

## Written evidence from Modern Slavery Policy and Evidence Centre (NBB0049)

### Introduction to the Modern Slavery Policy and Evidence Centre

This response has been prepared by the Modern Slavery and Human Rights Policy and Evidence Centre (Modern Slavery PEC).<sup>1</sup> The Modern Slavery PEC was created by the investment of public funding to enhance understanding of modern slavery and transform the effectiveness of law and policies designed to prevent it. The Centre is a consortium of six research organisations led by the Bingham Centre for the Rule of Law and is funded by the Arts and Humanities Research Council on behalf of UK Research and Innovation (UKRI).

The Modern Slavery PEC funds research to provide independent, innovative and authoritative insight and analysis on modern slavery. The Modern Slavery PEC is an impartial organisation and our focus is on ensuring the best available evidence and analysis is available for policymakers and law-makers. We are led by evidence and our position is that policies are more effective when they are firmly underpinned by evidence that is grounded in robust research and data. Our approach is rooted in human rights.

### The Modern Slavery PEC approach to this submission

The Modern Slavery PEC's approach draws on evidence from existing research and an analysis of the Bill's modern slavery provisions against relevant human rights standards, in particular the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and the European Convention on Human Rights (ECHR).

This submission is confined to Part 4 of the Bill and addresses the ninth and part of the eleventh question in the JCHR's call for evidence.<sup>2</sup> It also provides an assessment of the published data on the scale of misuse of the National Referral Mechanism (NRM).

### Summary

- **Further evidence and data are required to establish the scale of actual misuse of the NRM.** The data published by the Home Office to date does not contain sufficient information to make an informed judgement about the scale of misuse, particularly any misuse linked to children who have experienced modern slavery. (paragraphs 1-7 of this submission)
- **The Committee may wish to ask the Government for further explanation as to why clause 51(2) of the Bill is compatible with the positive duty to investigate in Article 4 ECHR and Article 10 ECAT.** Clause 51(2)(a) provides that the requirement to make a conclusive grounds decision ceases to apply where public order or "bad faith" exceptions apply. It is not clear how this is compatible with the positive duty to investigate whether a person is a victim of trafficking under both Article 4 ECHR and ECAT, which is not qualified by the exemptions in Article 13 ECAT. Further explanation would also be useful as to how clause 51(2)(b) is compatible with the duty in Article 10(2) ECAT not to remove anyone from the UK until the investigation of whether they are a victim of trafficking is complete. (paragraphs 8-11)
- **The Committee may wish to ask the Government for further explanation as to whether the provisions in Part 4 apply to children,** given that additional considerations would be required to ensure appropriate safeguards and support are available for children who have experienced modern slavery and trafficking (paragraphs 12-13).

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<sup>1</sup> This response has been prepared by the Modern Slavery PEC's core team and does not necessarily represent the views of all partners making up the PEC consortium

<sup>2</sup> In respect of that eleventh question, our submission considers the Bill's compliance with ECAT and Article 4 of the European Convention on Human Rights (ECHR).

- **The Committee may wish to seek further clarification about how several provisions will operate in practice, to ensure the Bill does not give rise to a risk of breaches of ECAT/ECHR in individual cases.** We suggest the Modern Slavery Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland sets out further detail on the following provisions:

  - The operation of ‘slavery or trafficking notices’ (Clauses 46 and 47). Evidence indicates numerous challenges and barriers to disclosure and self-identification for victims of modern slavery (paragraphs 14 and 20). Clarification is needed on aspects such as the processes for deciding who to issue a ‘slavery or trafficking notice’ to (including adults or children), how the Single Competent Authority will assess whether there are ‘good reasons’ for late provision and the route for individuals to challenge the Single Competent Authority's assessment.
  - The criteria for withholding a recovery period based on “bad faith” (Clause 51). Evidence suggests survivors of modern slavery may face challenges in providing a full and consistent account of their experience (paragraphs 14 and 20), meaning clarification is required on what would constitute claiming in “bad faith”; whether this clause applies to children, and the means to challenge such an assessment.
  - How another country’s capability to meet a person’s “need for assistance” would be assessed on an ongoing basis or the route to challenge such an assessment (clause 53).
  
- **The Committee may wish to ask the Government for further explanation on:**

  - The rationale for foreign national offenders being excluded from the recovery period on public order grounds based on the length of sentence received (Clause 51), rather than on the basis of the crimes for which they were convicted. (paragraph 28)
  - Its assessment of introducing a discretion not to withhold the recovery period in certain circumstances where public order exceptions apply, for example if a recovery period was deemed conducive to obtaining a prosecution against a trafficker (as access to support services may increase confidence of individuals to testify as witnesses in criminal proceedings). (paragraph 29)
  - Its assessment of whether refusing discretionary leave to confirmed victims on the grounds that their recovery needs can be met in another country, would constitute return or repatriation, in situations where the individual has no other routes to gain immigration status in the UK (paragraphs 35-36).
  - With respect to assistance, support and discretionary leave being granted to assist in recovery from harm (clauses 52 and 53), the merits of the current formulation which focuses on harm ‘arising from’ exploitation as opposed to ‘linked to’ exploitation. Evidence indicates that traffickers often deliberately target vulnerable individuals (paragraph 32), making it challenging to assess and separate out the support needed to recover from exploitation harm from support that may be required to address underlying vulnerabilities.
  
