# PART 4 OF THE NATIONALITY AND BORDERS BILL 141 OF 2021-22

## Doughty Street Chambers Anti-Trafficking Team

## Written Evidence

## 2 November 2021

## OVERVIEW

1. The Nationality and Borders Bill will have a devastating impact on victims of trafficking and modern slavery; those the Home Secretary has described as "*some of the most victimised, brutalised, exploited people in the world*".[1] The Explanatory Notes to the Bill[2] state that:

> "*The Government remains committed to ensuring the police and the courts have the necessary powers to bring perpetrators of modern slavery to justice, while giving victims the support they need to rebuild their lives. The UK is and will remain a signatory of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), which sets out signatory states' international obligations to identify and support victims of modern slavery*".

Contrary those statements, Part 4: Modern Slavery:

(1) **breaches** the United Kingdom's domestic and international legal obligations towards victims of trafficking including under ECAT;

(2) **undermines** claimed *"world leading efforts"*[3] in relation to modern slavery and trafficking, including under the Modern Slavery Act 2015 (MSA 2015);

(3) **undermines** the UK's ability to identify victims investigate and bring perpetrators of trafficking to justice, as observed by the Independent Anti-Slavery Commissioner.[4]

2. **This submission first outlines the lack of evidential or legal support for the Part 4 proposals (§§6-26); second, the specific concerns arising from Clauses 46-57 (§§27-98); and third makes recommendations, including that Part 4 be removed from the Bill; that ECAT be properly incorporated into domestic law; and that legislation, if any, on victim identification and protection be made under the existing s 50 MSA 2015, or the Victim Support Bill, not dangerously conflated in this immigration Bill (§99).**

3. Whilst this submission focusses on Part 4 of the Bill, it fully endorses the **criticisms** of the Bill overall which "***represents the biggest legal assault on international refugee law ever seen in the UK***";[5] and the risks identified by UNHCR (and others) to trafficking victims with asylum

[1] Speech Priti Patel: Modern Slavery, UK will double its development funding for tackling modern slavery, 20.9.2017 at the UN General Assembly, New York.
[2] Nationality and Borders Bill Explanatory Notes (Explanatory Notes) §33.
[3] HM Government, Department of Justice Northern Ireland, the Scottish Government, Welsh Government, 2020 UK Annual Report on Modern Slavery, October 2020.
[4] Independent Anti Slavery Commissioner (IASC) Response to the Nationality and Borders Bill. 7.9.2021.
[5] The Guardian Priti Patel's borders bill 'breaches international and domestic law' Lawyers' report says bill will lead to multiple challenges under international human rights, 12.10.2021 citing report by Raza Husain QC and a legal team on behalf of Freedom from Torture.

claims.[6] Due to the length and complexity of the proposals, it is not possible to comment on each provision individually. Any lack of comment on proposals must not be read as any tacit approval.

4. Parliamentarians are urged to scrutinise the significant and wide-ranging implications for victims of trafficking and British safety and policing as a whole. The Bill quickly followed[7] the 'New Plan for Immigration' Policy Statement, despite widespread criticisms of it, and a flawed consultation process in apparent breach of the Government's own consultation guidance principles.[8] The Doughty Street Chambers Immigration Team stated that the New Plan had "*potentially grave consequences for those in need of international protection and their families"* and *"requires careful thought and a properly informed approach. The 'New Plan' consultation offers neither.*"[9] The Bill retains the lack of care and grave consequences to victims of trafficking.

5. The Doughty Street Chambers Anti-Trafficking Team is a cross-disciplinary team with specialist expertise on the rights of victims of trafficking and modern slavery within different areas of law, e.g., immigration, crime, civil, human rights, international law, and members are recognised as leaders in these fields. Members have been involved, both in the UK and abroad, in the leading anti-trafficking cases and on advising on legislation, including the Modern Slavery Act 2015 (MSA). Members commented on the New Plan and contributed to the University of Nottingham Rights Lab *Nationality and Borders Bill Part 4: Modern Slavery Consideration Paper* (October 2021) (hereinafter 'Rights Lab').

## SECTION 1: LACK OF EVIDENTIAL OR LEGAL SUPPORT FOR PART 4 PROPOSALS

### Lack of evidential support or need for the proposals

6. The Explanatory Notes state that Part 4 aims to: (i) "*ensure that victims are identified and provided with support*"; (ii) address "*gaps in the system which allow for the NRM [National Referral Mechanism] to be misused*" (iii) "*distinguish more effectively between genuine and non-genuine accounts of modern slavery*"; and (iv) enable "*the removal of serious criminals and people who pose a threat to UK national security*" (§§35-36).

[6] UNHCR Observations on the Nationality and Borders Bill 141, 2021-22, October 2021; UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom, May 2021.
[7] Introduced on 6 July 2021.
[8] Cabinet Office Consultation principles: guidance, 17.7.2012, updated 19.3.2018.
[9] Doughty Street Chambers Immigration Team Response 'New Plan for Immigration' Home Office Consultation. 6.5.2021, §6.

7. **No evidence has been supplied to justify these claims or the need for these powers.** There is no supporting evidence of victims of trafficking and modern slavery raising bad faith claims or abusing the system of identification and support in the UK, the National Referral Mechanism (NRM) or the immigration system. The evidence is to the contrary; 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",* as shown by the Rights Lab. Part 4 duplicates existing measures or is completely unworkable. The Government already has a suite of powers and discretions to decide trafficking claims are not "*genuine"* or made properly, including in the Home Office *Modern Slavery: Statutory Guidance for England and Wales (under s 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland* ('MSSG' or 'Statutory Guidance'); and to deport serious criminals and those who pose a national security threat, including e.g. under the automatic deportation machinery in s.32 UK Borders Act 2007.

8. **The Part 4 proposals will undermine the UK's legal obligations and its trafficking efforts overall including the ability to prosecute perpetrators.** As a result of the proposed changes, and existing fears about the NRM and the role of immigration services, victims are less likely to consent to a referral to the NRM in the first place.[10] The proposed changes to identification (Clauses 46-51), by design, will inevitably result in both fewer positive Reasonable Grounds (RG) or Conclusive Grounds (CG) decisions, and the removal of potential victims and witnesses of crime, undermining policing and criminal justice efforts. This undermines the trafficking system in the UK as a whole and may put society at risk.

9. The Group of Experts on Trafficking in Human Beings (GRETA), the monitoring body to ECAT, in 2015 noted: "*One of the purposes of the Convention is to ensure the effective investigation and prosecution of trafficking offences. GRETA's evaluation of 35 parties to the Convention [including the UK] reveals that there is an important gap between the number of identified victims of trafficking and the number of convictions.*"[11] Even following the entry into force of the MSA, in its most recent report on the UK in October 2021 GRETA remained concerns that "*the number of prosecutions remains low compared to the number of identified victims*."[12]

[10] Schwarz, K et al. (2020) What works to end Modern Slavery? A review of evidence on policy and interventions in the context of justice, p.60.
[11] GRETA 4th General Report on GRETA's Activities, GRETA (2015) 1, March 2015 at 9.6; *SM v Croatia*, App. No. 60561/14 judgment (Grand Chamber), 25.6.2020 at §§171, 260-265, 344;
[12] GRETA Evaluation Report United Kingdom, Third Evaluation Round, GRETA (2021) 12, 20.10.2021, pps.5 &45 ('GRETA Third Evaluation Report').

