contrary to the principle of progression in human rights law.¹³²
- [139] The Modern Slavery Act (2015) relates to all potential victims of trafficking and modern slavery, whereas the Nationality and Borders Bill (2021) is primarily focussed on those potential victims who do not have status in the UK. The Bill therefore cuts across the existing statutory scheme and is incoherent with the existing legislative framework.
- [140] Sections 49 and 50 of the Modern Slavery Act (2015) set out that guidance and regulations must be issued for identifying, supporting, and aiding potential victims. Guidance has been issued under Section 49, dealing with the recovery and reflection period. However, no regulations have been promulgated. Instead of exercising the power under Section 49, the government has chosen to legislate on the parameters of the 'recovery and reflection period' in Clause 60 of the Bill. Parameters which do not appear in the Modern Slavery Act (2015). It is therefore unclear why the Nationality and Borders Bill purportedly seeks to legislate in reliance on ECAT, while the legislation specifically designed for identifying and assisting victims—i.e., the Modern Slavery Act (2015)—does not.
- [141] The Nationality and Borders Bill via Clause 60 ensures UK domestic legislation is in line with Article 13 of ECAT in relation to the provision of a 'recovery and reflection period'. However, the assistance potential victims are entitled to (as per Article 12 of ECAT) during this period is absent. Neither the Modern Slavery Act (2015) nor the Nationality and Borders Bill include provision for implementing Article 12 of ECAT, which lists the measures that should be adopted to assist victims.



Clause 61. No entitlement to additional recovery period etc

Overview of the clause

- [142] Clause 61 states that '*additional recovery periods*' will not be permitted for victims on the basis of facts occurring prior to the determination of a previous RG decision, unless there are specific circumstances that require an additional recovery period. Clause 61 aims to prevent the recovery period being misused by '*those wishing to extend their stay in the UK*' and is intended to act to remove barriers to removal of individuals where support and protections are not considered necessary.
- [143] This section links to Clause 60, which deals with the RG decision as the gateway to a recovery and reflection period. Clause 60 proposes both to cut the duration of the recovery period and limit it to potential victims who have a first RG decision, excluding those with 'a further' RG decision. Clause 61 gives the competent authority the power to refuse victims with a further RG decision an additional recovery and reflection period.

Implications and evidence of impact

The government does not want extended recovery periods to be used as a way for victims to stay in the country.

- [144] Clause 61 is not compliant in ECAT and the government does not claim compliance.
- [145] The concerns about the impact and effect of Clause 60 in practice apply to Clause 61, and these two clauses of the Bill and the two sections in this paper should be read together. If a victim is confined to having experiences of slavery or trafficking recognised once, without the opportunity for further consideration (under Clause 60), they may be excluded from any additional recovery period under Clause 61. This means that if an individual has already benefited from a recovery period, they will not be afforded support or protection from removal irrespective of their trafficking experiences or needs.
- [146] Additional concerns arise from Clause 61 because it adopts a wholly artificial and rigid legislative approach to the crime of trafficking not found in the Modern Slavery Act (2015), or any international instrument. It does so by limiting the impact of the RG decision for slavery or trafficking experiences that '*arise from things done wholly before the first RG decision was made*' (Clause 61(1)). The fact an RG decision is made on specific facts and experiences does not mean that additional trafficking has not taken place.
- [147] The crime of trafficking may run in complex and continuous chains or cycles and in multiple forms. Victims may not reveal significant facts and experiences in the initial stages of engagement with officials, as discussed in detail in consideration of Clauses 57 and 58. Important aspects of a victims' experiences—including distinct experiences and evidence of slavery and trafficking—may therefore not be identified in an initial RG decision or in the related CG decision. These may have significant implications both for victims' support and protection needs, and for subsequent decision-making in their case.



- [148] Clause 61 is said to be intended to address alleged misuse of the NRM ‘*by those wishing to extend their stay in the UK*’ while still allowing access to support for those who require it. It aims to prevent individuals making new claims of exploitation once they have received their RG decision. Evidence showing that the NRM is not currently being misused to a significant extent is presented in paragraphs 88, 94 and 97).
- [149] The government, via a press release claimed there was ‘an alarming rise in people abusing our modern slavery system by posing as victims in order to prevent their removal and enable them stay in the country’.¹³³ However, there has been no data provided to evidence the alleged misuse of the system or that individuals are seeking to extend their stay in the NRM. The Home Office ‘presenting this opinion as fact’ without providing supporting evidence has been criticised by a collective of Barristers Chambers and both the Refugee and Anti-Slavery sector.¹³⁴
- [150] In fact, available evidence is to the contrary, indicating that victims are subjected to unnecessary prolongation of the NRM by the SCA and Home Office for reasons entirely outside of their control. Further, effective protection is not about limiting support to a minimum or set number of days in a recovery and reflection period and entitlement to support, or the number of times this may be afforded. This is contrary to the Explanatory Notes to the Bill.¹³⁵
- [151] In the case of *NN and LP* it was argued that the Home Office policy to end support—including accommodation, support work, and financial assistance—45 days after a CG decision was unlawful as there had been a failure to assess support needs. It was argued that ECAT requires support to be provided for as long as victims need and want it, or until they leave the UK’s jurisdiction.¹³⁶
- [152] In 2019 the Home Office conceded that only allowing identified victims to receive support for 45 days was unlawful and incompatible with ECAT (Articles 11 and 12).¹³⁷ The government recognised that recovery was different for every individual and could not be achieved within a set timeframe. The government agreed that support should be given to a victim of modern slavery in line with their needs and not stopped after a specified period.¹³⁸
- [153] The Recovery Needs Assessment (RNA) process was developed by the Home Office in response to this case. The RNA process and guidance outlines how the process for applying for on-going support works.¹³⁹ However, concerns identified with the process by ATLEU include:
- Victims being unable to request continued support themselves.
 - The process only being available to those within the MSVCC.
 - Whether continued support is required is decided by the SCA.
 - How to challenge refusals of support from the SCA is not clear.¹⁴⁰
- [154] Other potential issues that have been identified from the RNA Guidance include:
- On-going needs that can be supported are only those linked to a trafficking experience (how support needs linking only to a trafficking experience are determined is not clear).
 - If support requested is deemed to be available or provided via another agency an RNA request will be declined (issues with waiting lists and eligibility for other services are not considered).



- All support needs identified must be accompanied with a timeframe for completion, (hard to predict if reliant on other external services and if victims are coping with trauma).
- Support workers are having to apply more than once via the RNA process (time involved with this process distracts from providing direct support to victims).
- Provision of evidence of need and how to get this from external agencies in the time frames required.

[155] The ATMG are currently researching the role and effectiveness of the RNA process. Concerns have been raised about how the process is being operated both for individuals in the community and those in detention.¹⁴¹

The prohibition on further recovery periods contradicts the identified need for individual assessment and support—the Recovery Needs Assessment process.

[156] The language of Clause 61(1) to restrict a further RG decision ‘*if the reasonable grounds for believing that the person is a victim of slavery or human trafficking arise from things done wholly before the first RG decision was made*’ is unclear and fails to reflect the nature of the crime, which may involve different and multiple incidents and locations of trafficking and re-trafficking by different actors. Trafficking is often a continuous chain, which is not broken by an initial encounter by the authorities and an RG decision, if the person remains under the control of traffickers or returns, is recaptured and/or re-trafficked. The Home Office has long accepted guidelines by UNHCR that:

*‘An important aspect of this definition is an understanding of trafficking as a process comprising a number of interrelated actions rather than a single act at a given point in time. Once initial control is secured, victims are generally moved to a place where there is a market for their services, often where they lack language skills and other basic knowledge that would enable them to seek help. While these actions can all take place within one country’s borders, they can also take place across borders with the recruitment taking place in one country and the act of receiving the victim and the exploitation taking place in another. Whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.’*¹⁴²

[157] Clause 61 therefore appears to be unrealistic because not connected to the realities of the situation in practice

[158] These Clauses (60 and 61) also risk undermining policing ability to tackle criminals. There is the potential that an individual may now be removed from the UK, unless the Competent Authority considers it appropriate that they are not removed (Clause 61 (2)). It is unclear how a conclusive grounds decision would effectively be made on a case without the individual in question in the country. This will have a direct impact on the quality of any criminal investigation and the quality of the NRM process both of which will be diminished without the individual being in the country and in a position to assist.

[159] When an RG decision is made it is an indication that the person is a potential victim of the crime of trafficking, requiring further investigation. If individuals are at risk of being removed post RG decision the potential for effective investigation of perpetrators is undermined. The



former Independent Anti-Slavery Commissioner Kevin Hyland, previously of the Metropolitan Police, in 2016 criticised 'substandard' crime recording¹⁴³ and the government's proposals here would weaken the police response to modern slavery even further.

- [160] Further, restricting the recovery and reflection period to victims with an RG decision, excluding those with further RG decisions, appears to be a blanket arbitrary and unlawful rule which applies irrespective of individual circumstances, including whether the victim has been subjected to ongoing or multiple trafficking or trafficking experiences and their support needs.

Clause 61 is likely to penalise acutely vulnerable victims who are subjected to repeated trafficking situations and exploitation.

- [161] Government guidance recognises that those who have been trafficked in the past may be at risk from further trafficking.¹⁴⁴ Victims are commonly re-trafficked even after they are placed in care or secure accommodation, including those referred to the NRM placed in secure accommodation and in receipt of an RG decision, as in the case of TDT.¹⁴⁵ These experiences of re-trafficking are not always discrete, new instances of slavery or trafficking as appears to be anticipated by Clause 61.
- [162] A report published by the Rights Lab raises the issue that re-trafficking is not a concept defined clearly in UK guidance, policy or legislation. It also finds that data on the numbers impacted by re-trafficking or those who are at risk of re-trafficking are not collated.¹⁴⁶ Further collection and investigation of data on re-trafficking in the UK is therefore needed before such measures as anticipated by Clause 61 can be properly assessed.
- [163] To be granted a new reflection period under Clause 61, potential victims would need to have experienced a whole new episode of exploitation, occurring after receipt of a CG decision. Evidence that this was unrelated to any trafficking experience for which they were originally offered support and protection for would also be required. This does not align with the UK's duty to investigate every claim of trafficking, regardless of when this claim is raised or the timeframes in which it occurred.