- **The Home Office should collect data to monitor how these provisions are operating in line with stated policy objectives.** Suggestions of data to be collected are provided in the Appendix.

What evidence is there that the NRM is being misused to delay immigration action?

1. One of the policy objectives for some of the modern slavery provisions in the Bill is to “reduce the potential for misuse of the National Referral Mechanism (NRM) system from referrals requested with the intention of delaying removal action”.<sup>3</sup> The UK Independent Anti-Slavery Commissioner<sup>4</sup> (IASC) and NGOs have questioned the evidence around the scale of misuse of the system.
2. Understanding how misuse has been defined and the scale of any misuse is important as it enables an assessment of both the necessity for and the proportionality of the responsive measures contained within the Bill. Ministers have provided individual case studies to illustrate misuse of the NRM<sup>5</sup> but it is not clear how representative such cases are of the wider cohort of individuals within the NRM. **Therefore, overall, the Modern Slavery PEC assesses that the data published by the Home Office to date does not contain sufficient information to make an informed judgement about the scale of potential misuse of the NRM system, particularly any potential misuse linked to children who have experienced modern slavery, and that further evidence and data is required.** Two recent data bulletins, and wider NRM statistics published by the Home Office, show the following data points:
  3. *Referrals*
    - The total number of referrals to the NRM for all potential victims of modern slavery increased from 2017 to 2019, from 5,135 to 10,613.<sup>6</sup> In the UK in 2020, a similar proportion of referrals were for individuals claiming exploitation as adults (48%: 5,087) as for children (47%; 4946).
    - The number of NRM referrals for people detained within the UK following immigration offences also increased over this time period, from 501 (3% of detentions) in 2017 to 1,767 (16% of detentions) in 2019. It is assumed that this data refers only to adults.
    - The number of NRM referrals for foreign national offenders (FNOs) in immigration detention increased from 89 in 2017 to 182 in 2019. Referrals of all FNOs (i.e. including those within and outside of immigration detention) to the NRM averaged 19 per month in 2018, 37 per month in 2019, 61 per month in 2020, and 85 per month in the first five months of 2021.<sup>7</sup>

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<sup>3</sup> UK Government, Nationality and Borders Bill Explanatory Notes, 6 July 2021, <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf>

<sup>4</sup> IASC, Letter to the Home Secretary: The Nationality and Borders Bill, 7 September 2021

<http://www.antislaverycommissioner.co.uk/media/1668/iasc-letter-to-the-rt-hon-priti-patel-mp-home-secretary-march-2021.pdf>

<sup>5</sup> Sarah Newton MP Minister for Vulnerability, Safeguarding and Countering Extremism, Letter to Rt Hon Frank Field, Chair Work and Pensions Select Committee RE: Victims of Modern Slavery Inquiry, 17 February 2017 <https://www.parliament.uk/globalassets/documents/commons-committees/work-and-pensions/letter-from-sarah-newton-mp-to-chair-re-modern-slavery-session-17-2-2017.pdf>; The Secretary of State for the Home Department, Nationality and Borders Bill Volume 699: debated on Monday 19 July 2021

<https://hansard.parliament.uk/commons/2021-07-19/debates/FC19E458-F75D-480D-A20D-CD1E7ADC937E/NationalityAndBordersBill>  
<sup>6</sup> Home Office, Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, End of Year Summary, 2020, 18 March 2021, <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2020/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2020>

<sup>7</sup> Home Office, Update on modern slavery referrals from detention and prisons, updated 19 July 2021

<https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/update-on-modern-slavery-referrals-from-detention-and-prisons>

4. Further evidence is needed to assess the potential reasons for the increase in NRM referrals for individuals in immigration detention. An increase in NRM referrals could be related to a range of factors, including an increase in the number of people who have experienced modern slavery that are prosecuted for immigration offences (which individuals may have been compelled to commit as part of their exploitation); an increase in identification of victims by relevant agencies; improved functioning of safeguards ('adults at risk in immigration detention' policy); as well as an increase in survivor self-identification, for example via being able to access relevant legal advice or other support whilst in immigration detention as opposed to in mainstream detention.<sup>8</sup>

5. *NRM decision outcomes*

- Data on NRM decision outcomes for people referred into the NRM from immigration detention may give an indication of the scale of misuse of the system, as it would be expected that individuals who had falsified their modern slavery claim would receive negative first-stage reasonable grounds or second-stage conclusive grounds decisions on credibility grounds, following consideration by the Single Competent Authority. It is important to note that as well as credibility, individuals may receive a negative NRM decision where their experience does not meet the legal definitions of modern slavery set out in the Modern Slavery Act 2015 statutory guidance.
- In 2019 90% (1,599) of NRM referrals for people detained for immigration offences received a positive reasonable grounds decision, with most still awaiting their conclusive grounds decision. This is in line with positive reasonable ground decisions for all NRM cases which was also 90% (9,765) in 2019.<sup>9</sup>
- There is no indication from these figures to date that a higher proportion of referrals are ending in refusal, but the number of conclusive grounds decisions made for this cohort is relatively small overall, making it difficult to draw clear conclusions. Within the cohort of people referred for immigration offences, of those with a conclusive grounds decision,<sup>10</sup> the proportion of positive conclusive grounds decisions were very similar across the three years with 79 (40%) of known decisions positive in 2017, 53 (40%) of known decisions positive in 2018 and 34 (41%) of known decisions positive in 2019.<sup>11</sup> A number of these cases did receive negative conclusive grounds decisions (18 in 2017, 25 in 2018 and 13 in 2019), however, the data is not disaggregated according to whether the negative decision was made on the basis of concerns around credibility or not meeting the definition of modern slavery or on public order grounds/claiming improperly. The 18 negative conclusive grounds decisions made in 2017 account for 5,143 of all NRM referrals made in 2017.<sup>12</sup>
- In terms of the proportion of positive conclusive grounds decisions for FNOs, they were 22 (46%) of decisions in 2017, 25 (57%) of decisions in 2018 and 13 (45%) in 2019. Again these figures do not indicate that a higher proportion of referrals are ending in refusal, but numbers are too small to draw full conclusions.