10. Police efforts will be undermined further as a result of the Part 4 proposals, as fewer RG or CG decisions will be made, and notified to the police to investigate as potential crimes. The Home Office Guidance on the NRM 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. … All NRM referrals should be referred to the police*." Similarly, under the MSSG, the Single Competent Authority (SCA), the NRM decision-maker, should update police following an RG or CG decision.[13]

11. This crime recording is critical for the effective investigation and prosecution of traffickers who will otherwise operate undetected and go unpunished. The former Independent Anti-Slavery Commissioner Kevin Hyland, previously of the Metropolitan Police Service, in his first ever report in 2016 criticised "*substandard*" crime recording, making it clear that each and every incident of trafficking should be recorded and treated as a potential crime. These problems persist 5 years later. The Rights Lab have identified that re-trafficking is not defined or understood clearly in UK guidance, and data does not deal with re-trafficking.[14]

12. Clauses 46-57 will increase these problems. In summary, by imposing barriers to identification at the RG or CG stage (Clauses 46-48); ignoring re-trafficking or eliminating support for those with "*further RG*" decisions (Clause 49); ceasing the requirement to even make a CG decision and disqualifying a large class of victims, including those potentially exploited for the purpose of forced criminality or terrorism (Clause 51); restricting eligibility for granting limited leave to remain (Clause 53); and cutting support and assistance to all victims (Clause 49), or a wide class of victims (Clauses 49-52).

13. In this way the **immigration scheme presented in Part 4** defeats the protection of victims under the NRM and ECAT; the very measures designed to help victims recover but also to enable cooperation with police to prosecute traffickers. Part 4 of the Bill tells traffickers that the NRM will not identify and protect victims if they are recaptured and re-trafficked for further exploitative purposes (the "*no further RG decision*" or "*no additional recovery period*" rules, Clauses 48-49), or if trafficked for forced criminality (Clause 51), which they widely are; and that this entire scheme enables their *"removal*" (Explanatory Notes §§34-36). These facts will be conveyed to victims to retain control and prevent the reporting of abuse, undermining the ability to tackle this crime.

[13] MSSG; Rights Lab §177.
[14] Rights Lab §162.

**Lack of legal basis**

14. The Bill is fundamentally at odds with the government's avowed commitment to upholding the United Kingdom's trafficking obligations; and with its obligations under domestic law, ECAT, the Trafficking Directive 2011/36,[15] the 1951 Refugee Convention, the European Convention on Human Rights (ECHR), and other international instruments, including the UN Convention on the Rights of the Child (UNCRC). The proposals undermine the rights of victims of trafficking by way of amendments to obligations under the Modern Slavery Act 2015 (MSA) and regulations under s.50 MSA (Cl. 57) and are discriminatory in several ways. GRETA identified in relation to the New Plan for Immigration policy statement:

> *"GRETA is concerned that the planned legislative and policy measures risk increasing the vulnerability of victims of trafficking who are undocumented migrants, as they may be reluctant to approach the authorities for fear of being prosecuted for immigration-related offences, resulting in failure to identify them as victims, provide them with the necessary assistance, and investigate human trafficking offences. In this context, GRETA stresses that the implementation of the new Plan for Immigration must be done in compliance with the obligations arising from the Council of Europe Anti-Trafficking Convention, in particular the obligations to identify victims of trafficking, including among asylum seekers, and to refer them to assistance, as well as the non-punishment provision contained in Article 26 of the Convention."*[16]

15. **The Part 4 Proposals do not comply with ECAT.** Whilst the incorporation of ECAT into domestic law would be welcome, the Bill does not achieve that and reliance on ECAT for the proposals is selective and misconceived. The Explanatory Notes state that the UK "*is and will remain a signatory*" to ECAT,[17] and claim, variously, to rely on the Trafficking Convention in relation to the Part 4 proposals,[18] or, that they "*implement*"[19] or bring ECAT "*obligations into [domestic/primary] legislation*",[20] or are "*in line*"[21], or "*in keeping*"[22] with it or the UK's

[15] 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 on 31.12.2020.
[16] GRETA Third Evaluation Report, §48.
[17] Explanatory Notes §33. ECAT was signed on 23 March 2007, ratified on 17 December 2008, and entered into force on 1 April 2009 (the same day the NRM commenced).
[18]Explanatory Notes: §§534-5, 537 Cl. 48 RG and CG thresholds; §§540-542, 544 Cl. 49 recovery period; §§544-547 Cl. 50 recovery period exemptions; §§552& 554 Cl. 51 disqualification; §§561- 563 Cl. 52 assistance and support; §§566, 569, 570, 571 Cl. 53 leave to remain.
[19] Explanatory Notes: §540 Cl. 49, recovery period; §561 Cl. 52, assistance and support.
[20] Explanatory Notes: §547 Cl. 50 recovery period "exemptions" (and §§546, 548); §552 Cl. 51 disqualification.
[21] Explanatory Notes: §535 Cl. 48, RG threshold; §537 Cl. 48 standard of proof for a CG decision.
[22] Explanatory Notes §554 Cl. 51(2) no requirement for a CG decision to be made to "*enable the removal of those who pose a threat to the UK. This is in keeping with the UK's ECAT obligations"*.

approach in Guidance.[23] Clauses 48 and 53 are said to "*clarify*" ECAT.[24] This is wrong. **If the Government is committed to ECAT it should incorporate it in full.**

16. Part 4 is contrary to ECAT in six significant ways, including (i) the protective purposes; (ii) the systems duty to put in place an effective mechanism of identification and support; (iii) positive duties of identification, support and protection; (iv) duties towards trafficked children; (v) the non-punishment principle; and (vi) the non-discrimination principle. Section 2, below unpacks this further. As to the protective purposes of ECAT and the system needed to achieve that: there is no doubt that the Nationality and Borders Bill (NAB) is not about the protection of victims, but about immigration; and unacceptably conflates trafficking and immigration processes which must be separate and distinct; as the Courts and GRETA have pointed out.[25] As the Court of Appeal held in *PK Ghana* [2018] EWCA Civ 98*:*

(1) "*the Convention is intended to be a comprehensive legal instrument focused not only on the prevention of trafficking and the prosecution of traffickers, but also on the protection of victims of trafficking. Thus, the Preamble recognises that "protection of victims" is a "paramount objective" of the Convention; and Article 1(b) includes as a particular purpose of the Convention, not only to protect the human rights of the victims of trafficking, but to "design a comprehensive framework for the protection and assistance of victims…".* (§5)
(2) "*Measures to protect and promote the rights of victims…" are dealt with in Chapter III of the Convention.*" (§6)
(3) The Convention must be construed "*purposively*" which is "*deep within the Trafficking Convention*" (as Counsel for the Secretary of State for the Home Department conceded);
(4) The interpretation of its provisions must be "*seen through the prism of the objectives of the Convention: … in the light of, and with a view to achieving, those objectives" (§44); "the only relevant objective of the Convention is the protection and assistance of victims of trafficking" (§50).*
(5) "*the Convention is intended to give victims of trafficking particular protection and assistance*" (§56)

Failing to comply with the relevant objective of protection and assistance simply renders that protection "*otiose*" (§43). This is the error made by Part 4 of the Bill.

17. This immigration Bill gives wide discretion to the Secretary of State not only under the Bill itself, but to promulgate regulations (the placeholder Clause 57, and Clause 48(7)) about the meaning of a victim of modern slavery and trafficking and support which are already contained in the 2015

[23] Explanatory Notes: §542 Cl. 49 recovery period "*The UK's approach to implementing the provisions of ECAT is set out in guidance. This clause puts some of the key principles of the guidance into primary legislation.";* §563 Cl. 52 "*The UK's approach to implementing the provisions of ECAT is set out in guidance. This clause puts provision relating to assistance and support during the recovery period into primary legislation.*"
[24] Explanatory Notes §533 Cl. 48 "*clarifies the thresholds applied in determining whether a person should be considered a potential victim of trafficking*"; §569 Cl. 53(2)(a) leave to remain – *"Subsection (2)(a) clarifies the obligation in Article 14(1)(a) of ECAT"*
[25] *PK (Ghana), R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 98; GRETA (Group of Experts on Action Against Trafficking in Human Beings) Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, First Evaluation Round, GRETA (2012) 6 12.9.2012, p.7, §§18, 75-76.