Clause 62. Identified potential victims etc: disqualification from protection

Overview of the clause

- [164] The Explanatory Notes relating to the Nationality and Borders Bill state that ‘The Council of Europe Convention on Action against Trafficking in Human Beings contains provisions for an exemption to the protections conferred during the recovery period on public order grounds or if it is found that victim’s status is being claimed improperly’ (paragraph 552) and that ‘This clause puts these exemptions into primary legislation’.¹⁴⁷
- [165] As the title of Clause 62 makes clear, this provision deals with the disqualification from protection of identified potential victims. Clause 62(1) provides that if the SCA is ‘*satisfied*’ that the potential victim is a threat to public order, then under Clause 62(2) the protections ordinarily afforded to a potential victim ‘*cease to apply*’. This means that the SCA is no longer required to make a CG decision and that prohibition on removal is removed, as is the victim’s right to access the reflection and recovery period, including any protection and support.
- [166] Clause 62 enables the disqualification and potential removal ‘*of those who pose a threat to the UK*’, which the government claims ‘*is in keeping with the UK’s ECAT obligations*’.¹⁴⁸

Implications and evidence of impact

- [167] If the SCA is satisfied that a person with an RG decision is a threat to public order or has claimed to be a victim of slavery or human trafficking in bad faith, Clause 62(1) provides that the requirement to make a CG decision and the prohibition of removal, or requirement to leave the UK under clauses 60 or 61 ‘*cease to apply*’.
- [168] The government’s claim that Clause 62 is ‘*in keeping*’ with ECAT is incorrect in law. The disqualification from identification and removal of victims is not in keeping with ECAT obligations. It is a misinterpretation of ECAT to claim that it ‘*contains provisions for an exemption to the protections conferred during the recovery and reflection period on public order grounds or if it is found that the victim’s status is being claimed improperly*’.¹⁴⁹
- [169] To date no evidence has been presented by the government to support Clause 62 or the general claims that measures in Part 5 of the Bill are needed to tackle misuse of the system or improper claims.
- [170] Existing evidence suggests that Clause 62 will have negative implications on policing and prosecutions and is likely to undermine the ability to investigate and convict perpetrators. This in turn undermines efforts to combat and tackle trafficking and organised criminal networks (OCNs). This runs counter to the government’s promise to be tough on traffickers and would allow them to operate with relatively low risk.
- [171] Clause 62 is unnecessary. While Clause 62 places significant discretion in the hands of the SCA to determine and disqualify individuals from protection and support, the government’s intention is the removal of those who pose a threat to the security of the UK. The power to remove those who pose a threat to the security of the UK is already found in a plethora of other legislative provisions, including the UK Borders Act 2007 concerned with the removal of foreign national criminals. The SCA simply makes a negative CG decision if the victim does not meet the definition of trafficking, meaning the person is not accepted as a victim.



- [172] Clause 62 is overly broad, potentially misleading, and likely to be administratively unworkable. The nine categories of individual to whom Clause 62 applies include people who are convicted of offences, people who are not, and may include those who even despite having convictions pose no threat to the security of the UK at all.

Policing and prosecution

Clause 62 limits the ability to convict perpetrators and dismantle organised criminal groups.

- [173] The Independent Anti-Slavery Commissioner has raised concerns about Clause 62 and its 'potential to prevent a considerable number of potential victims of modern slavery from being able to access the recovery and reflection period granted through the NRM'. She further highlights that without support, prosecutions will suffer as witnesses will not be available to provide evidence noting this 'will severely limit our ability to convict perpetrators and dismantle organised crime groups'.¹⁵⁰
- [174] Clause 62 limits the ability to investigate and convict perpetrators and dismantle OCN's in several ways, undermining policing and prosecution efforts. In cases subject to the Clause, notifications to police are removed, important witnesses for criminal cases may be removed from the jurisdiction without the appropriate protection infrastructure to prevent further violations, self-reporting is likely to decrease, and trust in the system is likely to reduce further.
- [175] Clause 62 penalises and punishes victims. Legislative provisions penalising victims ignore the prevalence of trafficking for the purpose of forced criminality as a deliberate business model used by traffickers for profit and undermines the non-punishment provisions with respect to victims in domestic and international law. A report by the UN Special Rapporteur on Trafficking, cites the OSCE and, shows the global increasing prevalence of trafficking for the propose of criminality. Their recommendations highlight:

'how such a form of trafficking is often based on the "deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities". It is to be appreciated that the more traffickers can rely on a State's criminal justice system to arrest, charge, prosecute and convict trafficking victims for their trafficking-related offences, whether criminal, civil or administrative, the better are the conditions for traffickers to profit and thrive, unencumbered in their criminality and undetected by the authorities'.¹⁵¹

- [176] The penalisation of victims through Clause 62 would reinforce the message and threats used by traffickers that if victims report abuse, they will be disbelieved, punished, and deported.

Impact on the effectiveness of criminal justice efforts

- [177] Home Office Statutory and Non-Statutory Guidance accepts that 'A potential victim of modern slavery is a potential victim of crime'. All cases should be referred to the police – either on the victim's behalf where they consent, or as a third-party referral where they do not.¹⁵² The SCA should update police following an RG or CG decision.¹⁵³ The former Independent Anti-Slavery Commissioner Kevin Hyland highlighted the importance of crime reporting to policing efforts.¹⁵⁴ This process enables the crime of trafficking to be recorded and investigated. The



removal of the requirement for a CG decision to be made for individuals who are disqualified removes the requirement upon the SCA to notify the police of a CG decision.

- [178] The disqualification of potential victims from conclusive identification and support, to ‘enable the removal of those who pose a threat to the UK’ means removing victims of crime and key witnesses from the jurisdiction.¹⁵⁵ This deprives the police and prosecution of a potential victim or witness and sends a message to OCNs and criminals that their crimes and activities carry little or no risk, undermining efforts to tackle and combat trafficking in the first place.
- [179] The disqualification from victim identification and support to facilitate removal, disincentivises victims coming forward to the NRM, or consenting to it where they have been trafficked for the purpose of forced criminality. This therefore removes potential victims of crime from the NRM and from police investigations. This further denies the police and prosecution of simple crime reporting and the most important witness in most cases—the victim.¹⁵⁶
- [180] The operation of Clause 62 is likely to undermine the trust victims are asked to place in front line responders, the authorities, and the NRM instead of their traffickers.
- [181] The operation of Clause 62, along with other early notice and removal provisions in the Bill, facilitates the ability of the Home Office to detain and swiftly remove victims. At the point of removal, they may face risk of re-trafficking, serious harm, or rights violations (or potentially refusal of country readmittance), without any or all necessary procedural safeguards to assess those risks. This gives rise to a risk of a breach of the UK’s obligations under ECAT, the Refugee Convention, and the ECHR.
- [182] The removal of the requirement to make a CG decision (or exercise of a discretion to deny one) also removes the associated requirement to consider eligibility for a residence permit or DLR at the time of a CG decision.¹⁵⁷ A residence permit is specifically designed to help combat trafficking under ECAT Article 14 based on cooperating with the police, compensation claims, and personal circumstances. Clause 62 would not only undermine the victim’s willingness or even ability to cooperate with the police, but they would be shut out from support they need to recover from their experiences.

Non-compliance with ECAT obligations

- [183] As the ECAT explanatory report makes clear:

Paragraph 181: *‘Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the victims this means having to start again from scratch – a failure that, in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims from falling into the same trap. A further factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. For the law-enforcement authorities, if the victims continue to live clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims’ confidence that their rights and interests are protected, the better the information they will give. Availability of residence permits is a measure calculated to encourage them to cooperate’.*

Paragraph 185: *‘The requirement of the cooperation with the competent authorities has been introduced in order to take into account that victims are deterred from*



contacting the national authorities by fear of being immediately sent back to their country of origin as illegal entrants to the country of exploitation'.¹⁵⁸

[184] Although Clause 62 purports to be in line with ECAT, it runs contrary to the obligations set out in the Convention in several clear ways. Clause 62(1) relates to disqualification from identification and support but finds no support in ECAT.

[185] To the contrary, insofar as Clause 62 expressly limits victim identification and protection, it is contrary to the ECAT duties to identify and protect victims.¹⁵⁹ The cessation of the reflection and recovery period and support, as well as the lifting of the prohibition of removal, flowing from an RG decision is contrary to ECAT Articles 10, 12, 13, 14 and 16.¹⁶⁰ Further, Clause 62 penalises victims for crimes arising from their trafficking situations for which they may not be culpable. It therefore fails to take account of the complexities of control and criminality and is contrary to the non-penalisation and punishment provision in Article 26 ECAT.¹⁶¹

[186] This is not only about legal duties. There are important practical consequences because the duties to identify and protect are measures designed to encourage victims to come forward and report abuse, and to facilitate their cooperation with the police and investigation of crimes, to tackle trafficking.¹⁶² As the ECAT monitoring body GRETA has made clear:

'the primary aim of the recovery and reflection period is to distance presumed victims of trafficking from the influence of the perpetrators and to give them sufficient time to take a decision on whether to co-operate with the authorities'.¹⁶³

[187] **The duty to identify and complete victim identification:** There is no criteria or basis in ECAT which allows for the non-identification of victims at CG stage proposed by Clause 62. Clause 62 is therefore contrary to the duty to identify in Article 10 ECAT.

[188] Nothing in Article 10 allows for the disqualification of victims or powers to prevent their identification, for public order reasons or otherwise. ECAT says the opposite: that where there are reasonable grounds to believe that a person is a potential victim of trafficking and of crime that person '*shall not be removed from the territory until the identification process as [a] victim of an offence provided for in Article 18 [ECAT] has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12...*'. The domestic courts have accepted that victims with an RG decision shall not be removed until the identification process is complete, and in some cases ordered victims to be returned to the UK where victim identification was not completed or was completed incorrectly.¹⁶⁴

[189] Article 10 requires that victims must be identified and should not be punished for crimes arising from their trafficking situation, in accordance with Article 26.¹⁶⁵ Therefore, if a person has been trafficked for the purpose of criminal exploitation that falls within the trafficking definition they should be identified as victims, not disqualified from victim status.