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<sup>8</sup> Research from Bail for Immigration Detainees described the challenges of accessing immigration advice in mainstream detention facilities. See: Bail for Immigration Detainees, *Mind the Gap: Immigration Advice for Detainees in Prisons*, February 2017 [https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2\\_assets/files/143/Mind\\_the\\_Gap.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/143/Mind_the_Gap.pdf)

<sup>9</sup> Home Office, *Update on modern slavery referrals from detention and prisons*, updated 19 July 2021 <https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/update-on-modern-slavery-referrals-from-detention-and-prisons>

<sup>10</sup> Decisions are recorded as 'positive', 'negative' or 'other' with the latter describing a situation where the decision has been suspended because the subject has gone missing and there is insufficient evidence to reach the appropriate standard of proof, as well as where the subject has withdrawn from the process. Percentages have been calculated based on the volume of positive, negative, or other cases, (i.e. known cases), those pending decision have been excluded

<sup>11</sup> Home Office, *Issues raised by people facing return in immigration detention*, updated 19 July 2021 <https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/issues-raised-by-people-facing-return-in-immigration-detention>

<sup>12</sup> HM Government, *2018 UK Annual Report on Modern Slavery*, October 2018 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/907527/2018\\_UK\\_Annual\\_Report\\_on\\_Modern\\_Slavery.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907527/2018_UK_Annual_Report_on_Modern_Slavery.pdf)

6. In order to obtain a fuller understanding of the scale of any actual misuse of the NRM, further data would need to be collected, analysed and published, for example on:
  - a. Conclusive grounds decision outcomes for 2019 and beyond, disaggregated by characteristics such as:
    - The reason for the negative decisions (credibility or not meeting modern slavery legal definitions, or on public order grounds/claiming improperly)
    - The first responder type
    - The individual's status at the time of referral (e.g. FNO, within immigration detention).
7. In addition, qualitative analysis of a sample of case files alongside a study of the experiences of First Responders and policymakers may provide further insight on how perceived misuse of the system is manifesting in practice.

Response to JCHR questions on modern slavery

The second limb of question 9 has been addressed first so as to discuss the Clauses sequentially.

What will be the consequences of the presumptions that compliance with procedural requirements should affect a person's credibility as a victim?

**Clause 46: Provision of information relating to being a victim of slavery or human trafficking and clause 47: Late compliance with slavery or trafficking information notice: damage to credibility**

8. Clause 46 of the Bill sets out that victims of modern slavery or human trafficking who make an international protection (asylum) or human rights claim may also be requested to provide information in the form of a "slavery or trafficking notice", relevant for the purposes of making a reasonable or conclusive grounds decision by a specified date. This appears to form part of the expanded "one stop-shop" process to ensure that asylum and human rights claims, referrals as potential victims of modern slavery and any other protection matters are made and considered together, ahead of any appeal hearing. The stated purpose of Clause 46 is threefold: early identification of potential victims subject to immigration control in order to ensure they receive the correct support package; considering modern slavery and international protection/ human rights claims at the same time to support decision making and to speed up processes; thereby reducing costs to the Government.<sup>13</sup>
9. Article 10 of ECAT sets out the duty on states to identify victims of trafficking and Article 4 of the ECHR provides for an investigative duty to investigate situations of potential trafficking where there is "credible suspicion". The UK's National Referral Mechanism (NRM) is the framework established for identifying potential victims of modern slavery and providing support.<sup>14</sup>
10. No information is provided on what form the information in the Clause 46 "slavery or trafficking notice" would take, which agency would issue such a notice and at what point in the proceedings they would be issued. Indeed, clause 46 does not specify whether a "slavery or trafficking notice" would be served on *all* potential victims who have made an international protection or human rights claim, nor whether the provision would also apply

<sup>13</sup> UK Government, Nationality and Borders Bill Explanatory Notes, 6 July 2021 <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf>

<sup>14</sup> Home Office, National referral mechanism guidance: adult (England and Wales), updated 22 June 2021 <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales#first-responder-organisations>

to children. If they would only in be issued in certain circumstances, this might introduce the potential for discrimination or unfair treatment.

