

Nationality and Borders Bill

Written evidence submitted by Hope for Justice (NBB44)

NATIONALITY AND BORDERS BILL 2021 – 22 WRITTEN EVIDENCE TO THE PUBLIC BILL COMMITTEE ON PART 4

1. About Hope for Justice

1.1 Hope for Justice is an Anti-slavery charity working across five continents to end modern slavery by preventing exploitation, rescuing victims, restoring lives and reforming society.

1.2 In the UK Hope for Justice has programmes, which focus on preventing exploitation, identifying victims of modern slavery and human trafficking, ensuring they are safeguarded, advocating on their behalf through its socio-legal Independent Modern Slavery Advocacy Model to achieve restoration as well as seeking legislative and policy reform. Hope for Justice also provides awareness training, including for law enforcement, social services, businesses, prosecutors and frontline NGOs. As a response to the Modern Slavery Act 2015, Hope for Justice launched Slave-Free Alliance in 2018, a membership initiative for businesses seeking to protect their operations and supply chains from modern slavery.

1.3 Whilst we recognise that there are wider aspects of the bill that impact on preventing exploitation, identification, safeguarding and support of victims as well as prosecution of perpetrators Hope for Justice evidence specifically focuses on Part 4 of the bill.

2. Executive Summary

2.1 Overall, Hope for Justice would welcome any positive changes to the immigration and asylum system as well as the system for identification and support of victims of modern slavery (National Referral Mechanism). However, we have serious concerns as to whether the Nationality and Borders Bill will achieve its intended aims and not merely create a firm but unfair system which will enhance the ability of those exploiting vulnerable men women and children through people smuggling or human trafficking to not just continue their trade but increase the pool of those vulnerable to being recruited and exploited. Overall many aspects of the bill including the part 4 provisions specific to victims of modern slavery lack impact and cost benefit analysis; do not appear informed by empirical evidence, independent academic research, those affected by any proposed changes or organisations supporting them.

2.2 Whilst we welcome government efforts to incorporate aspects of the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT) into primary legislation we have significant concerns that the current provisions in part 4 are too narrow and lack compliance with international law including, but not limited, to Council of Europe Convention on Action Against Trafficking in Persons (ECAT), European Convention on Human Rights and UN Convention on the Rights of a Child. In particular, Hope for Justice considers that many of the provisions in part 4 will not route out vexatious claimants but actively create extra barriers for victims, discourage victims from coming forward and disqualify many victims from safeguarding and support. In addition limiting access to support and leave to remain is likely impact on victims coming forward, increase risks of re-exploitation and reduce the ability of victims to engage with criminal and civil justice processes including providing valuable intelligence to the police. In turn, this reduces the ability of enforcement agencies to tackle these serious crimes and creates a fertile environment for those who exploit.

2.3 This evidence focuses on the following key areas of concern:-

- Information Notices and the Potential to Penalise Victims for Late Disclosure (Clauses 46 – 47);
- Potential Changes to the Reasonable Grounds Threshold (Clause 48);
- Public Order Exemption (Clause 51);
- Access to Support and leave provisions (Clauses 52 and 53)
- Access to Legal Aid (Clauses 54 and 55).

3. Information Notices and Potential to Penalise Victims for Late Disclosure: Clauses 46 - 47

3.1 The intended purpose of these provisions is to speed up identification, penalise a person for late disclosure on credibility issues as well as, root out vexatious claimants. However, our front line experience in respect of identification and providing independent advocacy to victims indicates the unintended result is likely to be increasing costs, delays in the system and barriers to genuine victims being identified and receiving the safeguarding and support they need, placing them at risk of re-exploitation. First, linking NRM decision making with immigration decision making would be a significant step backwards. The reasoning behind setting up the Single Competent Authority was to move NRM decision making away from immigration authorities which in our experience invariably created significant conflict of interests, delays in decision making and poor decision making as highlighted in a number of reports such as the Anti-Trafficking Monitoring Group Report "Hidden in Plain Sight" in 2013. [1] The Home Office's own review of the National Referral Mechanism in 2014 also highlighted issues with this convoluted process and recommended significant changes to the system. [2]

3.2 Secondly, it is well recognised by practitioners and in the government's own Statutory Guidance on Identification and Care of the significant barriers and reasons as to why victims do not disclose or may disclose over a period of time. This includes but is not limited to fear of statutory authorities such as immigration authorities, trauma, being a child, lack of trust of agencies, shame,

stigma, vulnerabilities such as learning difficulties. In addition, a person may not recognise themselves as a victim. [3] This is not a sign of a lack of credibility in our experience; it is often a sign of credibility. Hope for Justice have numerous examples from its case files where it has taken over 12 months to over 2 years or more for victims to disclose their situation and even then often in our experience disclosures of aspects of the abuse occur over a period of time as trust is built with the survivor.