Act.[26] This is notwithstanding the existing powers under the MSA, including the MSSG already issued under s.49 MSA; and the power in s.50 to "*make regulations providing for assistance and support*". No regulations have been issued to date, but when they are, they will be issued by reference to this immigration Bill, not the specific protection of victims. The power in Clause 48(7) in particular raises serious constitutional questions as it gives the Secretary of State *carte blanche* to over-ride the definition of a victim that Parliament enacted in the MSA 2015. Further, the Immigration Rules will also be amended to deal with leave to remain (Clause 53); and the Explanatory Notes state that "*Further legislation will be brought forward to support the wider NRM Transformation Programme and underpin any future changes to the system*" (§67). The "*NRM Transformation Programme*" aims to "*build on our world leading efforts to identify vulnerable victims and provide the support that they need to rebuild their lives*"[27] and increase the effectiveness of decision making and identification processes.

18. However, the regressive Part 4 proposals will undermine a decade of reform and the effectiveness of the NRM system itself. Indeed, reforms in 2017,[28] followed the recognition of a lack independent decision-making in trafficking claims by the Home Office – including in the Home Office's own commissioned independent review of the NRM in 2014,[29] and by the former Anti-Slavery Commissioner Kevin Hyland, GRETA and others.[30] This led to the establishment of the SCA and Multi-Agency Assessment Panels headed by an independent chair (MAPPs) to take power directly out of the hands of the Home Office. The Bill gives that power back and more.

19. **Part 4 is contrary to the ECHR**. The Home Secretary's statement of compatibility with the ECHR under s.19 (1)(a) Human Rights Act 1998, fails to take account of the risks to human rights of victims of trafficking, and the other groups affected by the proposals. The proposals give rise to a breach or risk of multiple breaches of the ECHR, including Article 4 (the prohibition of trafficking, slavery and forced labour), Articles 2 and 3 (prohibition of death or torture and inhuman and degrading treatment and punishment), Article 8 (private life and physical and moral integrity and family life), Article 14 (prohibition of discrimination), Article 15 (derogations), Article 1 of Protocol No 1 (peaceful enjoyment of property). The ECHR Memorandum published

[26] Public Law Project (PLP) Briefing Nationality and Borders Bill PLP Briefing for House of Commons Second Reading, July 2021.
[27] 2020 UK Annual Report on Modern Slavery. (October 2020). P.5.
[28] 17.10.2017 Amber Rudd Announcements of reform of the NRM; 27.11.2017 Publication of the NRM Pilot Evaluation
[29] Oppenheim, J. (2014). Review of the National Referral Mechanism for victims of human trafficking. p .49
[30] GRETA 2016 Report at §167, pps 112-113, IASC Annual Report 2016, p.41, letter 10.1.2017 the Independent Anti-Slavery Commissioner, Kevin Hyland OBE, letter to the Minister for Vulnerability, Safeguarding and Countering Extremism, Sarah Newton MP IASC Letter 10.2.2017;

alongside the NAB, expressly reinforces the immigration purposes of the Bill both in relation to Part 4 and read with Part 2, or overall. The Government acknowledges that the proposals engage Article 4 ECHR but claims no breach. This is wrong, as there is a high risk of ECHR breaches.[31]

20. **Part 4 is contrary to the Trafficking Directive**. This must be implicitly accepted by the Government in Clause 56, which disapplies rights derived from the Directive 2011/36 in the event of incompatibility with the Bill, or any provisions made under it. The incompatibilities are multiple, including on fundamental issues such as the trafficking definition itself (which includes forced criminality), identification and investigation and support duties, non-punishment, and children. The Bill is directly contrary to the human rights-based and child rights approach in the Directive and the duty to implement it in accordance with fundamental rights.

21. **Part 4 breaches the rights of child victims** and the enhanced duties of protection afforded to children, and their best interests, under domestic and international law, including the ECHR, ECAT and the UNCRC. **The rights of the child and their particular vulnerability due to age, are completely ignored by and not mentioned in the Bill or the Explanatory Notes at all. As this is manifestly unlawful, this submission need not say anything further.** However, further specific criticisms are made in relation to the devastating impact on children and their best interests have been more fully set out by Every Child Protected Against Trafficking (ECPAT);[32] including the acute concerns "*about the range of measures in the Bill which taken together will affect all child victims of trafficking including British national children and will be particularly detrimental to and unaccompanied children who are at significant risk of exploitation."*

22. **Part 4 breaches the prohibition on discrimination.** Part 4 is discriminatory in several ways. Under Clauses 46 and 47, slavery and trafficking information notices (STIN) and adverse credibility consequences will only apply to victims with protection and human rights claims; and relate to Part 2 priority notice and swift removal provisions. The Government's own evidence shows that non-UK nationals make up a significant proportion of victims referred into the NRM. Of the 10,613 potential victims referred in 2020, 5,087 were adults, and 4,453 (87%) were non-UK nationals. Clauses 49-53 potentially discriminate against different classes of victims based on their status, e.g., those who are subjected to repeat trafficking, or victims trafficked for the purpose of forced criminality or terrorism (Clause 51).

[31] Nationality and Borders Bill European Convention on Human Rights Memorandum, pps. 2-4, 8-10.
[32] Every Child Protected Against Trafficking (ECPAT) Nationality & Borders Bill Second Reading 19th and 20th July 2021.

23. The proposals breach the non-discrimination principle under ECAT, including the Preamble, and Article 3 to secure the rights of victims "*without discrimination on any ground*", as well as Article 14 ECHR read with Articles 4 or 8 ECHR,[33] and the Equality Act 2010. The "*New Plan for Immigration Equality Impact Assessment of polices [sic] being delivered through the Nationality and Borders Bill"* contains no equality impact assessment in relation to victims of trafficking. It is said to be based on data from responses to the consultation to the Plan including from "*stakeholders*" and others with "*experience of the asylum, broader illegal migration and modern slavery systems*", but no such evidence or data is provided. It recognises as a matter of generality that groups with *"vulnerability related characteristics could … experience indirect discrimination on the basis of an underlying protected characteristic*" unless any disadvantage can be objectively justified; but a single sentence in that 15-page document refers to the fact that women and girls may face "*particular difficulties*" if they have been trafficked for the purpose of sexual exploitation. The discriminatory impact of Part 4 on victims of slavery and trafficking is ignored.

24. **Part 4 is contrary to the Refugee Convention.** Extensive comment on the multiple ways in which the Bill overall, and in Part 4, penalises victims of trafficking with asylum claims in breach of their Refugee Convention rights, in addition to their rights under ECAT, the ECHR and other international instruments, is impossible here. However in summary, as identified by UNHCR including in its legal observations on the Bill "*The Bill is not well designed to reduce dangerous journeys, tackle human trafficking or fix a "broken" asylum system"* at all and the "*Bill's punitive provisions" "focus on punishing the asylum-seekers themselves"* (p.14, §§43-44).

25. Part 2 Asylum and Part 4 Slavery have a particularly problematic relationship. Victims of trafficking who are asylum seekers and refugees will be penalised *inter alia* by: **Clause 10** which assigns lesser, Group 2 refugee status for entering the UK illegally, which many victims will be forced to by reason of their trafficking or exploitation. UNHCR states: "*In short, "Group 2" status is not only inconsistent with the Refugee Convention. It is also a recipe for mental and physical ill health, social and economic marginalisation, and exploitation*" (§21). **Clause 23** - priority and late notice provisions – is a mirror to the slavery and trafficking information notice and credibility regime in Clauses 46-47. Both fail to take account of the many reasons for delays in disclosure or the production of evidence as a result of suffering trauma, fear, distrust (UNHCR §104). The externalisation of refugee policy and inadmissibility clauses (**Clause 14, Sch 3**)

[33] *Hode and Abdi v UK* (App. No. 22341/09, 6 November 2012); *K & Anor, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin).

(UNHCR §§ 28-33) taken alone, or with Clause 56 which enables removal to any country outside the UK, whether or not the victim is a national, without clearly stipulated requirements to protect against human rights abuses, or any victim repatriation assessment procedure under Article 16 ECAT, will inevitably give rise to legal challenges on multiple grounds.