11. A reasonable inference from the Bill's drafting that it is intended to apply without differentiation to adults and children. This requires clarification because the international legal definition of trafficking differs for adults and children. ECAT Article 4 provides that three components must be presented for adult victims of trafficking: action, means and purpose of exploitation. The 'means' of exploitation involves "the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person". ECAT Article 4 (c) provides that for children, the 'means' component is not required. That is, children are recognised as not being able to give informed consent to engage in criminal or other exploitative activity, and they cannot give consent to be abused or trafficked and their experience of threat/use of force/ coercion/deception is assumed.
12. Furthermore, children cannot consent to being entered into the NRM. Thus, a First Responder may refer a child who they believe has indicators of modern slavery, before that child has disclosed that experience or where that child does not identify as having experienced modern slavery and thus may be unable to provide information deemed relevant for the purposes of making a reasonable or conclusive grounds decision.
13. The requirement to provide information in a "slavery or trafficking notice" appears to take the onus away from a first responder to identify people who have experienced modern slavery with an international protection claim and instead puts the burden more squarely on a potential victim to know what information is relevant for the purposes of making a reasonable or conclusive grounds decision and to be able to disclose that information by a particular date. This requirement in effect may demand the self-identification of an experience of modern slavery.
14. Practitioners indicate that it can take time for survivors to build trust with a legal representative and that it may take months or even years for a person to disclose a history of trauma and exploitation.<sup>15</sup> Indeed, given the well-documented lack of immigration advice providers in certain areas<sup>16</sup>, a lack of trafficking specialists<sup>17</sup> and particular barriers for survivors in accessing legal aid funded immigration advice<sup>18</sup> not all survivors with a claim for international protection will be represented, or may have to wait months to access advice, or might only be represented at the appeal stage of their claim. Therefore, it may be the case that when a "slavery or trafficking notice" is issued, the applicant is not represented, or not represented by a modern slavery/trafficking specialist or for those that are able to access advice, there may not have been sufficient time to build up trust with their representative to disclose the full nature of their experiences. We note that Clause 54 which provides "add on" advice on referral to the NRM only applies to individuals already in receipt of legal aid for immigration and asylum matters, and thus will not address the aforementioned barriers to accessing such advice in the first place.

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<sup>15</sup> Dr Samantha Currie and Dr Matthew Young, Access to legal advice and representation for survivors of modern slavery, May 2021

<https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf>

Home Office, Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, June 2021, p.106

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/993172/Modern\\_Slavery\\_Statutory\\_Guidance\\_EW\\_Non-Statutory\\_Guidance\\_SNI\\_v2.3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993172/Modern_Slavery_Statutory_Guidance_EW_Non-Statutory_Guidance_SNI_v2.3.pdf)

<sup>16</sup> Jo Wilding, Droughts and Deserts, A report on the immigration legal aid market, June 2019

[https://www.researchgate.net/publication/333718995\\_Droughts\\_and\\_Deserts\\_A\\_report\\_on\\_the\\_immigration\\_legal\\_aid\\_market](https://www.researchgate.net/publication/333718995_Droughts_and_Deserts_A_report_on_the_immigration_legal_aid_market)

<sup>17</sup> Young Legal Aid Lawyers, A sector at breaking point: Justice denied for victims of trafficking, June 2020

<http://www.younglegalaidlawyers.org/sites/default/files/200621%20YLAL%20trafficking%20report.pdf>

<sup>18</sup> Modern Slavery PEC commissioned research has identified significant barriers for survivors of modern slavery in accessing immigration legal aid, including uncertainty about entitlements. The funding structure discourages lawyers from taking on complex modern slavery cases, contributes to a shortfall in provision, and is inadequate to deliver good quality legal advice and representation to survivors. See:

Dr Samantha Currie and Dr Matthew Young, Access to legal advice and representation for survivors of modern slavery, May 2021

<https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf>



15. Should the issuance of a “slavery or trafficking notice” place an increased evidentiary burden on survivors, this may further impact on the identification of victims. Refugees are recognised as facing challenges in accessing information to externally corroborate their account (e.g. documentary or medical evidence as well as country of origin information),<sup>19</sup> which may disproportionately affect those unable to access legal advice, and who face other barriers to disclosure including those with a lack of familiarity of systems, and those unable to speak English.
16. An experience of modern slavery may or may not be linked to, or form part of a persons’ international protection or human rights claim, and indeed, may begin after such a claim is lodged. Such considerations should be taken into account when considering when to issue a “slavery or trafficking notice”, the impact of non-disclosure at this time and why disclosure of an experience of exploitation and fear of persecution may not be practically possible at the same time.
17. If the notices are served on all individuals in the cohort, and sufficient flexibility and safeguards are built into the operation of this clause (see below) it is possible that this could result in a higher number of NRM referrals overall as there might be an increased likelihood that by asking for information, indicators of modern slavery will be identified, which will lead to a higher number of individuals receiving support services. In the UK there were 31,115 asylum applications (relating to 37,235 people) in the year ending June 2021.<sup>20</sup>
18. Clause 47 provides that the competent authority must take the late provision of a slavery or trafficking notice without “good reason” as damaging to credibility. The stated purpose of Clause 47 is to ensure that victims are identified as early as possible to receive appropriate support and to reduce the potential for misuse of the NRM from referrals requested with the intention of delaying removal action.<sup>21</sup>
19. What constitutes a “good reason” is not defined in the Bill. As mentioned above given the ‘means’ component of trafficking (which is not required for children), by the very nature of exploitation, persons who have experienced modern slavery may fear reprisals by their exploiters, targeted against them or their family, which can extend beyond the period of exploitation and impact on self-identification and affect survivors’ ability to give a full account of their experiences at a defined time.<sup>22</sup>
20. Evidence provides insights about the ways in which trauma makes the process of identification of victims of crime, particularly violent crime, more challenging for authorities. The distorting memory experienced by survivors can lead to an under-reporting of crime and high attrition rates, particularly for sexual violence-related crimes.<sup>23</sup> An experience of trauma and related mental health issues such as complex post-traumatic stress syndrome can lead to memory loss and impact on recall.<sup>24</sup> Shame is reported to be understood as a consequence of coercion that can affect trust-building with psychotherapists<sup>25</sup> and disclosure during Home Office substantive asylum interviews.<sup>26</sup>