3.3 Thirdly, Hope for Justice do experience challenges where frontline agencies including first responders can often lack a basic understanding of modern slavery to be able to identify potential victims and/or appropriately interview them in a trauma informed way. This is often due to a lack of resourcing and training. The way a victim is approached and interviewed can hamper the ability of victims to disclose information about their experience of exploitation. Such issues are compounded if the victim is fearful of particular authorities such as immigration authorities.

3.4 Fourthly, these clauses place the responsibility on the victim to self-identify whereas the obligation to identify a victim in international law such as ECAT is on the state. [4]

4. Potential Changes to the Reasonable Grounds Threshold: Clause 48

4.1 The bill states the test for the conclusive grounds decision should be on the balance of probabilities but does not set out the test for the reasonable grounds decision which is currently stated in the statutory guidance to be "I suspect but cannot prove." [5] The Immigration Plan appears to suggest the government will "consult on clarifying the Reasonable Grounds threshold to ensure decision-makers can properly test any concerns that an individual is attempting to misuse the system." In addition clause 48 (7) provides for "identification and protection of victims" "victims of human trafficking" and "victims of human trafficking" have the meaning as stated in regulations under section 57 of the Nationality and Borders Bill 2021. Hope for Justice do not consider there is a need to change the threshold and in fact doing so in our experience will create to an additional barrier to victims being identified.

4.2 First, there appears no evidence base to change the current threshold as there is no evidence of widespread misuse of the system for instance, data from the NRM end of year report 2020 would suggest the opposite, for instance, 92% received positive reasonable grounds decisions and 89% received positive conclusive grounds decisions. [6]

4.3 Secondly it is unclear as to why what constitutes a victim of modern slavery should feature in immigration regulations given that sections 49 and 50 Modern Slavery Act 2015 gives the Secretary of State powers to make statutory guidance (currently in force) and regulations on identification and care.

4.4 Thirdly, given that year after year National Referral Mechanism data shows the highest number of victims entering the NRM are British Nationals it appears nonsensical to place Modern Slavery provisions in immigration legislation and immigration regulations. This will only cause confusion for front line practitioners.

4.5 Fourthly, the explanatory report to ECAT at paragraph 131 clearly explains why the threshold should be low as "*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.*" [7] Hope for Justice would agree from its experience of working in communities to identify victims many victims flee their situation with only their story of what happened to them on initial contact. Raising the reasonable grounds threshold would just create additional delays and an additional barrier to victims being identified, safeguarded and supported and in our experience any delays would result in victims not coming forward, disengaging and/or being placed at risk of re-exploitation.

5. Public Order Exemption Clause 51

5.1 Hope for Justice have serious concerns about the Public Order Exemption. This denies access to a recovery and reflection period if victims have made a claim in bad faith or due to having certain criminal offence or behaviour. The provision casts a wide net and includes many criminal offences, which victims may have committed as a result of their experience of exploitation. Our key concerns are as follows:-

5.2 First, in Hope for Justice's experience this will deny a significant number of victims access to safeguarding and support. For instance, in the Operation Fort case victims were actively targeted from outside prisons, many of these victims went on to be identified, receive safeguarding and support and give evidence in criminal proceedings. Hope for Justice's own data on its live advocacy cases indicates that 29% of victims would directly fall into the public order category denying access to safeguarding and support, 13% may fit into the category and a further 3% the gravity of the offence is unknown. In many of these cases, the prime exploitation type is not criminal exploitation and one would expect these figures to be even higher if the prime exploitation type was criminal exploitation.

5.3 Secondly, this sets a dangerous precedent in public policy on victims of crime effectively categorising a victim of a serious crime as a "deserving" or "undeserving victim."

5.4 Thirdly, this provision will create an extra barrier to building trust and rapport to identify victim if they are asked probing questions such as whether they have previous criminal offences.