26. Problems are also found in the relationship between Part 3 Immigration Offences and Enforcement and Part 4. **Clause 30** proposes the narrowing of the definition of who is a refugee for the Convention reason of membership of a particular social group, which is often the very reason victims of trafficking are recognised as refugees (UNHCR §§151-156). **Clause 37** makes it a criminal offence punishable by up to four years imprisonment for an asylum seeker who requires entry clearance (a visa) to arrive or enter without it, irrespective of mode of travel, even if they have been trafficked. **Clause 38** makes it a criminal offence to assist another to commit the new offence in Clause 37. There would be no defence to the Clause 38 offence, whether on the basis of Article 31(1) Refugee Convention (UNHCR §§26-27, 39-40), or s.45 of the MSA (the statutory slavery defence), which is excluded by para 16 of Sch 4 MSA. The criminal penalty would also apply to those intercepted and brought to the UK including victims of trafficking. It follows that victims of trafficking who are compelled to assist in facilitating the arrival of any person in the UK without entry clearance face being criminalised under Clause 38 and sentenced to life imprisonment. Such a regime would constitute the antithesis of protecting of victims of trafficking; and would in our view be incompatible with the non-punishment principle that is integral to the regime of protection for victims of trafficking (see Article 26 ECAT), and which is inherent in Article 4 ECHR (*VCL v UK* (2021) 73 EHRR 9 (77587/12) §§158-162.

## SECTION 2: LEGAL CONCERNS RAISED BY CLAUSES 46-57

27. In addition to the concerns raised overall in Section 1 above, which are not repeated, the following specific additional concerns are raised in relation to Clauses 46-57.

### Clauses 46 and 47 'slavery or trafficking information notice' (STIN) and damage to credibility for non-compliance (or the 'STIN adverse credibility process').

28. Under Clause 46, a slavery or trafficking notice may be served on a person with a protection and human rights claim (Cl. 46(1)) (as defined in Part 2 of the Bill (Cl. 46(6)) requiring them to provide the Secretary of State and any competent authority specified in the notice, "*with any relevant status information*" (Cl. 46(2)), by a specified date (Cl. 46(4)). A statement must be provided setting out the reasons for late submission, and Clause 47 then applies (Cl.46(4)). Under

Clause 47(2), the STIN punishes victims because "*[w]hen determining whether to believe a statement"*, any person who responds to a STIN late (i.e., on or after the deadline) may be disbelieved. The competent authority "*must take account, as damaging the person's credibility, the late provision of the relevant status information,* ***unless there are good reasons why the information was provided late****."* Under both Clauses, relevant status information has the meaning of "*information that may be relevant for the purposes of making*" an RG or CG decision (Cl. 46(3), Cl.47(4)). It is presumed "*[a] statement*" is the one required by Clause 46(5), though it is unclear and could be any statement. "*Good reasons*" are not defined. The applicable deadlines are not defined, either by number of days, or relative to the NRM process itself, and it is unclear how this would work at all, or without adding further delay.

29. The STIN adverse credibility process is an immigration not a trafficking mechanism, and unacceptably conflates the two. This is clear from the stated objective that relevant information is to be considered "*alongside a protection and human rights claim*" (Explanatory Notes §523), and because it only applies to victims with protection and human rights claims (Part 2), not all victims. The STIN relates to Part 2 notice, enforcement and removal provisions (Cl. 18-20).

30. The Government makes no attempt to rely on ECAT in relation to Clauses 46-47. Rightly so, as the Clauses contradict the protective purpose of ECAT, and find no place within the Convention at all. Clauses 46-47 erect barriers to identification and support, contrary to ECAT Articles 4 and 10, and increase the need for early access to early free legally aided advice. The STIN and late compliance penalty are antithetical to the universal acceptance under ECAT, Article 4 ECHR, the caselaw of the European Court of Human Rights (ECtHR),[34] domestic courts,[35] and the MSSG, that victims face multiple barriers to disclosure, let alone early or by a specified date.

31. The MSSG recognises[36] that victims are commonly **unable** to provide disclosure of their experiences of trafficking and exploitation, and disclosure may be delayed as a result for multiple reasons including, trauma, shame, stigma, fear of traffickers or the authorities, fear of reprisals, methods used by traffickers including juju, or coached stories (full of errors) to tell the authorities

[34] *VCL & AN v UK* App Nos 77587/12 and 74603/12, judgment 15.2.2021 (final) 5.7.2021; *Rantsev v. Cyprus and Russia* [2010] 51 EHRR 1; *SM v Croatia*, App. No. 60561/14 judgment (Grand Chamber), 25.6.2020 at §344.

[35] The following cases outline the long time it can take for victims to come forwards about their experiences and the complexity of the process: *Atamewan, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin); *PK (Ghana), R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 98; *MN v Secretary of State for the Home Department* (Rev 3) [2020] EWCA Civ 1746; *SF v Secretary of State for the Home Department* [2015] EWHC 2705 (Admin)

[36] MSSG Sections 4, 6, 13, 14 Annexes D and E.

if approached. Victims may not recognise themselves as a victim, self-report or self-identify, and may even not see the trafficker as a trafficker, but as family, a friend or boyfriend: as recognised by the MSSG and Conservative Group on the Greater London Authority.[37] Information may emerge piecemeal, and disclosure requires time and trusted relationships. Further factors impact and impede the ability to recall facts let alone give an account all at once, coherently and chronologically.[38] The STIN process sets victims up to fail.

32. Victims are even more likely fail the STIN adverse credibility process, if the notice is not responded to on time, or at all, because of a lack of understanding (due to language, impairment, disability or capacity difficulties), or without access to early free legally aided advice. These barriers are compounded if the victim is detained; or subjected to accelerated procedures, under Part 2. The Government has previously conceded that accelerated processing of vulnerable groups including victims of trafficking and persons with disabilities in the Detained Fast Track (DFT) process, carried an unacceptable risk of unfairness and breaches of Convention rights and the Equality Act 2010, and was unlawful. The DFT was suspended in 2015.[39] These risks and illegalities are ignored by the priority notice (Part 2) and STIN proposals (Part 4) and the Impact Assessment of the Bill.

33. It is not sufficient for the Government to say that the proposal will not operate in a blanket way and will take account of good reasons in practice, or otherwise. This is because the process itself **fundamentally reverses the positive duty on the State to identify the victim** recognised in international and domestic law,[40] by placing the duty to self-identify on the victim instead of the State. There is a statutory duty to notify the Secretary of State when encountering a potential victim (s.52 MSA), and a general obligation to spot victims, set out in the MSSG;[41] which also recognises that: "*Victims may not recognise themselves as a victim of modern slavery or [may]*

[37] Ibid. MSSG Sections 4, 6, 13, 14, Annexes D and E; GLA Conservatives. (nd). Shadow City. Exposing Human Trafficking in everyday London. p.61, 144.
[38] Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings. (2013). Report on Trafficking in Human Beings Amounting to Torture and other Forms of Ill treatment., p. 80; Witkins, R. & Robjant, K. (2021). The Trauma-Informed Code of Conduct For all Professionals working with Survivors of Human Trafficking and Slavery, p. 29; Katona, C & Howard, L. (2017). Briefing Paper: The mental health difficulties experienced by victims of human trafficking (modern slavery) and the impact this has on their ability to provide testimony.
[39] Declaration and reasons in *R otao JM, PU & Ors v SSHD* CO/499/2015; and see related litigation e.g. *Detention Action v Secretary of State for the Home Departmen*t [2014] EWHC 2245 (Admin) etc.
[40] ECAT Article 10; UN Palermo Protocol Article 4; Trafficking Directive Article 9; ECHR Article 4; *SM v Croatia,* App. No. 60561/14, judgment (Grand Chamber) 25.6.2020; and the extensive supportive international legal framework on trafficking referred to therein.
[41] Public authorities must notify the Secretary of State if there are "*reasonable grounds to believe that a person may be a victim of slavery or human trafficking*" (s.52(1) MSA); MSSG, Sections 4&5.