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<sup>19</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 <https://www.unhcr.org/4d93528a9.pdf>

<sup>20</sup> Home Office, Immigration statistics, year ending June 2021, 26 August 2021

<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2021>

<sup>21</sup> UK Government, Nationality and Borders Bill Explanatory Notes, 6 July 2021, para 529 <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf>

<sup>22</sup> Helen Bamber Foundation, The Trauma-Informed Code of Conduct For all Professionals working with Survivors of Human Trafficking and Slavery, April 2021, p.33

[https://www.helenbamber.org/sites/default/files/2021-05/Trauma%20Informed%20Code%20of%20Conduct\\_April%202021.pdf](https://www.helenbamber.org/sites/default/files/2021-05/Trauma%20Informed%20Code%20of%20Conduct_April%202021.pdf)

<sup>23</sup> Hardy A, Young K, Holmes EA. Does trauma memory play a role in the experience of reporting sexual assault during police interviews? An exploratory study. *Memory*. 2009 Nov;17(8):783-8

<sup>24</sup> Helen Bamber Foundation, The Trauma-Informed Code of Conduct For all Professionals working with Survivors of Human Trafficking and Slavery, April 2021

[https://www.helenbamber.org/sites/default/files/2021-05/Trauma%20Informed%20Code%20of%20Conduct\\_April%202021.pdf](https://www.helenbamber.org/sites/default/files/2021-05/Trauma%20Informed%20Code%20of%20Conduct_April%202021.pdf)

Some behaviours might be difficult for authorities or law-enforcement that are not adequately trained to understand and to correctly identify victims.<sup>27</sup> Survivors may also have a fear of authority figures and/or a fear of detention and removal, and research from the US has indicated a “chilling effect” of immigration enforcement felt within other policy systems, whereby there has been lower reporting of crime and declining usage of welfare safety-nets by immigrants who are eligible to access them, due to fear of detection and deportation by authorities. This effect has been strongest within communities targeted by immigration enforcement.<sup>28</sup> Evidence suggests this could partly be mitigated by ‘sanctuary’ policies that separate other areas of government, including law enforcement, from immigration enforcement.<sup>29</sup>

## 21. Recommendations:

- a. The Committee may wish to seek further clarification about how clauses 46 and 47 will operate in practice, to ensure the Bill does not give rise to a risk of breaches of ECAT/ECHR in individual cases. We suggest the Modern Slavery Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland sets out further detail on: the processes for deciding who to issue a “slavery or trafficking notice” notice to (including adults or children), in what circumstances, at what point, and by which agencies; how the Single Competent Authority will assess whether there are ‘good reasons’ for late provision; what would constitute a ‘good reason’ (while enabling flexibility to consider a range of scenarios); what the route is for individuals to challenge the Single Competent Authority’s assessment of whether a “good reason” existed for the late provision of information and whether the evidence required to complete a notice will require individuals to self-identify as potential victims.
- b. Clarification is needed on whether the requirement to provide information deemed “relevant to for the purposes of making a reasonable or conclusive grounds decision” will be accompanied by the provision of adequate legal aided funded advice for individuals. Depending on how the “slavery and trafficking information notices” are implemented, completing a notice may require legal assistance.
- c. Appropriate training should be provided to the Single Competent Authority to ensure consistency in the application of this additional guidance.
- d. Given the potentially higher case numbers that might be referred into the NRM as a result of the introduction of slavery and trafficking information notices, it is important that the Single Competent Authority (SCA) is adequately resourced to make decisions on, and provide support via the Modern Slavery Victim Care Contract to all individuals in the NRM.
- e. The Home Office should collect data to monitor how these provisions are operating in line with stated policy objectives (see Appendix).

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<sup>25</sup> Paola Michelle Contreras, Diya Kallivayalil & Judith Lewis Herman (2017) Psychotherapy in the Aftermath of Human Trafficking: Working Through the Consequences of Psychological Coercion, *Women & Therapy*, 40:1-2, 31-54, DOI: 10.1080/02703149.2016.1205908

<sup>26</sup> Diana Bogner, Jane Herlihy, Diana Bogner and Chris Brewin (2007), Impact of sexual violence on disclosure during Home Office interviews <http://pc.rhul.ac.uk/sites/csel/wp-content/uploads/2019/09/Bogner-Herlihy-Brewin-2007.pdf>

<sup>27</sup> Cortney A. Franklin, Alondra D. Garza, Amanda Goodson, Leana Allen Bouffard (2019) ‘Police Perceptions of Crime Victim Behaviors: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors’ Trauma Responses’ *Crime and Delinquency*.