5.5 Fourthly, the provision is completely impractical and would result in significant delays accessing safeguarding and support e.g. the time taken to access information on criminal records in the UK or other countries could be weeks.

5.6 Fifthly, it should be noted that the public order exemption is detailed only within Article 13 on the recovery and reflection period not within any of the other measures or requirements in ECAT. The Explanatory Report to ECAT notes at para. 173 "*Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims' status will not be illegitimately used.*" [8] Clearly, the public order exemption is to ensure that victim status is not illegitimately used as opposed to denying genuine victims important safeguarding and support on the basis of offending behaviour which could relate to someone's experience of exploitation and/or the very vulnerability targeted to recruit them into exploitation.

5.7 Sixthly, it should be noted that rights under Article 3 of the European Convention on Human Rights (right not be subject to torture or to inhuman or degrading treatment or punishment) and Article 4 (prohibition of slavery and forced labour) are non-derogable rights.

5.8 Seventhly, the provisions disproportionately impact children given that National Referral Mechanism data for 2020 showed the commonest exploitation for children was criminal exploitation. [9] The clause is incompatible with the rights of children under the UN Convention on the Rights of a Child. In addition, clauses around terrorism will exclude child victims exploited by armed groups from accessing protection. This fails to take into account the wider international legal framework designed to protect these victims including but not limited to ILO Convention Number 182. [10] Given the nexus identified in a recent CTFD report exploring the

nexus between human trafficking, terrorism and the financing of terrorism. Failure to protect victims in this situation also fails to dismantle part of the business model i.e. human trafficking, which is financing such activities. [11] This has wider implications for national security.

5.9 In addition, whilst clause 51 clauses make exclusions in respect of offences which are excluded from the statutory defence (clause 51 (3) (b)) it should be noted that schedule 4 exclusions under the Modern Slavery Act 2015 are exclusions from the section 45 defence and not designed to exclude victims from accessing safeguarding and support. At the time, this provision was going through parliament many organisations including ourselves considered the schedule 4 list too long and contained many offences victims were likely to have committed because of their experience of exploitation. In addition, victims may have wider defences such as duress and prosecutors have discretion not to prosecute if it is not in the public interests to do so. Article 26 of ECAT and Article 8 of the EU Directive on Human Trafficking (Directive 2011/36/EU) and The ILO Forced Labour Protocol to the Forced Labour Convention [12] detail legal requirements to have non-punishment provisions. Notably, none of them has limits or exclusions on the severity of the crime the victim has been compelled to commit recognising the key factor is circumstances of the abuse that has compelled the criminal act as opposed to the severity of the criminal act. This is because the very aim and purpose of non-punishment provisions is to encourage victims to have confidence in coming forward, be protected, receive support and prevent secondary victimisation without fear of penalty. This also encourages victims provide intelligence to the police, act as witnesses against perpetrators and recognises that victims will not seek help from authorities if they fear arrest or detention. Clause 51 conflicts with these very aims and will in our experience significantly impact on the already low prosecution rates. In particular, prosecutions under sections 1 and 2 of the Modern Slavery Act are still often dependent on victim testimony.

5.10 Finally what is meant by "bad faith" is not clarified on the face of the bill and ought to be clarified.

6. Access to Support and leave provisions (Clauses 52 and 53)

6.1 Whilst HfJ welcomes support being placed on a statutory footing we note that clause 52 reduces the current 45 day recovery and reflection period to 30 days and are concerned that support within this provision may be restricted to recovery from their trafficking experience and may not take into account pre-existing vulnerabilities. In addition, longer-term support and the recovery needs assessment has not been placed on a statutory footing. Leave provisions are also in our view more restrictive than the current guidance on discretionary leave to remain and as anticipated by Article 14 of ECAT. Clause 52 and 53 does not take into account the particular support needs of children or recognise that under Article 14 (2) leave provisions for children should be made in the best interests of the child. We note that the government have already conceding in the case of NN and LP that support under Article 12 of ECAT should not be time limited. [13]