[190] The duty prescribed under Article 10 of ECAT is to determine whether an individual falls within the Article 4 ECAT definition of trafficking. This legal definition encompasses trafficking for a wide range of exploitative purposes, including forced criminality—both in Article 10 ECAT and the EU Trafficking Directive 2011/36/EU which expressly mentions the 'exploitation of criminal activities' in the open list of forms of exploitation. The Directive explains that '*[t]he expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain'.¹⁶⁶*



- [191] There is no support for Clause 62 under ECAT or the UK's trafficking obligations. There is nothing in the duty to identify (Article 10 of ECAT) or the duty to support (Article 12 of ECAT) (referred to in Article 13(2) ECAT) that allows for disqualification or cessation of support for public order reasons.¹⁶⁷
- [192] ECAT must be read compatibly with the ECHR in accordance with Article 31 of the Vienna Convention on the Law and Treaties, and therefore the notion of 'public order' under Article 13 of ECAT cannot be interpreted in a manner that deprives rights and entitlements under ECAT of any meaning or practical effect.¹⁶⁸ This is further supported by Article 40 of ECAT.
- [193] The ECHR deals with the notion of threat to public order or public emergency and makes provision for such threats.
- [194] Under Article 15(1) of the ECHR: 'in time of war or public emergency threatening the life of the nation', states may take derogating measures 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.¹⁶⁹
- [195] Case law on the notion of 'public order' requires there to be 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.¹⁷⁰ Case law requires any danger must be clear, ongoing, or imminent and derogation may only be admitted to the extent strictly required by the situation and must be proportionate.¹⁷¹
- [196] As Article 15(2) makes clear, there can be no derogation in relation to a list of specific rights, including Articles 2, 3, 4 and 7 of the ECHR. Any derogation must be notified to the Secretary General of the Council of Europe (Article 15(3)).¹⁷²
- [197] Article 3 of the ECHR—the prohibition on torture and inhuman and degrading treatment and punishment—prohibits expulsion to countries even in the event of a public emergency threatening the life of the nation. The European Court of Human Rights has repeatedly affirmed: '*even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment*'.¹⁷³
- [198] Article 4 of the ECHR—interpreted in accordance with ECAT and international law—prohibits slavery, servitude, and forced or compulsory labour, including trafficking in human beings and serious exploitation.¹⁷⁴ The duties under Article 4 of the ECHR have been interpreted in line with duties under Articles 2 and 3 of the ECHR, all of which are non-derogable rights and admit no exceptions).¹⁷⁵
- [199] The concern with Clause 62 is that it requires a derogation from, or an exception to, a non-derogable Convention right—Article 4 of the ECHR—for public order grounds. Such derogation is not legally permissible. This is because Article 4 of the ECHR includes duties to investigate and identify and protect and support; which Clause 62 contravenes.
- [200] No derogation is possible in relation to Article 4 of the ECHR, even in the event of a public emergency threatening the life of the nation (*C.N. v. the United Kingdom & Stummer v. Austria*).¹⁷⁶ The need to protect the public order cannot justify derogation from the duties to identify and investigate and protect and support victims (*Rantsev and T.I. and Others v Greece; J. and others v Austria*)¹⁷⁷ and to protect and apply the non-punishment and non-penalisation provision (*VCL and AN v UK*).¹⁷⁸



[201] The wording of ECAT Article 13(1) itself requires the reflection period be 'sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities' and 'without prejudice' to other activities, including the investigation or prosecution of offenders. It is geared towards recovery and/or cooperation, including ensuring that there are effective witnesses to support national policing and the prosecution of perpetrators, combatting trafficking activities, and ensuring victims are not removed until identification is complete.

[202] Article 13 provides:

*'Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. **During this period, it shall not be possible to enforce any expulsion order against him or her.** This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.'*

During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly'.¹⁷⁹

[203] **The duty to protect and provide support:** While Article 13(3) ECAT uses the concept of 'public order' or 'improper' claims, there is nothing in this or any other provision of ECAT that allows for disqualification from identification and support. In fact, ECAT Article 13(2) indicates the opposite: that where there are reasonable grounds to believe that the person concerned is a victim of trafficking, they are granted a recovery and reflection period during which '*it shall not be possible to enforce any expulsion order*' and such persons must be provided with measures of support contained in Articles 12(1) and (2) of ECAT. Therefore, cessation of support and lifting the prohibition of removal is directly contrary to ECAT.

[204] Article 13(3) of ECAT provides two grounds for consideration in relation to parties not being 'bound to observe' a recovery and reflection period: '*if grounds of public order prevent it or it is found that victim status is being claimed improperly*'.

[205] This essentially provides a test of necessity to 'prevent' a recovery and reflection period being 'observed'. The matter of necessity concerns the practical domestic arrangements on the ground. For example, there might be public order reasons preventing a female victim of trafficking convicted of trafficking offences residing in a safe house with other female victims, as it might pose issues of conflict, confidentiality, or even recovery issues.

[206] Even if public order/an improper claim prevented the observance of a reflection and recovery period being observed, this is a discretion not a requirement, and would in any event need to comply with the overall aims and principles of ECAT, including non-discrimination and proportionality principles (Articles 1, 2 and 3). This might mean that alternative secure accommodation for vulnerable persons might need to be arranged with outreach support. These practical arrangements are already provided for in guidance, for example, bail



accommodation and hostels, or even where victims are detained in the reflection and recovery period.¹⁸⁰

Public order implications

[207] The definition of ‘*threat to public order*’ or ‘*bad faith*’ is not found in ECAT Article 13 or defined elsewhere in the Convention. Whilst there is a reference to public order and bad faith claims, the Explanatory Report to ECAT states that ‘*This provision aims to guarantee that victims’ status will not be illegitimately used*’.¹⁸¹ There is nothing in Article 13(3) that supports an interpretation which cuts across the protective aims of ECAT or the duties referred to.

[208] An illustration of the way in which the concept of public order operates in other (non-trafficking) contexts may be found in refugee law, human rights, and EU law. For example, in EU law the public order concept has been interpreted to mean that a person must represent a ‘*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*’.¹⁸² Within the asylum law context, in terms of free movement law:

*‘Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted’.*¹⁸³

[209] Even if a person has been convicted of a particularly serious crime, they continue to be entitled to a certain number of rights laid down by the Refugee Convention and the ECHR.¹⁸⁴ These instruments require detailed assessment and safeguards in connection to removal and must always comply with fundamental rights. Clause 62 appears to abrogate or directly cut across these rights.¹⁸⁵

[210] Clause 62 has drastic and far-reaching consequences in terms of denial of protection and potential removal contrary to key safeguards and rights. Yet the Bill and the Explanatory Notes fail to explain how the provisions will operate, which ministerial department or civil servant will operate them (whether the SCA or UKVI), and/or the relationship with or processes in relation to the police or security services. A number of questions arise as to how Clause 62 will work in practice, and there is no explanation as to:

- The mechanism for procedural safeguards and remedies, and rights of appeal or review in relation to each stage of the decision-making process.
- How these matters would be decided relative to the exercise of immigration powers or national security processes, and the immigration statutory appeal and special immigration appeals committee (SIAC) structures.
- The definition or mechanism in immigration or otherwise for sub section 3(i) ‘the person otherwise poses a risk to the national security of the United Kingdom’ because it is entirely new and unexplained.
- What evidence may be used or required, and whether potentially open and closed material processes may be used, and if so how.

[211] There is also a real problem with the lack of clarity in relation to the nine circumstances that would lead to a victim of trafficking being disqualified from protection, or any of the definitions,



e.g. Clauses 62 (5) and (6) including in relation to offences abroad. There is no explanation and Clause 62 appears to be problematic and unworkable in practice on its face.

- [212] Given the ambiguities and lack of clarity, Clause 62 if enacted would result in applications for judicial review in cases and legal challenges. The NRM is not on a statutory footing and there is no statutory appeals mechanism. Judicial review is therefore the only avenue available for remedy.
- [213] The far-reaching impacts of Clause 62 and Part 5 generally emphasise the need for access to early legal advice and free legal advice to victims of trafficking, to provide them with the right of access to a court—which is an undeniable and inviolable right.¹⁸⁶

The non-penalisation and punishment of victims

- [214] Clause 62 will target and punish victims who need protection and support and is in breach of the duty to protect including through the non-punishment provision in several ways.
- [215] Clause 62(3) stipulates that an individual is a threat to public order in nine circumstances, some of which arise from a conviction and some which do not require a conviction at all. Even if there is a conviction, this does not in itself necessarily equate to being a ‘*threat to public order*’, or still less that a person represents ‘*genuine present and sufficiently serious threat to the UK*’.
- [216] This overly broad definition of what constitutes a threat to public order, by reference to specified offences alone, may apply to many vulnerable victims of trafficking for the purpose of forced criminality who are convicted of offences but identified as victims much later on.¹⁸⁷ However, as a result of the legislative proposals in Part 5 of the Bill, they are likely not to be identified and protected.
- [217] Clause 62 will undermine the duty to protect in the non-punishment provision in Article 26 ECAT which operates where:

*‘victims have been compelled to be involved in unlawful activities... at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion’.*¹⁸⁸

- [218] The EU Trafficking Directive 2011/36/EU contains an express binding provision on non-punishment in Article 8, according to which:

‘Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of their victim status’.¹⁸⁹

- [219] Withing Article 26, there is no stated limit on the severity of the crime, and no reference to public order.