<sup>28</sup> Francisco I. Pedraza, Ling Zhu (2015) The “Chilling Effect” of America’s New Immigration Enforcement Regime, *Stanford Center on Poverty and Inequality*

<sup>29</sup> Martínez-Schulda, R. and Martínez, D. (2021) ‘Immigrant Sanctuary Policies and Crime-Reporting Behavior: A Multilevel Analysis of Reports of Crime Victimization to Law Enforcement, 1980 to 2004’ *American Sociological Review*, 86 (1): 154-185

Do the changes that the Bill would make to the law regarding modern slavery ensure appropriate protections for victims?

See above for a discussion of how clauses 46 and 47 impacts on protections for victims.

### **Clause 51: Identified potential victims etc: disqualification from protection**

22. Clause 52 provides a recovery period to potential victims of modern slavery, during which the potential victim must be provided with assistance and support to aid their recovery. Clause 49 provides for a recovery period for people identified as potential victims of modern slavery of not less than 30 days after the positive reasonable grounds decision was made, during which time they may not be removed from the UK. Clause 51 sets out exclusions to providing a recovery period as set out in Clause 49 which enables states to withhold protections for those with a positive reasonable ground decision if the authority is satisfied that the individual is a threat to public order or has claimed to be a victim in “bad faith”. It is not clear whether this provision would also apply to children.

23. These clauses implement Article 13 (1) of ECAT which provides that States must provide in 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”, during which time “it shall not be possible to enforce any expulsion order” unless, as set out in Article 13 (3), “grounds of public order prevent it or if is found that victims status is being claimed improperly”.

24. The main difficulty with clause 51 is that there appears to be a significant risk of incompatibility with the positive duty to investigate whether a person is a victim of trafficking under both Article 4 ECHR and ECAT. Clause 51(2)(a) provides that where the public order or bad faith exceptions to protection apply, the requirement to make a conclusive grounds decision ceases to apply. However, the exceptions in Article 13 ECAT qualify the right to protection, not the duty to investigate. There is a positive duty to investigate whether a person is a victim under Article 4 ECHR, and that duty is not qualified by the exemptions in Article 13 ECAT. Whether an individual is disqualified from protection is to be decided after the completion of the investigation into whether they are a victim of trafficking.

25. Clause 51(2) also appears to give rise to a risk of incompatibility with Article 10 ECAT. Clause 51(2)(b) provides that if the Article 13 ECAT exceptions apply, any prohibition on removing them from or requiring them to leave the UK ceases to apply. However, Article 10(2) ECAT imposes a duty 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 ... has been completed by the competent authorities”. The exemptions in Article 13 do not qualify that duty to complete the investigation and not to remove them until the investigation is complete.

26. The government’s interpretation is that once the recovery period is denied on public order or bad faith grounds, “the obligations to give a conclusive grounds decision and/or residence permit, and to provide support, falls away on the basis that the invocation of the public order exemption (or any other exemption) must have been expected to result in removal”. However, this appears to overlook the fact that the qualification in Article 13(3) ECAT, to which this clause is intended to give effect, only qualifies the right to protection provided by a recovery and reflection period.

27. The Bill has also not defined what would establish a claim being made in “bad faith”, nor which body would make this judgment and on what criteria. As set out above, research

indicates the myriad of reasons why survivors of modern slavery may face challenges in providing a full and consistent account of their experience, particularly at the outset of a claim for international protection. In light of that research, such partial or inconsistent accounts should not be assessed as demonstrating that the person has claimed to be a victim in “bad faith”. It is also not clear whether there will be a means to challenge such an assessment. Without a safeguard, there is the risk that people who have experienced modern slavery are denied protections and returned without an opportunity for the full assessment of evidence as part of the conclusive grounds decision.

28. Clause 51(3) sets out the circumstances in which someone would be a “threat to public order”. These are broadly defined and imply an automatic withholding of a recovery period. Section 51(3)(f) provides for exclusion from the recovery period if the person is a foreign criminal within the meaning given by section 32(1) of the UK Borders Act 2007 (automatic deportation for foreign criminals). This might include persons who have served a sentence of at least 12 months abroad for offences which would be classified as minor in the UK. Indeed, a conviction may be linked to a person’s vulnerability to exploitation or the experience of exploitation itself (e.g. the criminalisation of sexual exploitation under prostitution offences) and where there might not have been an opportunity to raise a statutory defence. Furthermore, there is evidence of UK cases where victims of criminal exploitation have not been identified as such until late in criminal proceedings.<sup>30</sup>
29. An exclusion from a recovery period would limit the possibility for potential victims to engage in criminal prosecutions. Assistance during criminal proceedings may be available as part of the support provided through the Modern Slavery Victim Care Contract. Victims of modern slavery are recognised as vulnerable witnesses who may be eligible for “special measures” during criminal proceedings with child victims automatically eligible.<sup>31</sup>
30. Recommendations
  - a. The Committee may wish to ask the Government for further explanation as to how clause 51(2) of the Bill is compatible with the positive duty to investigate in Article 4 ECHR and Article 10 ECAT.
  - b. The Committee may wish to seek further clarification about how clause 51 will operate in practice, to ensure the Bill does not give rise to a risk of breaches of ECAT/ECHR in individual cases. We suggest the Modern Slavery Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland sets out further detail on: what would constitute “bad faith” and whether this would also apply to children, along with an explanation of the means to challenge such an assessment. The provision of new evidence should not automatically be assessed to negatively impact on credibility nor constitute claiming in “bad faith”.
  - c. The Committee may wish to ask the Government for further explanation on the rationale for foreign national offenders being excluded from the recovery period on public order grounds based on the sentence length received, rather than on the basis of the crimes for which they were convicted.
  - d. The Committee may wish to ask the Government for its assessment of introducing a discretion not to withhold the recovery period in certain circumstances, for example if