*be reluctant to be identified as such*" (§13.10). Contrary to that recognised duty, Clauses 46-47 require victims to provide any relevant information about their identification, within a time limit.

34. The damage caused by the Clauses, would not be prevented even if "*good reasons*" included the non-exhaustive list of reasons in the MSSG. This is because of the way the STIN process is set up. It operates as a mandatory statutory presumption of adverse credibility based on late status information, potentially rebutted only if a statement is provided, and then believed to contain good reasons. If no statement is provided, or it is but is disbelieved, the victim again fails the STIN. By reaching adverse credibility findings absent a mitigating or "*good reason*"; this statutory two-stage credibility assessment process, mirrors the process found to be unlawful by the Court of Appeal in the case of *MN*.[42] GRETA has also criticised the UK for placing "*disproportionate weight*" on adverse credibility and asylum-immigration related factors which are irrelevant to the trafficking definition; [43] yet the STIN compounds this error.

35. There is no evidence to show that victims are deliberately withholding information to misuse the NRM or act in bad faith, but rather there are "*good reasons*" why they are unable to self-identify or disclose. Delays in the NRM or asylum process are well-established to be the result of systems and resource issues by the Home Office, not the fault of victims, as recognised by the IASC and the Courts.[44] As these sources recognise, whilst there are published timescales for making an asylum decision (6 months from claim) or a CG decision (45 days from an RG decision), these are frequently exceeded. There is no system or policy for implementing the prioritisation or expedition of cases raising trafficking and asylum, even where the Home Office or SCA accepts the need for expedition. This is also despite the promises by the then immigration minister in March & May 2019 to move away from service standards and instead focus on *"cases with acute vulnerability and those in receipt of the greatest level of support*" in a system which will be monitored.[45] No such process has been introduced. Delays prevail and vulnerable victims are disadvantaged. **As a stated aim of the Bill is to "*address gaps in the system*",[46] instead of**

[42] *MN v Secretary of State for the Home Department* (Rev 3) [2020] EWCA Civ 1746.
[43] GRETA Second Evaluation Report on the UK 2016 §149 and §150 (citing First Evaluation Report on the UK and the disparity in the rate of positive CG decisions delivered by the Home Office versus the UKHTC.
[44] Refugee Council Living in Limbo, A decade of delays in the UK asylum system, July 2021; Independent Anti Slavey Commissioner Annual Report 2020-2021 citing Home Office figures; ITV News *Suspected modern slavery victims wait around 450 days on average for decision,* 17.9. 2020; *FH v SSHD* [2007] EWHC; *JP and BS v SSHD* [2019] EWHC 3346 (Admin); NN & LP vs. Secretary of State. (2019). [2019] EWHC 1003 (Admin). *EOG (Anonymity Order Made) v Secretary of State for the Home Department* [2020] EWHC 3310.
[45] Announcements by immigration minister Caroline Nokes MP in March 2019; Letter from Caroline Nokes MP to Yvette Cooper MP, Chair of the Home Affairs Select Committee, May 2019; answer to written question by Ms Nokes 16.5.2019.
[46] Explanatory Notes §35.

**introducing a flawed STIN process which penalises victims, systems should be improved to prioritise decision-making in the most vulnerable cases.**

**Clause 48 identification of potential victims – raising the identification thresholds**

36. Clause 48 alters the wording of the test for identification, from "*having reason to believe someone may be"* a victim to *"is a victim"* at the RG stage and places the standard of proof at the CG stage as the "*balance of probabilities*'; the civil standard. The existing threshold accepted in the MSSG and the Courts for an NRM referral is "*very low*" ; the RG threshold "'*I suspect but cannot prove' is a relatively low threshold*";[47] and the CG stage, is *"on the balance of probabilities"* where the SCA must consider whether *"there is sufficient information to decide if the individual is a victim of modern slavery"* (§14.83); *"The 'balance of probabilities' essentially means that, based on the evidence available, modern slavery is more likely than not to have happened. This standard of proof does not require the SCA to be certain that the event occurred.*" (§14.84). The RG stage is low because it indicates that the person "*may*" be a potential victim, not *"is*" a victim; pending further investigation to a CG determination of whether a person "*is*" a victim.

37. The Explanatory Notes state (§533) that Clause 48 "*clarifies*" the identification threshold(s); (ii) the stated purpose to separate "*genuine*" and "*non-genuine*" victims and stop misuse of the NRM; (iii) the change in primary legislation, despite the low RG threshold being found in Guidance for well over a decade; (iv) the power to issue regulations under Clause 48(7) (and Cl. 57), rather than using the existing s.50 MSA power. However such clarification is unnecessary as it is contained in the MSSG, which mirrors the approach in ECAT Article 10, the Trafficking Directive Article 11(2) (read with recital 18), and Art 4 ECHR obligations that potential victims should be identified as such based on a sufficient number of **indicators** raising a credible or reasonable suspicion of trafficking, or in the words of the Directive, a "***reasonable-grounds indication*** *for believing that the person might have been subjected to offences of trafficking".* As a result, there can be no legal change to the threshold. **Insofar as the Bill is intended to change that, it would be inconsistent with those provisions and is wrong for all the following reasons:**

38. The RG decision, or indication that the person may be a victim, is a **deliberately low** threshold as it is the gateway to basic support and protection, including a sufficient recovery period during

[47] MSSG p.56.

which removal is prohibited, to aid recovery cooperation with police against the traffickers.[48] The RG decision may trigger release from detention.[49]

39. The use of indicators is a standardised tool to identify potential victims – according to the NRM referral form, the domestic MSSG and international guidance on identification.[50] For example, a leading case concerning a child trafficked for forced criminality, *TDT, R v The Secretary of State for the Home Department (Rev 1)* [2018] EWCA Civ 1395 found that the indicators present (including those outlined in Home Office Guidance) were "*fully sufficient to raise a credible suspicion that TDT had been trafficked*". The Joint UN Commentary on the EU Directive states that the authorities:

> "*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."*

Once there are reasonable grounds for believing a person might be a victim that is "*sufficient reason not to remove them until completion of the identification process **establishes conclusively** whether or not they are victims of trafficking*" and access to entitlements under Chapter III of ECAT (ECATER §132). "***Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible"*** (ECATER §131).

40. If the Government believes that the RG threshold in Clause 48 is being raised, this will not achieve the stated aims of the Bill, would result in failure to identify victims of trafficking, and would be unlawful and inconsistent with ECAT, Article 4 ECHR and the Directive. Although it may result in fewer RG decisions, decreased support provision, so as to complement swift removal and Part 2 proposals; such changes cannot be made in the name of ECAT and would result in legal challenges. Nor can it be justified by the need for increased ability to tackle perpetrators, as this will be undermined by removing the notification of potential crimes, or the victims themselves (see §§8-11 above). Therefore there is no need for Clause 48 on any view.

41. Further, there is no evidence to show any misuse of the NRM to justify Clauses 46-47 (or any of Part 4), and the Government's assertions are misleading. The consultation paper on the Bill does not contain any data, apart from the fact that 89% of trafficking claims made whilst in detention

[48] ECAT Art 10(1), 12, 13, Explanatory Report to ECAT (ECATER) §§173-4.
[49] A positive RG decision will automatically be accepted as meaning that the potential victim is a vulnerable adult at level 2 of the Adult at Risk Policy, which strengthens the general presumption of release, subject to immigration considerations. Home Office Adults at risk: Detention of potential or confirmed victims of modern slavery, v.1.0, 25 May 2021. P.11.
[50] ILO & European Commission. (2009). Operational indicators of trafficking in human beings

resulted in a positive reasonable grounds decision. The Explanatory Notes contain no supporting data. Instead, the Government's own data shows that of the 10,627 referrals to the NRM in 2019, 91% were investigated by police forces rather than the Home Office; the Home Office's own statistics state that the increase in referrals is due to increased awareness of modern slavery and the NRM.[51] 90% of RG decisions were positive. The End of Year NRM statistics in 2020 show that 92% (9,765) of RG decisions and 89% (3,084) of CG decisions made by the SCA were positive. 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.[52] There is also a high rate of successful challenges to faulty negative NRM decisions.[53] The existing data does not come close to demonstrating abuse of the NRM. There is no gap in the system to be addressed, as the SCA separates potential or confirmed victims from those who are not accepted as such.