The statutory defence under the Modern Slavery Act (2015)

- [220] The Modern Slavery Act (2015) introduced a statutory defence (Section 45) for victims of slavery and trafficking, designed to protect them from prosecution for crimes they were forced to commit as a result of their experience of modern slavery. This was designed to implement Article 26 ECAT and Article 8 of the Directive.¹⁹⁰



- [221] Whilst Clause 62 stipulates that an individual is considered a threat to public order *inter alia* if they have been convicted of any of the offences listed in Schedule 4 to the Modern Slavery Act (2015) or a corresponding offence under the law of Scotland or Northern Ireland or under the law of any other country, it fails to recognise key distinctions between the purpose of the MSA—which is directed to the non-punishment provision—and Clause 62, which is focussed on punishment.
- [222] The statutory defence in Section 45 was designed to provide further encouragement to victims of slavery to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation. Schedule 4 of the Modern Slavery Act (2015) lists 140 offences that are exempt from the statutory defence in Section 45.¹⁹¹
- [223] The listed offences exempt from the Modern Slavery Act (2015) Section 45 statutory defence may still arise in trafficking cases, and evidence as to whether the statutory defence applies may not always be clear. Therefore, victims may still not be culpable because they have a common law defence of duress or it is not in the public interest to prosecute. The alternative ways in which a defence may operate, and the complexity of such considerations, are set out in guidance published by the Crown Prosecution Service.¹⁹² Clause 62 fails to take any of this into account.
- [224] According to evidence from The Prison Reform Trust and Hibiscus, despite the enactment of the MSA, victims continue to be prosecuted for crimes they were forced to commit despite the existence of the statutory defence.¹⁹³
- [225] As identified by the Independent Anti-Slavery Commissioner the statutory defence in the Modern Slavery Act (2015) is not currently operating effectively to prevent victims being criminalised.¹⁹⁴ Clause 62 will undermine this further.
- [226] Further, the reference to the UK Borders Act, automatic deportation provision (Section 32), is problematic, since it is triggered by a period of imprisonment of one year or more.¹⁹⁵ However, this does not automatically render that person to pose a threat to public security on any legal view. A victim with a 12-month sentence may not have committed a serious offence, may not pose any security risk, and may not even have been culpable for crimes arising in consequence of their trafficking situation in the first place. Moreover, 12-months sentences are likely to arise from trafficking-related behaviours, including identity card or illegal entry offences. Even public order offences can occur in trafficking situations because of the actions of traffickers in procuring or arranging those documents or trafficking them to the UK.¹⁹⁶ Again Clause 62 is divorced from the realities of trafficking situations and bears no relationship whatsoever to existing laws and standards that have aimed to address this.
- [227] Clause 62 also goes further in punishing victims because victims to whom the provision applies may be disqualified from identification and protections including support measures and the benefit of non-punishment and penalisation provisions. Clause 62 is itself penalising and is likely to compound the punishment and re-victimisation of victims further.

A lack of evidence to support Clause 62

- [228] Clause 62 is unnecessary because there are a host of existing statutory powers, guidance, and immigration rules, enabling the removal of those who pose a security risk to the UK. An obvious example are persons deemed to be foreign criminals within the UK Borders Act (automatic deportation for foreign criminals) referred to in Clause 62(3)(f). From 2015-2019



the deportation of foreign national offenders (FNOs) who have no right to remain in the UK has been a government-wide priority.¹⁹⁷

[229] As referred to in the Rights Lab submission to the Immigration Plan, there were 350 Foreign National Offenders (FNOs) with an NRM referral between 2017 and 2019 (see Home Office Data on Detention Section 5 Table 2 (b)). In total over the same period, 22,765 potential victims were referred into the NRM. This means only 1.5% of all referrals into the NRM related to FNOs. What is not clear is: (a) what offence they were charged with (and whether they would have fallen within Clause 62); (b) if the offence was linked to their experience of exploitation; (c) if they received a positive CG decision and were deemed to be victims of modern slavery; and (d) how this will be impacted by the proposed public order exemption in Clause 62.¹⁹⁸

[230] Government figures show that of 4,582 FNOs being released from detention in 2020, 288 were referred into the NRM while they were detained. This means that less than 3% of NRM referrals in 2020 related to FNOs with trafficking claims. This runs contrary to the claims that serious criminals are currently abusing the systems in place. In addition, figures show that of those who were detained for immigration-based offences, 27% were identified as potential victims during their time in detention and referred to the NRM.¹⁹⁹

[231] The government has faced criticism for detaining victims of slavery who instead should be recognised as victims and provided with support.²⁰⁰ Research conducted by Hibiscus and the Prison Reform Trust found direct coercion to commit offences such as cannabis production, prostitution related offences, begging, and theft were common circumstances and narratives identified for women they were supporting in prison. They further reported that in some cases, women were left vulnerable to offending behaviour after they had escaped a situation of exploitation as traffickers may have stolen their identity documents or given them false papers. The report suggests a continuing failure to ensure victims are identified, protected, and supported in a timely fashion.²⁰¹

The overlap with criminal exploitation – criminal vs. victim

[232] The Modern Slavery Statutory Guidance outlines forced criminality as the exploitation of a person to commit activities that may include:

- Pick-pocketing;
- Shop-lifting;
- Drug trafficking or cultivation;
- Begging;
- Benefit fraud and/or other types of fraud;
- Sham marriage; and
- Other similar activities which are subject to penalties and imply financial gain.²⁰²



[233] NRM statistics show that 48% of all identified victims in 2020 had elements of criminal exploitation in their cases. Criminal exploitation was present in 65% of cases referred that involved children and 33% of cases that involved adults. For all nationalities, criminal exploitation was the primary exploitation type in 33% of identified victims' cases. Of the 3,788 UK national victims identified, 2,560 (67%) cases had criminal exploitation recorded as the primary exploitation type. Over 1,000 identified foreign national victims were considered to have been exploited for criminal purposes. Not only could they be disqualified from protection under Clause 62, but they may also face removal from the UK.²⁰³

Case Study: Sourced from the Report Still No Way Out

Victims trafficked for the purpose of criminal activities and then convicted of those offences are often not identified until much later. The case study below is from the joint report of the Prison Reform Trust and Hibiscus Initiatives that considered the experience of foreign national women and trafficked women in the criminal justice system in England and Wales.

Cristina is a Romanian national who came to the UK when she was 19 years old, having begun a relationship a few months previously. Her boyfriend treated her well until they arrived in the UK, when he forced her to enter prostitution and started hitting her regularly. Cristina tried to escape and went to the police. She explained everything to police officers but was left alone when leaving the police station. Her boyfriend had followed her there and picked her up in front of the police station, throwing her mobile phone in the bin and forcing her into the car. Cristina was exploited for years before being arrested by the police during a raid. She was convicted and sentenced to six years for controlling prostitution, despite being a victim herself. Later, while in HMP Peterborough, she disclosed everything to a Hibiscus project worker and the immigration officer who acted as a first responder in her case. Although she was officially recognised as a victim of modern slavery, Cristina remained in prison until the end of her sentence and was deported to Romania on her early release date.

[234] Evidence provided by Hope for Justice for the purpose of this report indicated 45% of their current caseload are victims who have a conviction. However, in most of these cases, criminal exploitation was not recorded as the primary exploitation type by the SCA. 29% of individuals supported committed offences that would be likely to meet the Clause 62 criteria for exemption under public order grounds. A further 13% committed wider offences that may or may not meet the criteria for a public order exemption, and 3% have a conviction but the details of this are unknown.²⁰⁴ The information on the cases also showed some victims identified were originally identified cultivating cannabis.²⁰⁵

[235] Research into male victims of trafficking conducted by Hestia found 50% of men had spent time in prison or in detention before being identified as a potential victim of modern slavery. Another key finding showed that where detail was provided the reason for their imprisonment was related to their exploitation.²⁰⁶

[236] Hibiscus and the Prison Reform Trust reported foreign national women being imprisoned for predominantly non-violent offences, including fraud (18%), theft (18%), and false document offences (10%). All of these are offences that may have been linked to exploitation and trafficking, as such offences are commonly identified in trafficking cases.²⁰⁷



- [237] Given the increased likelihood that cases will be viewed via a criminal offender lens as opposed to being seen as a potential victim, enacting Clause 62 may mean that in the future a large proportion of victims may not consent to access to the NRM.
- [238] As stated above, the operation of Clause 62 will make breaking the trafficking chain less likely, as victims are unlikely to come forward to report exploitation and abuse for fear of the consequences for themselves.²⁰⁸ It may therefore contribute to maintaining victims in their trafficking situation. It may also facilitate trafficking, as Clause 62 may place those who have criminal convictions at greater risk of being approached and exploited by traffickers, who use forced criminality as a deliberate strategy and know that those with criminal convictions will be disqualified from protection and therefore will be more reliant on them and less likely to leave or seek assistance (as recognised by the UN Special Rapporteur and OSCE, see paragraph 171).
- [239] As identified in a report by Hestia criminal activity may also be an indicator of criminal exploitation occurring.²⁰⁹

'Sometimes having been through the criminal justice system can be an indicator of exploitation. For example, if there are men who have convictions from around the country for low-level crime, that may be an indicator of being coerced into criminal activities'.²¹⁰

Exclusion from support and impact on prosecutions

- [240] Both the Independent Anti-Slavery Commissioner and The Centre for Social Justice raise concerns that the exclusion from NRM support of foreign national victims with prior convictions of 12 months or more may impact victims who pose no risk to the public.²¹¹ Both briefings offer examples from Operation Fort that indicate those found to be exploited had been directly targeted by traffickers due to their previous convictions. If the government plans to increase prosecution rates for modern slavery and target traffickers, it is possible that Clause 62 may undermine this aim as victims may not come forward if they know they will be denied a recovery period and possibly deported.²¹²
- [241] Information provided by Hope for Justice for this report noted nearly 80% of the individuals who would be disqualified from protection under Clause 62 were engaging with the police and assisting them with their enquiries and investigations under the status quo.²¹³
- [242] Positive correlations are reported by support organisations between the provision of support and engagement rates with the authorities. The Centre for Social Justice reported the biggest challenge facing police in achieving successful prosecutions and convictions is maintaining continuous engagement with victims, who are inevitably key witnesses in many cases.²¹⁴
- [243] If authorities and those involved in the criminal justice system are first and foremost seeing potential victims as perpetrators of crime, rather than victims of crime, achieving the government's aim of increasing modern slavery prosecutions becomes less likely.