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<sup>30</sup> IASC, The Modern Slavery Act Statutory Defence: A call for evidence, October 2020

<http://www.antislaverycommissioner.co.uk/media/1478/the-modern-slavery-act-2015-statutory-defence-call-for-evidence.pdf>

<sup>31</sup> Home Office, Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, June 2021 p.163

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/993172/Modern\\_Slavery\\_Statutory\\_Guidance\\_EW\\_Non-Statutory\\_Guidance\\_SNI\\_v2.3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993172/Modern_Slavery_Statutory_Guidance_EW_Non-Statutory_Guidance_SNI_v2.3.pdf)

was deemed conducive to obtaining a prosecution (and if access to support services would enable an individual to testify as a witness in criminal proceedings). In that instance a law enforcement or prosecution agency could make an application to the Single Competent Authority.

- e. When learning lessons from the evaluation of the Multi Agency Assurance Panels,<sup>32</sup> the Home Office should explore using these panels to review Single Competent Authority decisions around withholding a recovery period based on grounds of public order and where people are assessed to be claiming in bad faith.
- f. The Home Office should collect data to monitor how these provisions are operating in line with stated policy objectives (see [Appendix](#)).

### **Clause 53: Leave to remain for victims of slavery or human trafficking**

31. Clause 53 sets out the circumstances in which a grant of temporary leave to remain must be granted to confirmed victims of modern slavery. Clause 53 (2) enables a discretionary grant of leave to remain, including for (a) purposes of “assisting the person in their recovery from any harm arising from the relevant exploitation”.<sup>33</sup> Article 14(1) of ECAT provides for a grant of leave where it is “necessary owing to their personal situation” and Article 12(1) sets out that States should adopt “such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery”.
32. Evidence has shown that modern slavery is the result of overlapping and interconnected drivers and vulnerabilities which may be shared across multiple country contexts, in addition to national or locally specific factors in certain countries.<sup>34</sup> Individual and institutional vulnerabilities to modern slavery include poverty, inequality and discrimination, denial of human rights, power imbalances between workers and employers, gender-based violence, forced displacement and weak rule of law.<sup>35</sup> It is widely understood that exploiters may deliberately target vulnerable people who may have existing needs prior to being exploited (such as mental health needs or an insecure immigration status) which in turn make them vulnerable to exploitation.<sup>36</sup>
33. For these reasons, it would be very challenging to define harm specifically arising from exploitation and separate out the support needed to recover from this harm (Clause 52) from support required to address underlying vulnerabilities. Thus, as currently defined, the potential impact is that survivors of modern slavery may be denied leave that would be necessary to assist in their recovery unless they are able to explicitly demonstrate how harm “arose from” the exploitation experience.

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<sup>32</sup> The MAAPs review all negative conclusive grounds decisions made by the Single Competent Authority across England, Wales, Scotland and Northern Ireland. For further details, see: Home Office, Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, June 2021 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/993172/Modern\\_Slavery\\_Statutory\\_Guidance\\_EW\\_Non-Statutory\\_Guidance\\_SNI\\_v2.3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993172/Modern_Slavery_Statutory_Guidance_EW_Non-Statutory_Guidance_SNI_v2.3.pdf) p.131

<sup>33</sup> 53 2 (b) provides for a grant of leave for enabling compensation being sought and 53 2 (c) for cooperating with an investigation for criminal proceedings linked to their exploitation

<sup>34</sup> Katarina Schwarz et al., The top 20 source countries for modern slavery victims in the UK, Comparative report, April 2021 <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/april/the-top-20-source-countries-for-modern-slavery-in-the-uk.pdf>

<sup>35</sup> Modern Slavery PEC, Policy Brief: Modern Slavery and International Development, Future opportunities for policy and evidence, April 2021 <https://modernslaverypec.org/assets/downloads/PEC-International-Development-Briefing-final.pdf>

<sup>36</sup> Home Office, A Typology of Modern Slavery Offences in the UK, October 2017 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652652/typology-modern-slavery-offences-horr93.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652652/typology-modern-slavery-offences-horr93.pdf);

Katarina Schwarz et al., The top 20 source countries for modern slavery victims in the UK, Comparative report, April 2021 <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/april/the-top-20-source-countries-for-modern-slavery-in-the-uk.pdf>

34. Section 53 (3) enables the Secretary of State not to grant leave if it considers that the “person’s need for assistance is capable of being met” in the person’s country of nationality or a country or territory to which the person may be removed. The latter would be in accordance with an agreement between that country/territory and the UK as contemplated by Article 40(2) of ECAT, i.e. concluded between Parties to the Convention. No details are provided as to how such capability of meeting a person’s needs would be assessed on an ongoing basis. Nor is it set out whether the provisions would also apply to children.