**Clauses 49 and 50 – restrictions on identification and protection and/or "no additional recovery period"**

42. Clauses 49 and 50 must be read together, along with Clause 51. There can be no doubt that the restrictions on the right to a reflection and recovery period and support are directed at the swift removal of victims, not their protection, and are manifestly unlawful. These proposals are *"likely to penalise acutely vulnerable victims who are subjected to repeated trafficking situations and exploitation"* and will undermine prosecutions.[54]

43. Clause 49 defines the "*recovery period"* as the period which begins from the RG decision and ends with the CG decision (Cl. 49(4)). When the "*recovery period*" in Clause 49 applies, there is a **discretion** that potential victims "***may not*** *be removed from, or required to leave the [UK]"* during that period (Cl. 50(3)). The personal scope of who may be recognised as a potential victim and protected are those with a first positive RG decision, and "***not a further RG decision***" (Cl. 49(1)(b) defined in Cl. 50(1)) and is also subject to Cl. 51 public order exceptions). A "*further RG decision*" is said to be where "the *reasonable grounds for believing that the person is a victim*

[51] Home Office: National Referral Mechanism Statistics, End of Year Summary, 2019.
[52] Rights Lab. (2021). UK Government's New Plan for Immigration Consultation response submitted on behalf of the Rights Lab, University of Nottingham; (§§94 -101) p. 4; National Referral Mechanism Statistics: End of Year Summary 2020; Office of the Independent Anti-Slavery Commissioner. (2020). Annual Report p.69.
[53] Rights Lab §88, After Exploitation, Freedom of Information Request (2021). New data: Majority of trafficking claims found to be 'positive' after reconsideration.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.
[54] Rights Lab pps.28-34.

*of slavery or human trafficking arise from things done wholly before the first RG decision was made*' (Cl. 50(1)).

44. In a "*further RG decision*" case, the competent authority **may** determine that a CG decision **may** be made if "*appropriate in the circumstances*" (Clause 50(3)) or that a person "***may** not be removed or required to leave during the period*" (Clause 50(4)). This **removes the existing mandatory requirements** to: (i) complete the process of identification of the victim with a CG decision, which may be for trafficking, re-trafficking or ongoing exploitation (Cl. 50(2)); (ii) and the prohibition of removal during that period. In addition, the duration of the period is cut from the current minimum of 45 days to "*at least 30 days*" (Clause 49(2)). The Explanatory Notes to Clause 49 claim that this "*implements"* ECAT obligations (§540) by reference to Article 13 ECAT (§542) or more opaquely "*some of the key principles of the guidance*" which sets out the "*UK's approach to implementing the provisions of ECAT*" (§542). The Notes claim that the minimum 30-day "recovery" period in ECAT is put "*into domestic legislation*" (§547). This reliance on Article 13 ECAT is legally wrong and misleading.

45. Firstly, Clauses 49 and 50 **breach the express mandatory requirements** following an RG decision to prohibit removal, provide support and complete CG identification under:

(1) Article 13(1) ECAT: "*During this period **it shall not be possible to enforce any expulsion order** against him or her."*; "*During this period, the Parties shall authorise the persons concerned to stay in their territory*";

(2) Article 10(2) ECAT: a person with an RG decision "***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** and **shall likewise ensure** that that person receives the assistance provided for in Article 12, paragraphs 1 and 2*";

(3) Article 13(2): victims "*shall be entitled*" to support measures in Articles 12(1) and (2);

(4) The MSSG at §8.20: requiring a "*Recovery Period of at least 45 calendar days. … During this period, support and assistance will also be provided on a consensual basis and **potential victims will not be removed from the UK**. A Recovery Period will not be observed where grounds of public order prevent it.*"

46. Second, the statutory cut to the minimum duration of the recovery and reflection period from 45- to 30-days (Cl. 49(2) and (4)) is artificial, and ignores the protective content and purpose of Article 13(1) which requires a **minimum** recovery and reflection period which must 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. … **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."*

This must be read with the protective purpose of ECAT Article 13(1), Articles 10, 12, 14 in Chapter III and as a whole. The Government's proposals rob these protective measures of any meaning or content whatsoever; and are contrary to the MSSG – which accepts a protection-based approach based on need, not time alone: "*It is important to note that a full recovery should not be expected during this minimum 45-day period; for some victims this may take considerably longer or may not be possible at all*" (§8.23). It is impossible to see how the Government can claim that the proposals even bring the approach to ECAT in Guidance into law. They do not.

Third, the proposals are regressive and undermine reforms to protection and support provision since the NRM commenced in 2009 (see §18 above). In 2017, the 45-day minimum period was **extended** to at least 90 days to allow for move-on support in the England and Northern Ireland.[55] In Scotland a minimum of 90 days is offered for the recovery and reflection period alone.[56] Whilst in practice the period in the NRM is usually much longer than 45 days, i.e., on average 465 days to a CG decision,[57] this is largely because of operational failings and delays in the NRM system, rather than being the fault of a victim. The Part 4 proposals do not and will not address these failures (see above (§35)) and undermine existing initiative for positive reform, such the stated intention in 2017 to fund 'Places of Safety' as part of the NRM Transformation Programme, providing pre-NRM support to help protect victims leaving immediate situations of trafficking and exploitation. This however was not implemented in the Modern Slavery Victim Care Contract (MSVCC) in January 2021, and is not part of the Bill, despite the Explanatory Notes pledging an ongoing commitment to the NRM Transformation Programme (§67).

47. Fourth, the "*further RG decision*" exemption to support (Cl.49(1)(b) and 50(1)), if "*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, at odds with the reality of trafficking and is therefore, unsurprisingly, not found in ECAT or any domestic or international guidance. It fails reflect the trafficking definition where *"[a]n 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."* (MSSG citing UNHCR Guidelines).[58] Similarly, under

[55] Rights Lab §§110-141; *Galdikas & Ors, R (on the application of) v Secretary of State for the Home Department & Ors (Rev 1)* [2016] EWHC 942 (Admin).
[56] Home Office. (2017). News story: Modern slavery victims to receive longer period of support. Scottish Government. (2021). Human Trafficking: Support.
[57] Rights Lab §§114-121; IASC. (2020). Annual Report: p.69.
[58] MSSG 2.5 citing UNHCR Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, 7.4.2006 HCR/GIP/06/07.

Article 4 ECHR the duty is to investigate all or any "*part of the trafficking chain*", to prevent traffickers operating with "*impunity*" as the ECtHR held in *Rantsev*: "*The need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable"* (§307). [59] The "*further RG decision*" exemption ignores consistent authority that those who have been trafficked may be at risk of re-trafficking;[60] and is arbitrary as it fails to consider ongoing or multiple trafficking experiences, re-trafficking, or support needs.