Impact on British Nationals currently outside of the UK's jurisdiction

- [244] Clause 62(2) could potentially apply to British and non-British nationals, including British victims who have been trafficked abroad and to crimes committed outside the UK. Whilst the government's drafting and intentions are unclear, the concern is that vulnerable women and



children trafficked from the UK abroad could be caught and penalised by Clause 62. A report published by Reprieve has revealed that 63% of British women detained in Northeast Syria were victims of trafficking.²¹⁵

[245] As trafficking can be (although not necessarily) a cross border crime, the European Court of Human Rights has recognised that the UK's positive obligations under Article 4 ECHR in respect of trafficking extend to all parts of the trafficking chain, even those parts which take place abroad (see the case of *Ranste v Cyprus and Russia*).²¹⁶

Lack of CG decision and the impact on statistics

[246] Clause 62 provides a discretion that there is no requirement for a CG decision to be made in cases of a public order threat or bad faith claims. However, it is unclear if and how these cases or data will be recorded on official databases, let alone in the official NRM or Office of National Statistics (ONS). The ONS covers the NRM and the duty to notify under Section 52 of the Modern Slavery Act (2015) processes and Home Office Guidance places various requirements on data recording internally and with third party agencies at various stages of the NRM. It is however unclear:

- what (if any) data will be held on how many people initially identified as potential victims with an RG decision will have their recovery period ceased on public order or bad grounds.
- whether they will feature in the ONS statistics on victims with RG decisions or not.



Clause 63. Identified potential victims etc in England and Wales: assistance and support

Overview of the clause

- [247] Clause 63 is said to implement Article 13 of ECAT with the provision of a recovery and reflection period to potential victims of modern slavery during which the victim must be provided with assistance and support to aid their recovery.
- [248] Currently, unlike in Northern Ireland and Scotland, victims in England and Wales have no legal right to support. Clause 63 would change this and puts provision relating to assistance and support during the recovery period into primary legislation.

Implications and evidence of impact

- [249] Via the NRM process and the recovery and reflection period, the government provides victims with a limited period of support and assistance while the authorities determine if the person is a victim. This support is currently not on statutory footing.
- [250] The proposal to place assistance for victims into primary legislation overall might appear positive and in-line with what the anti-slavery sector have been calling for. However, the reduction of support, is contrary to ECAT and of real concern. Further, the affirmation of the Nationality and Borders Bill as the source of the definition on what constitutes an 'identified potential victim' of slavery or trafficking is problematic. This definition more appropriately resides in the specialised anti-slavery regime of the Modern Slavery Act (2015), rather than in immigration legislation.
- [251] As to the choice of legislative route, Clause 63 amends the Modern Slavery Act (2015), with the addition of section 50A to be inserted after the current section 50 that provides for regulations about identifying and supporting victims. Following criticisms by the High Court that the Secretary of State had failed to comply with her statutory duty to issue guidance under Section 49 of the Modern Slavery Act (2015), guidance was issued.²¹⁷ No Section 50 regulations have been passed to date.
- [252] The Clause 63 exemptions apply by reference to the meaning of an RG decision found in Clause 61 (Clause 63(3) and (4)) or disqualification entirely if there is a determination under Clause 62 (Clause 63(6)). Clause 63 establishes that both 'CG decision' and 'recovery period' are defined by the meanings given in the Nationality and Borders Bill, rather than the Modern Slavery Act (2015). Reference to assistance and support is currently defined through Section 49(1)(b) Modern Slavery Act guidance and Section 50 regulations. Since no regulations have been issued under Section 50 and the Section 49 guidance frequently changes, it appears the government is giving itself the power to change and limit these as a result of the enactment of the Nationality and Borders Bill. It is problematic to situate these definitions in the context of immigration legislation rather than the specialist context of the Modern Slavery Act (2015).

Reduction and restrictions on victim assistance and support

- [253] If enacted, Clause 63 will enshrine in law the right to assistance and support during a recovery and reflection period if there are reasonable grounds for believing that a person is a victim of trafficking. However, it does so in a restrictive way, with caveats and exemptions. Contrary



to the Explanatory Notes to Clause 63, this is not compliant with ECAT Article 13, or with Articles 10 and 12.

[254] Further, Clause 63 does not outline what support and assistance should consist of as per Article 12 of ECAT, minimum standards, and the proposals tabled in Lord McColl's Bill.²¹⁸ It therefore operates as a legislative vehicle to restrict existing support and assistance.

[255] The lack of specification in legislation of the support and assistance a potential victim will be entitled to raises concerns that as drafted the clause may place restrictions on victims being able to access support.

[256] As to ECAT, the Explanatory Report states the purpose of Articles 12 and 13 are for those identified as victims to recover:

*'This minimum period constitutes an important guarantee for victims and serves a number of purposes. One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victims' recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability.'*²¹⁹

[257] The wording of support provision in Clause 63 includes the following phrasing 'where necessary' or 'where appropriate'. This is not in keeping with the wording of ECAT Article 13, which states victims 'shall be' entitled to measures for the recovery and reflection period, referencing the list of services in Article 12, as a right.

[258] The proposed amendment restricts assistance and support, as a result of Clauses 52(1) and (2), and the express exemptions from support in Clauses 50 and 51, as the Explanatory Notes to the Bill make clear, but also Clauses 59 and 60.²²⁰

[259] Clause 62(1) and (2) also require attention as they restrict assistance and support. Clause 63 requires the Secretary of State to secure necessary assistance and support under Section 49 of the Nationality and Borders Bill. However, the meaning of 'necessary' is at the discretion of the Secretary of State 'for the purpose of assisting the person receiving it in their recovery from any physical, psychological or social harm arising from the conduct which resulted in the positive reasonable grounds decision in question'. This provides broad discretion to refuse support if not considered 'necessary', rather than providing it as of right following an RG decision—which is what Articles 10, 12 and 13 of ECAT and the guidance require.

The benefits of increased assistance and support

[260] This is not only a regressive step—again contrary to international human rights law principles. It is a missed opportunity by the Secretary of State to make progressive provision for victims. Indeed, whether the MSVCC and the guidance in its current format provides the necessary support victims need is fiercely contested. Calls for the standardisation of care, longer term support, access to the labour market, leave to remain, and legislation to enshrine victims' rights have all been tabled.²²¹

[261] Lord McColl introduced a Private Members Bill in the House of Lords in 2017 proposing amendments to Section 48 of the Modern Slavery Act (2015). These amendments would put into law victims' entitlements during the recovery and reflection period, outline the key aspects of assistance required, and provide support and leave to remain within the UK for a 12-month period after a positive CG decision. The Bill was reintroduced in October 2020 Modern Slavery (Victim Support) Bill [HL].²²² The government have stated that they do not



support the Bill in its current form, nor do they agree victims should automatically be granted leave to remain for 12 months.²²³

[262] Available evidence shows the benefits of greater support. A cost-benefit analysis conducted by the Rights Lab examined the costs and benefits of extending support to conclusively identified victims. The report concluded that enabling conclusively identified victims to reside in the UK for 12 months after a positive CG decision would produce a direct financial benefit to the UK government estimated to be in the region of £15.4 to £21.3 million.²²⁴ It also evidenced significant benefits for victim recovery and criminal justice processes. Evidence also shows that enabling individuals to access work and access long term support has a positive impact on recovery.²²⁵

The Survivor Care Standards

[263] Following the Modern Slavery Act (2015), The Human Trafficking Foundation worked with partners to develop The Slavery and Trafficking Survivor Care Standards. The aim of the Standards is to ensure that adult victims of trafficking receive consistent standards of care wherever they are in the UK. The Survivor Care Standards set out the minimum standard of support that should be provided for victims and potential victims of modern slavery accommodated in safehouses and/or receiving outreach support (both as part of the MSVCC and outside of it), including how professionals should support victims and work with referring agencies to help them. The Standards were last updated in 2018 and provide a blueprint, with guiding principles and practical recommendations, for UK-wide service providers.²²⁶

[264] In October 2017, the government announced that it would adopt the Standards as a minimum standard for victim support. The then Minister responsible, Sarah Newton MP explained during a backbench debate on the Modern Slavery Act:

*'If a potential victim opts to enter the NRM, we must ensure that the care they receive is consistent and meets minimum standards, regardless of where in the country they are being cared for. That is why the government will adopt the Human Trafficking Foundation's trafficking survivor care standards as a minimum standard for victim support.'*²²⁷

[265] In January 2021, the Home Office commissioned the Care Quality Commission (CQC) to independently inspect safehouses and outreach support provided through the MSVCC. As well as considering the five key questions the CQC asks of all providers of health and social care, the framework for these inspections was also required by the government to be based on the Survivor Care Standards.²²⁸

[266] The proposed changes to the framework for victim assistance and support in Clauses 49–52 runs counter to the minimum standards established in the Survivor Care Standards, which have been adopted by the government.