6.2 In HfJ's experience holistic long term independent advocacy and support that is not dependent on cooperation with a criminal investigation coupled with support which addresses needs arising from exploitation, pre-existing vulnerabilities and long term regularisation of status is critical to recovery, reintegration and reducing risks of re-exploitation as well as wider re-victimisation. In addition, in our experience this empowers victims to engage with criminal and civil justice processes at a point in their recovery that they are able to do so. This is borne out by the Department of Work and Pensions Select Committee Report, numerous academic reports and the Independent Evaluation of Hope for Justice's Independent Modern Slavery Advocacy Model. [14] A snapshot of Hope for Justice data in September 2022 reveals of Hope for Justice's full caseload (live support cases and litigation only) 73% of victims have engaged with or are currently engaged with criminal investigations and between 2013 – 2021 100% of victims called to give evidence at court were able to do so. We would recommend that victims are provided with minimum levels of support of at least a year plus automatic regularisation of status on receipt of a positive conclusive grounds decision in line with Lord McColls Victim Support Bill. [15]

7. Access to Legal Aid (Clauses 54 and 55)

7.1 HfJ welcomes any provisions that extends legal aid provisions including pre-NRM advice. However, we note that these are an add on to existing legal aid provisions. Given the potential impact of wider provision under Part 4 some of which apply to British Nationals and the particular difficulties accessing immigration legal aid for those who may not have a protection claim we would recommend that there is a stand-alone provision of legal aid for pre NRM advice and representation. In addition, the application of legal aid contracts including commercial viability needs to urgently be addressed if victims are to access immigration legal aid advice. Hope for Justice Independent Modern Slavery Advocates note there are significant legal aid deserts across the country, pre NRM advice is extremely limited and this issue is more acute for victims of modern slavery which is a specialism within a specialism. This is also borne out in recent academic research. [16]

7.2 This evidence has been submitted by Phillipa Roberts Head of Policy and Research on behalf of Hope for Justice. Should you have any queries regarding the above please contact Phillipa Roberts, Head of Policy and Research, Hope for Justice

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[1] Anti Trafficking Monitoring Group Report, Hidden in Plain Sight 2013 sourced at <https://www.antislavery.org/hidden-plain-sight/>

[2] Home Office Review of the National Referral Mechanism 2014 see in particular para. 2.2.2, 2.2.4 and 2.2.5 sourced at <https://www.gov.uk/government/publications/review-of-the-national-referral-mechanism-for-victims-of-human-trafficking>

[3] Statutory Guidance on the Identification and Care of Victims of Modern Slavery see in particular para. 14.50 sourced at <https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims>

[4] See in particular Article 10 (1) of ECAT sourced at

[5] Statutory Guidance on the Identification and Care of Victims of Modern Slavery para. sourced at <https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims>

[5]

[6] National Referral Mechanism End of Year Report 2020 sourced at <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2020>

[7] Explanatory Report to the Council of Europe Convention on Action Against Trafficking in Human Beings para. 131 sourced at <https://rm.coe.int/16800d3812>

[8] <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyid=197>

[9] National Referral Mechanism End of Year Report 2020 sourced at <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2>

[10] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182

[11] CTED Report Identifying and Exploring the Nexus Between Human Trafficking, Terrorism and the Financing of Terrorism 2019 sourced at <https://www.un.org/securitycouncil/ctc/content/identifying-and-exploring-nexus-between-human-trafficking-terrorism-and-terrorism-financing>

[12] International Labour Organization, P029 - Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 11 June 2014) (entered into force 9 November 2016) (hereinafter "ILO Protocol") sourced at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

[13] Case of [https://www.baillii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2019/1003.html&query=\(NN\)+AND+\(LP\)](https://www.baillii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2019/1003.html&query=(NN)+AND+(LP))

[14] <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/672/67202.htm> ; see also A Game of Chance <https://research.stmarys.ac.uk/id/eprint/3883/> ; Human Trafficking Foundation Reports Life Beyond the Safe House, Day 46 and Long Term Recommendations sourced at <https://www.humantraffickingfoundation.org/policy> ; Independent Evaluation of the Independent Modern Slavery Advocacy Model sourced at <https://www.liverpool.ac.uk/humanities-and-social-sciences/research/research-themes/slavery-unfree-labour/slavery-theme-news/hope-for-justice/> What Looks Promising for Tackling Modern Slavery sourced at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.antislaverycommissioner.co.uk%2Fmedia%2F1565%2Fmodern-slavery-report-what-looks-promising-a4-brochure-21-031-feb21-proof-2.pdf&clen=1224166&chu> .

[15] <https://bills.parliament.uk/bills/2543>

[16] <https://news.liverpool.ac.uk/2021/05/18/people-who-survived-modern-slavery-face-significant-barriers-to-access-good-quality-legal-advice-in-england/>

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