48. Fifth, there is no evidence of the alleged misuse of the NRM "*by those wishing to extend their stay in the UK and remove unnecessary support and barriers to removal"* (c.f. Explanatory Note §548).[61] Further, and contrary to this statement, there is no general automatic right to stay for victims with an RG decision anyway, who are simply tolerated on immigration bail, or for victims with a CG decision who are not automatically granted limited leave to remain. As a result of Clauses 49-50, vulnerable victims in need of support and protection will be placed in danger, whether from (re)trafficking, exploitation, homelessness, destitution, all of which are likely to damage their physical and psychological health. This will disincentivise victims to come forward or cooperate with police, undermining the ability to tackle the crime and prosecute perpetrators.[62]

**Clause 51 disqualification from identification or support on public order or bad faith grounds**

49. **Clause 51 is overtly damaging to victims, excessively broad and fundamentally at odds with ECAT and domestic law in several significant ways, which for reasons of space can only be summarised here.**

50. Under Clause 51(1), "*[a] competent authority*" may disqualify potential victims from protection if it is "*satisfied*" that the person "*is a threat to public order*" (Cl.51(1)(a)) or "*has claimed to be a victim...in bad faith*" (Cl.51(1)(b)). If applied, the protection to which they are entitled must "*cease to apply*" (Cl.52(2)), including *"any requirement*" to make a CG decision (Cl. 51(2)(a)) or the prohibition on removal or a requirement to leave (Cl. 51(2)(b), by reference to Cl. 49 or 50). The Explanatory Notes rely on ECAT, stating that it "*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*" and "*This clause puts these exemptions into primary legislation"* (§552). This is "*intended to enable the removal of those who pose a threat*

[59] *Rantsev v. Cyprus and Russia* [2010] 51 EHRR 1.
[60] *TDT*; *TD and AD (Trafficked women)(CG)* [2016] UKUT 92 (IAC); *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC).
[61] Rights Lab §142-163.
[62] Rights Lab §§124-141 and 150-163.

*to the UK. This is in keeping with the UK's ECAT obligations."* (Explanatory Notes §554). **This claimed reliance on ECAT is misleading and legally wrong.**

51. ECAT, the UN Palermo Protocol[63] and the Trafficking Directive 2011/36 are predicated on the effective identification of victims, protection and the prevention of crime, and the prosecution of offenders. These instruments already take account of a range of the challenges faced by states in terms of protection of victims and prosecution of offenders. However, conflating the status of victims of trafficking/modern slavery with foreign national offenders or convicted or suspected criminals or terrorists is not only a misleading and dangerous narrative, but also criminalises and penalises victims, not the perpetrators; and breaches international trafficking instruments.

52. **First, Clause 51 is contrary to ECAT.** Clause 51 a penalty *against* the victim and is therefore at odds with Article 13 ECAT which provides protection *for* the victim. The protective components of Article 13 are set out above (§44); but the provision in full reads:

> "(1) *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."*
> *"*(2) *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."*
> ***"(3)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."***

53. **ECAT**/ ECATER do not define "*public order*" in Article 13(3), but they do explain the ratio is to protect the victim and that public order grounds are **extraneous** to the victim; relating to the investigation of offences committed **against** them, not by them. This is shown by Articles 13(1) and (2) in which the **victim is the subject** and shall be protected. By contrast, the victim is not the personal subject of Article 13(3); it "*allows Parties not to observe* ***this [recovery and reflection] 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****."* The reflection and recovery period in Article 13(1) is "*without prejudice*" to the investigation and prosecution of "*the offences concerned"* (Art 13(1)); i.e., the offences of trafficking against the victim. ECATER at §§126, 147, 150, 153, 172-178, explain Article 13(3)

[63] 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),

"*public order*" grounds further which are "*against the trafficker*" to "*prevent"* the reflection and recovery period being observed. Article 13(3) is not a blank cheque to exclude victims from protection if public order grounds prevent observance of the recovery period.

54. Clause 51 undermines the dual purpose of **recovery and reflection on cooperation with police** against the trafficker.[64] As ECATER explains "***Victims recovery*** *implies, for example, healing of the wounds and recovery from the physical assault which they have suffered*" (§173) and:

> *"174. The other purpose of this period is to allow victims to come to a decision "on co- operating with the competent authorities". By this is meant that victims must decide whether they will cooperate with the law-enforcement authorities in a prosecution of the traffickers. From that standpoint, the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal. "Informed decision" means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. Such a decision requires that the victim no longer be under the traffickers' influence."*

55. Further, whilst public order grounds in Article 13(3) ECAT "prevent" observance of the recovery and reflection period, this does not apply to identification. The public order grounds do not give states a choice: they must actually be prevented from observing the recovery and reflection period. There is nothing in ECAT to support a summary cessation of the entire identification and protection scheme itself of Chapter III, which is what Clause 51 proposes, in breach of the following duties:

(1) The **duty to prohibit removal** (Articles 13 and 10) 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...*".

(2) the duty to **complete the identification** of status (Articles 13(1), 4, 10 and 18) according to the legal definition of trafficking itself which includes exploitation for the purpose of forced criminality or terrorism, under Article 4 ECAT, Article 2 Trafficking Directive 2011/36/EU ("*exploitation of criminal activities*"); and the MSSG.[65] Indeed the illicit or criminal activity may be an indicator of trafficking in of itself in favour of positive identification under the legal definition;[66] not against it, which Clause 51 cuts across.

(3) the **duty to protect** by the **prohibition on removal/authorisation of stay** and the **duty to support** victims (Articles 13(1)(2) and 12, 14, 16);

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[64] It is noted that Clauses 49-51, use *"recovery period*" not "*recovery and reflection*"; and whilst it may be convenient short-hand, it indicates that the dual purpose of the period, both to assist victims recovery and their reflection and ability to cooperate as witnesses of crime is being overlooked.
[65] Rights Lab §232 FN 202.
[66] International Labour Office (ILO) Operational Indicators of trafficking in human beings, March 2009.

(4) the **duty to protect** victims from punishment or penalisation particularly for conduct arising from their status as victims or exploitation (Article 26).

56. **Clause 51 breaches the non-punishment provision 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."* Article 8 of the Trafficking Directive requires States to take measures which entitle the competent authorities "*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*". There is no stated limit on the crimes victims are compelled to commit in consequence of their victim status, no reference to public order reasons related to the victim, and nothing which supports Clause 51.

57. **Clause 51 breaches the non-discrimination (Article 3 ECAT) by deliberately punishing victims of trafficking for the purpose of forced criminality or terrorism.** Clause 51 would apply to British and non-British nationals, or those British nationals who the Secretary of State has ordered be deprived of their citizenship where it is conducive to the public good (s.40(2) British Nationality Act 1981; Cl.51(3)(g)); if convicted of crimes set out in MSA Sch 4 (Cl 51(3)(b)&51(5)); or for "terrorist offences" committed outside the UK (Cl. 53(2)(a) & Cl. 51(4)(d)). Reprieve[67] has revealed that 63% of British women detained in Northeast Syria were victims of trafficking; and have clearly stated that this vulnerable cohort of individuals will be heavily punished by the application of Clause 51; and prevent trafficked victims returning to the UK, including those who were trafficked as children.[68]

58. The non-punishment or penalisation provision applies to all penalties, criminal or administrative, as the UN Special Rapporteur on Trafficking in Persons, especially women and children (UNSR) has stated.[69] A recent report[70] of the UNSR, Professor Siobhan Mullally, to the General Assembly of the United Nations, analyses failures to identify and assist victims of trafficking, and to protect their human rights; and urges States to protect victims, including through the application of the

[67] Reprieve. (2020). Trafficked to Isis: British families detained in Syria after being trafficked to Islamic State p. 12; Rights Lab §244.
[68] Reprieve, New bill would prevent trafficked Britons returning to UK, 28.7.2021, and written briefing on the Bill.
[69] UN General Assembly, UNSR Trafficking in persons, especially women and children, Report 17.7.20
[70] United Nations General Assembly, UNSR Trafficking in persons, especially women and children, Report 3.8.2021.

legal definition of trafficking, the non-punishment and non-discrimination provisions. Presenting the report on 27 October 2021, the UNSR stated: [71]

> *"Victims of trafficking, instead of receiving protection, are being punished and stigmatised," … It is a very serious concern that, where trafficking occurs in the context of terrorism, discrimination by States leads to failures of protection, and increases risks of trafficking and re-trafficking, including of children. … Trafficking for purposes of forced marriage, sexual exploitation, forced labour and forced criminality is a strategy used by terrorist groups, and is continuing with impunity because of these failures."*

The UNSR also highlighted concerns about the regressive nature of Part 4 proposals in oral evidence on the Bill.[72] Further, the specific failures and the illegality occasioned by Clause 51 are addressed in the written evidence of Duke Law International Human Rights Clinic.[73] Whilst it is not possible to go into further detail here, these legal analyses are fully endorsed.