Challenges of causation and the impact of pre-existing vulnerabilities

[267] Explanatory Notes for the Nationality and Borders Bill outline restrictions on support and

*'requires that those identified as potential victims of modern slavery are provided with necessary support to aid their recovery from harm to their physical and mental health and their social well-being arising from the conduct which resulted in the positive reasonable grounds decision concerned.'*²²⁹



- [268] As detailed above, it is for the Secretary of State to decide if the support is ‘necessary’. It also requires an RG decision within the meaning of Clause 59, as well as establishing that the harm caused and recovery needs are a result of the experience of slavery or trafficking.
- [269] The proposed wording for the support and assistance for victims in the recovery period is outlined in the Explanatory Notes of the Bill. It is drafted to require those identified as potential victims of modern slavery to be provided with necessary support to aid their recovery from harm to their physical and mental health and social well-being arising from the conduct that considered in relation to the RG decision.²³⁰ This appears positive. However, evidencing that the support a victim requires comes only from their experience of trafficking and exploitation is problematic.
- [270] Existing evidence establishes that traffickers target individuals with pre-existing vulnerabilities and burdens, including homelessness, addiction, mental health issues, and insecure immigration status. A report by the Rights Lab highlights traffickers targeting vulnerabilities based on environmental, social, community, family, and personal factors.²³¹ While the government may not be solely responsible for supporting all these needs, identifying which needs have arisen as a direct result of trafficking does not appear to be an easy task either for victims to evidence or for the SCA (who are not experts in support) to assess.
- [271] There are several difficulties with the introduction of concepts of necessity, harm, and causation, as well as with limiting this to a particular event in time recognised by an administrative decision. Causation is clearly a vexed question and will likely require medical evidence. Even with expert evidence, it will be difficult to separate causation arising from multiple traumatic experiences. It is also difficult to separate causation of trafficking and current victim support needs. Some vulnerabilities may be the precursor to being ‘selected’ by traffickers, as well as being exacerbated by exploitation. The Centre for Social Justice highlights the complexities of victims’ needs, citing mental health issues and drug and/or alcohol dependency as factors support providers have identified when assisting victims. It is also indicated that traffickers target those with vulnerabilities and that this ‘*makes recovery even more challenging as the initial vulnerability is then compounded by the trauma of being exploited and abused*’.²³²
- [272] As outlined in a Home Office Research report, slavery is not a crime that is time limited or related to a one-off single event. It can take place over a series of locations, involving different people, across a span of time. The report also notes that:
- ‘Modern slavery offences tend to involve, or take place alongside, a wide range of abuses and other criminal offences such as grievous bodily harm, assault, rape or child sexual abuse’.*²³³
- [273] A report by Crisis shows that separating the needs arising from having been trafficked from pre-existing or additional vulnerabilities is complex. The report states that:
- ‘substance abuse was most prevalent amongst people who were forced into criminal activity. Mental health issues were most prevalent in people who experienced sexual exploitation or domestic servitude, who were mostly women’.²³⁴
- [274] The report Life Beyond the Safe House highlights a causal link between the way a person is treated after being released from the control of traffickers and the potential downward spiral back to a situation of slavery or exploitation.²³⁵



- [275] Homelessness also often intersects with trafficking prior to, during, and after exploitation. A report published by the Modern Slavery and Exploitation Helpline showed 48 potential victims were homeless prior to exploitation, 86 potential victims were homeless during exploitation and 234 potential victims were homeless following exploitation.²³⁶
- [276] The question of support needs is further complicated by the operation of the current RNA process and guidance. How this would interrelate with the proposed provisions in the Nationality and Borders Bill in practice is unclear. However, this ambiguous patchwork of provisions and guidance is likely to be unworkable in practice and will be subject to legal challenge.

It is not clear how victims are expected to recover and move away from the influence of those who have exploited them if support offered will not address pre-existing vulnerabilities.

- [277] Clause 63 overlooks the evidence and realities of trafficking experiences and support needs and is inconsistent with support duties under ECAT.



Clause 64. Leave to remain for victims of slavery or human trafficking

Overview of the clause

- [278] Clause 64 establishes the circumstances in which the Secretary of State must grant temporary limited leave to those in receipt of a positive CG decision and determined to be victims of trafficking. It also provides for when a grant of leave is not required to be made, as well as making provision for revoking leave that may have already been granted. It is said that detail pertaining to the grant of leave will be set out in the immigration rules.²³⁷
- [279] The Explanatory Notes make reference to provisions of ECAT such as Article 14, under which a renewal residence permit shall be issued to victims of trafficking in certain circumstances.²³⁸

Implications and evidence of impact

- [280] The duty under ECAT to issue a residence permit to confirmed victims of trafficking is found in Articles 14 and 10(1). Article 12(2) further specifies '*Each Party shall take due account of the victim's safety and protection needs.*' Articles 12(7) and 14 (2) refer specifically to the needs of children both in relation to their protection and when leave should be granted.

Current Discretionary Leave to Remain (DLR) Policy

- [281] The UK version of the residence permit required by ECAT is discretionary leave to remain (DLR), which is a form of limited leave to remain. It derives from the Secretary of State's residual power to grant limited leave to remain to persons subject to immigration control.²³⁹
- [282] A positive CG decision in the NRM does not give rise to automatic right to remain in the UK, or DLR. Persons recognised as victims with a CG decision and refused DLR who do not have outstanding immigration applications will therefore be subject to removal from the UK.
- [283] The UK has until now chosen not to make provision for trafficking leave in the immigration rules but has done so in policy guidance. According to the Home Office's Discretionary Leave policy, trafficking leave will be considered if leave is required:
- Due to personal circumstances;
 - To pursue compensation; or
 - To assist police with enquires.²⁴⁰
- [284] Clause 64 puts the current trafficking discretionary leave policy entitlements on a statutory footing, albeit with the details to be provided in the immigration rules. It is assumed that an amendment to the immigration rules will also be subject to parliamentary scrutiny and approval in the usual way (though this is not mentioned in the Explanatory Notes).
- [285] Under the current DLR policy the SCA will normally grant DLR at the time of a CG decision but may defer that consideration if there is an outstanding protection claim. There have been several successful legal challenges to the protection or support gap created by the refusal of DLR or gaps between a CG decision and DLR.²⁴¹
- [286] A grant of DLR allows victims to remain in the UK, access mainstream benefits and housing, and take up employment if they are ready and able. While individuals can apply for extensions of DLR, DLR does not provide a route to indefinite leave to remain within the UK.



- [287] As identified in a Rights Lab report, official data is not routinely collated or published on the number of grants of DLR. It is therefore unclear if the current provisions in the UK provide an effective route for victims to be able to seek further support and stability.²⁴² It is also not clear whether the current system is fulfilling the protective aims of ECAT.
- [288] According to data obtained through a Freedom of Information request submitted by the organisation ECPAT, of 1,949 individuals conclusively identified as victims of trafficking and who did not have the right to remain in the UK, 70 (4%) were issued with DLR (note: others may have also been granted other forms of leave). The request also identified 64% of grants of DLR allowed temporary leave for seven to twelve months. Figures showed that 59% of identified victims were not granted any form of leave.²⁴³
- [289] Existing data shows that the number of grants of DLR to victims is already very low. The restrictions and exemptions in Clause 64 threaten grants for victims even further.

Grants of DLR based on personal circumstances

- [290] Clause 64(2)(a) seeks to restrict or define ‘*stay that is necessary owing to their personal situation*’ (recognised in ECAT Article 14(1)(a)) to stay being considered ‘necessary for the purpose of—(a) assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation’. Clause 64(10) defines ‘relevant exploitation’ means the conduct resulting in the positive RG decision, which is defined and further limited by Clauses 57 and 58 of the Bill.
- [291] This presents a number of legal hurdles and burdens for a confirmed victim to overcome, substantially limiting the scope of personal circumstances or situations that will result in a grant of DLR. By contrast, ECAT Article 14 criteria are clear and simple. As the Explanatory Report to ECAT explains:
- ‘The personal situation requirement takes in a range of situations, depending on whether it is the victim’s safety, state of health, family situation or some other factor which has to be taken into account’.*²⁴⁴
- [292] Regard must be had to a victim’s needs (particularly if they fear reprisals) and the security that a residence permit can provide to bolster confidence to encourage victims to cooperate with prosecutions and/or to enable their recovery.²⁴⁵
- [293] It is not clear if Clause 64 would include the broad range of non-exhaustive factors referred to in the Explanatory Report to ECAT above. For example, it is unclear whether it includes the risk of reprisals or re-trafficking upon return, or how this would be assessed.
- [294] Research indicates re-trafficking is a risk facing those identified as victims. Challenges with the returns process for those identified as victims of trafficking have been raised by the anti-slavery sector. Challenges include failures to apprehend levels of risk to individuals returning, as well as returns and repatriation programmes not being adequately resourced. There is currently no specialised returns and reintegration process for victims of trafficking.²⁴⁶
- [295] A report by the Rights Lab and the Office of the Independent Anti-Slavery Commissioner exploring the phenomenon of re-trafficking raises the issue that without effective reintegration strategies, dedicated returns programmes, and viable, stable options for victims, re-trafficking is a significant risk. This study found that effective returns and reintegration programmes are identified throughout literature as being a necessary element of support that assists in reducing the risk of, and preventing, re-trafficking.²⁴⁷



[296] The Explanatory Notes for the Bill indicate that if support is available upon return to home countries, it may be considered that a grant of leave is not necessary.²⁴⁸ As outlined in this paper in relation to Clause 63, identifying support needs that arise directly from experiences of exploitation is not straightforward.

Grants of DLR based on pursuing compensation

[297] Clause 64(3) appears to limit leave provision if the person can seek compensation from outside the country. How this will be defined and assessed is not clear from the Explanatory Notes. This presents a risk to victims' right to remedy and redress for violations, as enshrined in Article 15(3) and (4) of ECAT, Article 13 of the ECHR, and domestic law.

Grants of DLR based on assisting police

[298] For victims to be able to assist the police, and therefore be eligible for consideration for DLR under this category, the necessary measures calculated to assist with victim cooperation need to fit together. Victims need to feel supported and have access to the support they need. Consideration of DLR under this category, and whether this adequately fulfils the UK's obligations under ECAT and achieves the objectives of effective investigation and prosecution of trafficking cases, must be viewed in light of the objective aims of the Convention.

Increase of support and longer period to remain in the UK is a positive step

[299] As identified in the New Plan for Immigration Policy Statement, certainty in relation to immigration status is an enabler for identified victims to recover. It is also crucial for victims assisting police prosecutions. It is acknowledged that victims may need a longer form of leave to assist with their recovery.²⁴⁹

[300] As stated by the Department of Work and Pensions Committee, Red Cross, and others, lack of long-term support puts victims at risk of homelessness, destitution, and re-trafficking.²⁵⁰ The Centre for Social Justice identifies that a lack of immigration status and no access to public funds puts identified victims in a precarious position, as they have no eligibility to access mainstream services to assist their recovery post-NRM.²⁵¹

[301] As referenced in paragraph 257, a range of actors across the anti-slavery sector have consistently called for victims to have access to longer term support. Lord McColl's Modern Slavery (Victim Support) Bill [HL] calls for victims to be able to access support, including accommodation, medical treatment, material assistance, support work, translation services, and assistance to obtain legal advice for a period of 12 months after receipt of a positive CG decision.