35. It remains unclear whether not granting leave on the grounds that recovery needs can be met in another country, would constitute return or repatriation, in situations where the individual has no other routes to gain immigration status in the UK. The government’s own Human Rights Memorandum does not address ECAT Article 16 Repatriation and Return of Victims. Article 16 (2) provides that return “shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim and shall preferably be voluntary”. Should clause 53 apply to children, further information would be required to demonstrate compatibility with ECAT Article 16 (7) which provides that “Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child”.

### 36. Recommendations

- a. The Committee may wish to seek further clarification about how clauses 52 and 53 will operate in practice, to ensure the Bill does not give rise to a risk of breaches of ECAT/ECHR in individual cases. We suggest the Modern Slavery Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland sets out further detail on: how a Party to the Convention would be designated as capable as meeting recovery needs in situations where discretionary leave is not granted, or whether this would be assessed according to an individual’s needs; whether the provision would also apply to children; and what the route is for individuals to challenge an assessment of a country’s capability to meet their recovery needs. An individualised assessment more closely aligns with the relevant ECAT provisions and is consistent with the government’s individualised approach to conducting Recovery Needs Assessments.<sup>37</sup>
- b. The Committee may wish to ask the Government to consider whether with respect to assistance, support and discretionary leave being granted to assist in recovery from harm (clauses 52 and 53), the merits of the current formulation which focuses on harm ‘arising from’ exploitation as opposed to ‘linked to’ exploitation.
- c. The Home Office should collect data to monitor how these provisions are operating in line with stated policy objectives (see Appendix).

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<sup>37</sup> Home Office, Recovery Needs Assessment (RNA), 18 January 2021

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/953307/recovery-needs-assessment-v3.0-gov-uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953307/recovery-needs-assessment-v3.0-gov-uk.pdf)

Appendix: Suggested data and evidence to monitor impact of the modern slavery provisions in the Bill

Should the provisions discussed above in the Bill be implemented, we suggest that the Home Office collects the following data and evidence on an ongoing basis to monitor whether provisions are operating in line with stated policy objectives:

<p>Clause 46: Provision of information relating to being a victim of slavery or human trafficking and clause 47: Late compliance with slavery or trafficking information notice: damage to credibility</p>	<ul style="list-style-type: none"> <li>▪ Number and characteristics of issuance of “slavery or trafficking notices”, by whom and when the notice is issued e.g. prior to substantive asylum interview, or post initial decisions, whether issued at first engagement with First Responder, or after the NRM referral. ‘Characteristics’ include age, gender, nationality and exploitation type.</li> <li>▪ Number and characteristics of issuance of “slavery or trafficking notices” that do not lead to a referral to the NRM, and by which First Responder.</li> <li>▪ Number and characteristics of potential victims who had access to legal support when responding to “slavery or trafficking notices”.</li> <li>▪ Number and characteristics of people who do not respond to “slavery or trafficking notices” within the set time frame, any reasons given and the number of whom subsequently disclose modern slavery information.</li> <li>▪ Number and characteristics of instances where the Single Competent Authority accept there is a valid reason for not responding to a notice within the set time frame.</li> <li>▪ Number and characteristics of challenges to the Single Competent Authority assessment that there is not a valid reason for responding late.</li> <li>▪ Number of NRM referrals, disaggregated by whether the referral was linked to a “slavery and trafficking information notice”, broken down by characteristics such as First Responder organisation, age, gender, and exploitation type.</li> <li>▪ Outcomes of NRM reasonable and conclusive grounds decisions, disaggregated by whether the referral was linked to a slavery and trafficking information notice, broken down by characteristics such as First Responder organisation, age, gender and exploitation type.</li> <li>▪ Number and type of issues raised by those seeking international protection (‘issues raised’ includes asylum claim, rule 35 report and NRM referral, as set out in the Home Office data bulletin.<sup>38</sup>)</li> </ul>
<p>Clause 51: Identified potential victims etc: disqualification from protection</p>	<ul style="list-style-type: none"> <li>▪ Length of recovery periods for all potential victims (e.g. range, median and mean), broken down by characteristics</li> <li>▪ Number and characteristics of potential victims requesting additional recovery periods</li> <li>▪ Number and characteristics of potential victims not granted a recovery period on public order grounds, and any challenges to these</li> <li>▪ Number and characteristics of potential victims not granted a recovery period due to assessment that they had claimed to be a victim in “bad faith”, and any challenges to these</li> </ul>

<sup>38</sup> Home Office, Issues raised by people facing return in immigration detention, updated 19 July 2021  
<https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/issues-raised-by-people-facing-return-in-immigration-detention>

Clause 53: Leave to remain for victims of slavery or human trafficking	<ul style="list-style-type: none"><li>▪ Number of confirmed victims granted discretionary leave to remain, and on what grounds, length of leave granted (e.g. range, median and mean)</li><li>▪ Number and characteristics of people where the Secretary of State decides recovery needs can be met in country of origin and which countries these are</li><li>▪ Number and characteristics of potential victims not granted leave to remain on public order grounds, and any challenges to these</li><li>▪ Number and characteristics of potential victims not granted leave to remain due to assessment they had claimed to be a victim ‘in bad faith’, and any challenges to these</li></ul>
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