[302] The cost-benefit analysis conducted on Lord McColl's Bill identified that extended support would lead to savings, ultimately saving the government money in the future by generating tax revenue and preventing costly interventions. It also suggested that benefit would be seen in victims having additional support in relation to prosecutions of traffickers.²⁵²

[303] The Nationality and Borders Bill does not appear to have taken this into consideration. The narrowing of opportunities for conclusively identified victims to access support and DLR (as well as other forms of leave) poses a risk to these benefits to both the UK's criminal justice efforts against trafficking and the economy.



Clauses 65 and 66. Civil legal aid under Section 9 of LASPO: add-on services in relation to the National Referral Mechanism & Civil legal services under Section 10 of LASPO: add-on services in relation to National Referral Mechanism

Overview of the Clauses

- [304] Under Clauses 65 and 66, legal advice on referral into the NRM is to be provided as ‘add-on’ advice where individuals are in receipt of civil legal services, either for certain immigration and asylum matters (‘in scope’ of legal aid) granted under Section 9 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), or by way of exceptional case funding (ECF) under s.10 LASPO.²⁵³ The aim of Clauses 54 and 55 is to identify and support individuals who may be potential victims by ensuring they receive advice on referral into the NRM to understand what it does and how it could help them.
- [305] Clauses 65 and 66 will amend LASPO. The Explanatory Notes to the Bill state that the aim of Clause 65 is to identify and support individuals who may be potential victims by ensuring that where they are already receiving advice on an immigration issue that is ‘in scope’ of legal aid, as part of that advice that person will be entitled to ‘add-on’ advice on referral into the NRM to understand what it does and how it could help them.
- [306] The Explanatory Notes to the Bill say the aim of Clause 66 is to provide an ‘add-on’ to legal aid upon referral to the NRM if the victim has been granted exceptional case funding and is being advised in relation claim that their removal from or requirement to leave the UK would breach the Human Rights Act 1998.²⁵⁴
- [307] Clauses 65 and 66 do not provide a route to pre-NRM advice for those who are not already in receipt of legal aid via the scope of another matter, and therefore do not provide free legal aid pre-NRM for all trafficking cases.

Implications and evidence of impact

- [308] This paper does not provide detailed discussion of Clauses 65 and 66, and the legal aid regime, which are beyond its scope. Readers should refer to work being conducted on legal aid by Immigration Law Practitioners Association (ILPA), the Public Law Project and Justice, who are well-placed to offer evidence as to the detailed legal regime under LASPO and the potential implications and impact of these clauses on victims of trafficking and on effective access to justice and protection of the rule of law.²⁵⁵
- [309] While the extension of legal aid to victims of trafficking pre-NRM is welcomed, it is important not to limit in a way which is excessively difficult and undermines the effectiveness of their rights. Clauses 65 and 66 make advice on referral to the NRM limited in scope to cases where there is an existing immigration or asylum matter.
- [310] The proposals in Part 5 of the Bill increase the need for free legal aid at the earliest stage—including pre-NRM—given the potentially far reaching and severe consequences of the proposals, as set out above. Indeed, whilst the government wishes for trafficking matters to be raised at an early stage, this increases the need for access to legal advice at the earliest possible stage.



- [311] Extensive research by the Public Law Project (PLP) demonstrates existing difficulties in access to justice and free legal aid under the LASPO regime and the importance of legal aid and access to early legal advice generally.²⁵⁶ PLP identify five key issues relating to the availability of early legal advice arising from the reforms to legal aid under LASPO, including the fact that early legal advice and assistance at the outset can help to prevent issues escalating into more complex and severe problems which then fall to courts and tribunal to resolve.²⁵⁷
- [312] Whereas early legal advice costs are relatively minimal, failure to provide it increases costs both in relation to proceedings as well as wider costs to society. Cuts to legal aid have also led to legal advice deserts and more litigants in person, with a costly burden on the courts and tribunals.²⁵⁸
- [313] The particular and additional difficulties with ECF in practice, as an unnecessary barrier to legal advice, has been well-documented. ECF was intended as a scheme to safeguard and protect those without access to legal aid. However, the ECF scheme has been widely criticised as being *'woefully inadequate and does not provide the promised safety net for vulnerable people who are struggling to navigate complex processes and effectively advocate for their rights'*.²⁵⁹ The numbers of ECF applications remain lower than the Ministry of Justice's own predictions.²⁶⁰
- [314] As PLP and Justice point out:
- 'The provision of legal aid to individuals who seek redress is not simply a matter of compassion, but a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law and an essential precondition of a fair and democratic society. Failure to provide it can amount to a breach of fundamental rights under the common law and/or the European Convention on Human Rights.'*²⁶¹
- [315] The importance of access to early legal advice for victims of trafficking and the particular difficulties faced because of the impact of trauma and specific issues has been noted by the Helen Bamber Foundation.²⁶² In their submission to Parliament they note: *'the Bach Commission found that LASPO has seriously damaged the functioning of the justice system, especially for those most in need'*.²⁶³
- [316] A report assessing the supply and demand of legal aid, found that since the implementation of LASPO there has been an exponential increase of advice deserts and droughts in large areas of England and Wales.²⁶⁴ *'Increasing numbers of advice deserts and droughts compounds issues of capacity and overwhelm for those remaining within the immigration sector. Coupled with reductions in legal aid fees and lawyers leaving the profession in their droves, it is unsurprising that LASPO's implementation has adversely affected clients' access to justice and the quality of representation'*.²⁶⁵ Considering these barriers, provision should therefore be made for all cases relating to trafficking, to ensure effective protection of the rights of victims pre NRM and after.
- [317] The importance of free legal aid at an early stage, including for victims of trafficking is beyond doubt. Research led by the University of Liverpool reports that legal advice and representation can play a pivotal role in supporting victims of modern slavery to achieve positive, long-term outcomes, contributing to recovery and rehabilitation. Key findings conclude that access to legal advice is crucial for victims and that the barriers to obtaining



legal aid in the UK are significant. These barriers include issues with funding, understanding of entitlements, and a shortfall in legal aid provision.²⁶⁶

- [318] GRETA has commented on the importance of free legal aid provision in the UK in its Evaluation Reports of both 2012 and 2016.²⁶⁷ The First Evaluation Report on the UK notes legal aid as a measure to protect and promote the rights of victims of trafficking in human beings and the importance of it:

'Failure to recognise a victim at the outset can result in him/her being treated as an irregular migrant, detained and/or peremptorily removed from the UK. Much depends upon the access a person has to legal advice and representation to be able to put forward the evidence that he/she has been trafficked and is in need of protection. The British authorities have informed GRETA that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (see paragraph 19), which has removed free legal aid for immigration cases while retaining it in asylum cases, makes an exception for victims of trafficking so that identified victims will have access to legal aid in immigration as well as asylum cases' (emphasis added).²⁶⁸

- [319] The ATLEU briefing submitted to the GRETA evaluation states:

'Regrettably, many trafficking survivors across the UK are currently unable to get legal advice when they need it. This is due to three factors. First, a dearth of trusted legal advisors to take on cases. Secondly, a lack of timeliness in the advice, as legal aid is provided only once a survivor enters the NRM, but not before. Thirdly, the reduced scope of the current legal aid programmes, which exclude key remedies such as state compensation, or welfare rights claims.'²⁶⁹

- [320] A briefing submitted by the Joint Council for the Welfare of Immigrants also refers to legal aid challenges that restrict access to justice even further.²⁷⁰

- [321] Legislation in the UK should comply with the duty to provide effective remedies to victims of trafficking under international law. Under the ECHR, provisions should be interpreted and applied so as to make its safeguards practical and effective, not theoretical and illusory, which has particular importance in the context of trafficking. This principle has been highlighted as having particular importance in the context of trafficking, including in the case of *Rantsev v. Cyprus and Russia*.²⁷¹

- [322] The principle of effectiveness under EU law also precludes national legislation imposing procedural requirements that:

'render virtually impossible or excessively difficult the exercise of rights conferred by Community law'.²⁷²

- [323] Free legal aid and advice for potential victims of slavery and trafficking in the UK pre-NRM should therefore not be limited only to cases with existing immigration and asylum matters. Victims with existing asylum matters rightly get legal aid anyway; and for those who do not have legal aid (because matters are out of scope or they do not get ECF), should not face additional practical difficulties in accessing it. Therefore, the proposals contained in Clauses 54 and 55 does not fully address the existing shortcomings in the system. The clauses may also be discriminatory between different classes of victims in terms of access to justice.



Clause 67. Disapplication of retained EU law deriving from Trafficking Directive

Overview of the Clause

- [324] According to the Explanatory Notes Clause 67 states that ‘the Trafficking Directive should be disapplied in so far as it is incompatible with any provisions in this [Nationality and Borders] Bill’.²⁷³ This requires close attention.
- [325] The title of Clause 67 refers to the ‘*Disapplication of retained EU law deriving from Trafficking Directive*’ and Clause 67(1) references to Section 4 of the Withdrawal Act (2018). Section 4 of the Withdrawal Act (2018) saved the Trafficking Directive in domestic law so that it continued to have effect on or after the UK left the European Union (31 December 2020).²⁷⁴ Clause 67(1) has the opposite effect, by stipulating that any ‘*rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Trafficking Directive*’ that were saved to ‘*cease to apply*’ ‘*so far as their continued existence would otherwise be incompatible with provision made by or under this Act*’.

Implications and evidence of impact

- [326] The details of the legal implications of Clause 67 are beyond the scope of this paper and will be addressed by other actors. However, the following limited comments are made insofar as these may assist generally.
- [327] The concern with Clause 67 is that the power to disapply the rights derived from the Trafficking Directive will cease the rights and remedies available to victims generally, as a matter of domestic or EU law that continues in force in the UK.
- [328] The issue of concern is that the government is giving itself a wide power to limit rights and remedies available to victims of trafficking derived from the Trafficking Directive.
- [329] Where it is incompatible with the Bill. The issue of incompatibility with Part 5 of the Bill and the UK’s international and domestic obligations have already been raised above.
- [330] The disapplication of rights and entitlements of victims that have been deemed necessary to tackle trafficking threatens the government’s ability to combat this crime. This raises a concern that this will give a legislative power to delete rights already agreed and afforded to victims and deemed necessary to tackle this crime.
- [331] It may further undermine the response to criminal justice and the rights of victims of trafficking as victims of crime in the Victims of Crime Directive and relevant Codes of Practice.²⁷⁵
- [332] The Trafficking Directive is part of a suite of measures designed to combat the crime of trafficking. The EU has introduced several legislative measures to strengthen the protection of victims of human trafficking including EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (Trafficking Directive).²⁷⁶ As the Trafficking Directive states:

‘Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by



the Charter of Fundamental Rights of the European Union. Preventing and combating trafficking in human beings is a priority for the Union and the Member States.²⁷⁷

- [333] The UK may no longer be a Member State of the EU, but the government publicly remains committed to combatting trafficking, as stated in the New Immigration Plan Policy Statement.²⁷⁸ Thus, the express power to cease the application of rights in the Trafficking Directive if incompatible with the Bill runs counter to the government's stated commitments.
- [334] The disapplication of the Trafficking Directive will affect rights, entitlements, and remedies available to victims in domestic law. It is necessary to consider how the Trafficking Directive applies vis a vis ECAT, to understand the threat posed by Clause 67.
- [335] The EU adopted the Trafficking Directive on 5 April 2011. As noted in a report by the ATMG, the UK's decision to opt-in to the Trafficking Directive was unanimously welcomed across the anti-trafficking sector.²⁷⁹ On 22 March 2011, a Home Office Ministerial Statement announced that the UK would opt-in to the Directive, calling the UK was a *'world leader in fighting trafficking'*. An annexe to this letter is recorded in the European Scrutiny Committee, stating:
- 'The Minister considers that the Directive would not add new requirements to support victims beyond those which the UK already provides, in compliance with the 2005 Council of Europe Convention, but says that the UK may have to provide the support for a longer period of time. He adds, "The Government's new prime contracting funding model for support for victims of trafficking will enable the prime contractor to assess support needs on a case-by-case basis"'*.²⁸⁰
- [336] By opting into the Trafficking Directive, the UK was obliged to ensure that it was transposed in domestic law by the deadline of 6 April 2013. Since 6 April 2013 the Trafficking Directive has had 'direct effect' under EU law, as referred to in several cases (for example: *Galdikas & Ors, R and Houna v. Allen*).²⁸¹
- [337] Prior to the deadline for transposition, the government broadly took the view that existing provisions of domestic law already complied with the Directive. In 2012 the Home Office told the House of Lords that they *'complied in practice'* with Article 11 of the Trafficking Directive through the NRM and victim care model.²⁸² Therefore the government did not at that stage deem it necessary to legislate on the NRM or victim identification or support to ensure that the Trafficking Directive was compliant with UK law.
- [338] In contrast to the Directive, which applies directly in domestic law, ECAT only applies indirectly. This is because the Government has not incorporated ECAT, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol), or other key international instruments into domestic law. The government has therefore argued that these cannot apply or be invoked directly before courts.²⁸³ ECAT is given effect through the NRM in policy guidance. However, if domestic law or guidance purports to give effect to ECAT, but fails to do so, it will be unlawful (*MS Pakistan*).²⁸⁴
- [339] A briefing by the Aire Centre outlines that the Directive is enforced via the European Commission, while implementation of ECAT is monitored via GRETA.²⁸⁵
- [340] The government informed the monitoring body of ECAT GRETA that:



'The entry into force of the Council of Europe Anti-Trafficking Convention was accompanied by the formalisation of the identification procedures and victim support process through the setting up of a National Referral Mechanism (NRM) on 1 April 2009'.²⁸⁶

[341] In 2012, the Committee of the Parties on the implementation of ECAT recommended that all parts of it should be placed on a statutory footing instead of having piecemeal legislation.²⁸⁷ On 12 March 2015, the UK government responded that though the NRM would not be put on a statutory footing, the Modern Slavery Bill would make provision for the Secretary of State to issue regulations.²⁸⁸ That provision is now found in Section 50 of the Modern Slavery Act (2015). However, no regulations have been issued.

[342] In March 2020, Lord McColl of Dulwich (Conservative) asked Her Majesty's Government *'what plans they have to incorporate EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims into UK law'*. Baroness Williams of Trafford (Conservative) stated:

'The Government is committed to eradicating human trafficking and the scourge of modern slavery.'

The UK currently gives effect to obligations on modern slavery under The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), Article 4 of the European Convention on Human Rights (ECHR) and the EU Anti-Trafficking Directive (2011/36), through the Modern Slavery Act 2015 and policy guidance.

At the end of the EU Exit transition period in December 2020, the UK will no longer be bound by EU law. The Modern Slavery Act 2015 and relevant policy guidance will be unaffected. The UK will remain bound by international obligations in relation to preventing and combatting human trafficking and modern slavery'.²⁸⁹

[343] After eight years of the government's general position being that the rights under the Trafficking Directive were already in domestic law, the choice to legislate now in the Nationality and Borders Bill—to reduce and restrict rights and entitlements through Part 5 of the Bill—and the presence of the express power to disapply them in the event of an incompatibility with the Bill in Clause 67 is concerning. The government should instead ensure that rights under the Trafficking Directive continue to apply in UK law, by incorporating it, and further, it should incorporate ECAT in domestic law and to end the fragmented approach to victim identification, protection, and support.

[344] The lack of compatibility of Part 5 of the Bill with the UK's international obligations is noted above. Clause 67 may therefore have far-reaching consequences. Further examples of concerns regarding incompatibility of the Bill and the Directive emerge in relation to rights under the NRM, victim identification and support, and non-penalisation. For example, Article 8 of the Directive provides for the non-prosecution or non-allocation of penalties to victims and requires the UK to ensure that *'competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2'*. This is threatened by Clause 62.

[345] Part 5 of the Bill further threatens compliance with Articles 11-17 of the Trafficking Directive, which set out the assistance and support measures to be provided to victims of human trafficking, including a recovery and reflection period and access to compensation.²⁹⁰



- [346] The issue of victim support is an area where the government has historically claimed a wide discretion, as outlined in the legal case referred to in paragraph 336. Therefore, the proposals to widen that discretion further still and reduce the support duty are concerning
- [347] The support duty in Article 11 of the Trafficking Directive corresponds to Article 12 of ECAT. Article 11 is a free-standing right in domestic law operating with 'direct effect' and saved by the Withdrawal Act (2018). However, Article 12 of ECAT is not enshrined in domestic law or regulations, but in guidance. If Article 11 of the Trafficking Directive (in so far as there is incompatibility with the provisions of the Nationality and Borders Bill) ceased to apply, victims would lose that direct application of the support duty and would need to rely on guidance and the indirect application of ECAT.
- [348] As identified earlier in this document in relation to Clause 60, Article 12 of ECAT is not present in either the Modern Slavery Act (2015) or the Nationality and Borders Bill.
- [349] The Modern Slavery Act (2015) does not explicitly place a duty on the State to provide support and assistance to victims, nor set out victims' support entitlements. This means that victims are still reliant on Statutory Guidance in relation to support entitlements and are not legally entitled to support within the UK. The Nationality and Borders Bill states identified victims are eligible for support, but not what this support is.
- [350] This is striking, because unlike asylum support that has a primary statutory base (Sections 4 and 95 support under the Immigration and Asylum Act), the support for victims is not as strongly defined or embedded in primary legislation.²⁹¹
- [351] This leaves no clear legislative basis in primary legislation for the assistance and support measures that should be adopted to assist victims and required by international law. Section 49 of the Modern Slavery Act (2015) stipulates that:
- 'The Secretary of State must issue guidance to such public authorities and other persons as the Secretary of State considers appropriate about...arrangements for providing assistance and support to persons who there are reasonable grounds to believe may be victims of slavery or human trafficking'.²⁹²*
- [352] Without a clear statutory basis for minimum standards of support, it is possible for the UK to downgrade support and assistance with administrative ease through guidance. This has been seen in practice with the removal of subsistence payments to victims (i.e. cut to the rates of financial support) during 2020, followed by their reinstatement once legal challenges were brought. It also perpetuates the piecemeal approach to victim protection criticised by ECAT which the government said it was committed to combating in the Modern Slavery Act (2015). There is no consultation and no Parliamentary scrutiny of guidance or its amendment.
- [353] Although the government has published its Human Rights Memorandum alongside the draft Nationality and Borders Bill, this does not sufficiently address the risks clauses in the Bill pose to human rights standards.²⁹³

A lack clear of statutory basis for minimum standards of support means support can be downgraded without parliamentary scrutiny.



Clause 68. Part 5: Interpretation

Overview of the Clause

- [354] This clause provides definitions of terms used in Part 5 of the Nationality and Borders Bill and confers a power on the Secretary of State to set out the meaning of ‘victim of slavery’ and ‘victim of human trafficking’ in Regulations.

Implications and evidence of impact

- [355] Clause 68 of the Bill refers to ECAT, but as stated above the proposals in Part 5 of the Bill are contrary to ECAT, the Trafficking Directive, the ECHR, and the UK’s international obligations.
- [356] Clause 68 also states that ‘positive reasonable grounds decision’ has the meaning given by section 60(1) of the Nationality and Borders Act (currently Clause 60 of the Bill). This is evaluated in detail in the discussion of Clause 60.
- [357] Clause 68 outlines that the meanings given to ‘victim of slavery’ and ‘victim of human trafficking’ will be those made by regulations made by the Secretary of State.
- [358] The definition of a victim of slavery and human trafficking are already available in the Modern Slavery Statutory Guidance in relation to victim identification; and for the purpose of defining conduct constituting an offence, under Sections 1, 2, and 56 of the Modern Slavery Act (2015).²⁹⁴ The creation of regulations under the Nationality and Borders Act to define victims of slavery and trafficking appears unnecessary and duplicative.
- [359] It is also unclear why central definitions related to slavery and trafficking should be situated within regulations concerning immigration policy rather than the legal framework chosen previously to deal with these crimes—the Modern Slavery Act (2015). This fragments policy in this area in a way that is counterproductive to the coherence of the legal framework and compounds the piecemeal approach to victim identification and support evidenced above.



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