59. **Second, Clause 51 is contrary to the ECHR,** which prohibits public order operating as a derogation from the duty to identify, investigate and protect and support victims under Article 4 ECHR (read with ECAT) including those who have been trafficked for forced criminality. ECAT must be read compatibly with the ECHR in accordance with Article 31 of the Vienna Convention on the Law and Treaties. The ECtHR in its caselaw on Article 4 ECHR has held that it is "*guided by [ECAT] and the manner in which it has been interpreted by GRETA."*[74] As a result, the notion of "*public order*" cannot be interpreted in a manner that deprives rights and entitlements under ECAT of any meaning or practical effect. ECAT, cannot be interpreted in a way that would breach any, or any greater human or Refugee Convention rights either, under Article 40(4) which states:

> "*Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein*."

Even if a person has been convicted of a particularly serious crime, or a convicted terrorist, they continue to be entitled to rights and procedural safeguards under international and domestic law, including the Refugee Convention and the ECHR.

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[71] UN News, New York, 27.10.2021, Human trafficking victims must be protected even in fight against terrorism – UN expert.
[72] House of Commons, Committee Stage, Oral Evidence, 23.9.2021
[73] Duke Law International Human Rights Clinic, Written Evidence to the Nationality and Borders Bill Public Bill Committee on Part 4 (Modern Slavery), October 2021.
[74] Chowdury & Others v Greece, App. No. 21884/15, Judgement, 30.3.2017 at §104.

60. Clause 51 contravenes Article 4 ECHR, from which there can be no derogation even on grounds of public order or even in time "*public emergency threatening the life of the nation*". Article 15(1) ECHR provides that:

> "*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*".

Article 15(2) ECHR stipulates that no "*public order*", or any other justifications, apply to the prohibition on trafficking and slavery in Article 4 ECHR, or the prohibition of removal to death or torture under Articles 2 or 3 ECHR. There can be no derogation whatsoever from these rights (they are "*non-derogable*"). The ECtHR 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*".[75] Similarly in relation to Article 4 ECHR, the Court in *CN v the United Kingdom* held at §65:

> *"65. The Court reiterates that, together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe (Siliadin, cited above, § 82). Unlike most of the substantive clauses of the Convention, Article 4 § 1 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation."*[76]

61. The Court has confirmed that even in respect of those rights form which a derogation may be justified, a "*public emergency threatening the life of the nation*" refers to "*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*".[77] That danger must be clear; ongoing or imminent; based on evidence; and a derogation will only be admitted to the extent strictly required by the exigency of the situation.[78] A derogation must be notified to the Secretary General of the Council of Europe, as the UK did in relation to Article 5 ECHR following the 9/11 attacks on the Twin Towers; though the measures were found to be disproportionate and unjustifiably discriminated between nationals and non-nationals.[79] The public order exceptions in Clause 51(3)(4)-(7) are not about such imminent emergencies at all, or saving life and limb; and they do not necessarily '**prevent**' compliance with the recovery and reflection period.

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[75] *Lawless v Ireland, No.3*, App. No. 332/57, 1.7.1961 at §28.
[76] *CN v the UK*, App. No. 4239/08, judgment 13.11.2012.
[77] *Lawless v. Ireland, No.3*, at § 28.
[78] See ECtHR Guide on Article 15 of the European Convention on Human Rights Derogation in time of emergency, 30.4.2021.
[79] Derogation made under s.14 Human Rights Act 1998 on 11.11.2001 lodged with the Secretary General of the Council of Europe pursuant to Article 15 on 18.12.2001 under Article 5(1)(f) ECHR; *A. and Others v. the UK,* App. No. 3455/05, judgment, Grand Chamber, 19.2.2009 at §§11 & 190.

62. **Clause 51 is excessively broad and far-reaching.** "*Bad faith*" claims are not defined. Whilst "*Public Order*" is defined by nine broad categories of conduct 51(3)(a)-(i)), (4)-(7)) it is excessively broad and clearly does not correspond to the intention of the phrase as used in ECAT or by the ECHR:

(1) **Six** of the nine categories **may not even require convictions,** undermining the claim this is about deporting "*foreign criminals*" (Cl. 51(3)(c)(d)(e)(g)(h)(i))). Cl. 51(3)(d) refers to mere suspicion that the potential trafficking victim has been involved in terrorism-related activity. Cl. 51(3)(i) suggests that the list of public order exemptions is not exhaustive and provides the Secretary of State with a discretion to exclude potential victims from protection even beyond Clause 51, which is unprecedented. Cl. 51(5) and (6) relate to offences abroad, which could be misapplied or misused.

(2) **Three** of the nine categories apparently require convictions but are highly problematic. e.g., Cl. 51(3)(a) (terrorist offence); Cl 51(3)(b) (MSA Sch 4 offence); Cl.51(3)(f) (any offence with a 12-month sentence deeming the person to be a "*foreign criminal"* within s.32(1) UK Borders Act 2007 (automatic deportation for foreign criminals). Terrorist or MSA Sch 4 offences are caught whether they are committed in the UK, or outside it, and "however [the offence] is described*" in foreign law, by virtue of Cl.51(3)(a) & (4), Cl. 51(*3)(b) & (5), and Cl. 51(6).

All nine categories of offences, suspicions, or discretions are automatically deemed to equate to "*a threat to public order*"; so operate in a blanket way, without consideration of individual circumstances, or regard to trafficking or human rights protections, or proportionality, which must render Clause 51 unlawful as a matter of domestic law.[80]

63. **Clause 51 is apparently unworkable**. It is unclear how it operates compatibly with the statutory schemes referred to within it, which do not automatically mean a person is a threat to public order. For example, the MSA is for a different purpose entirely. The statutory defence to conduct arising from trafficking is contained in s.45 MSA which sought to implement the non-punishment provision (Article 26 ECAT, Article 8 Directive); subject to 140 excepted offences listed Schedule 4 (Cl. 51(3)(b)). However, even for those offences, the Crown Prosecution Service (CPS) guidance recognises victims may still not be culpable if they have a common law defence of duress or it is not in the public interest to prosecute. The Guidance sets out the alternative

[80] Blanket rules based on criminality thresholds found to be unlawful in *AH (Algeria) v Secretary of State for the Home Department & Anor* [2015] EWCA Civ 1003; *EN (Serbia) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 630

ways in which a defence may operate, the complexities evidentially and legally as to whether a defence applies. Therefore Cl.51(3)(b) does not show that a person is a threat to public order.

64. Similarly, under the UK Borders Act referred to in Cl.51(3)(f), any conviction which carries a 12-month sentence deems the person to be a "*foreign criminal"* within s.32(1) UK Borders Act 2007 for the purpose of automatic deportation; that, however, does not mean automatically mean that they pose a threat to public order or the security of the UK, let alone one that "prevents" compliance with the recovery and reflection period. Many victims convicted of offences or deemed to be "*foreign criminals*" will be victims of trafficking who were not identified prior to their convictions, but only later on, as the cases of two child cannabis gardeners showed in *VCL & AN v UK*; and the Report Still No Way Out.[81] Document offences which may carry a sentence of 12 months commonly occur in trafficking situations because of the actions of traffickers in procuring or arranging those documents or trafficking them to the UK. [82] 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. For example, in Operation Fort those found to be exploited had been directly targeted by traffickers due to their previous convictions.[83]

65. Moreover, even for those convicted of such offences and who may be considered a public order threat, conviction does not automatically prevent compliance with the recovery or reflection period or excuse the UK from the rest of its obligations toward that person as a potential victim of trafficking. Indeed, conviction for any such offence may have no bearing on ability to comply with the recovery and reflection period and it remains essential and in the public interest that they are identified as a victim of trafficking.

66. Furthermore, the precise legal mechanism by which Clause 51 would operate to enable the disqualification and removal of potential victims deemed to be a threat to the UK is not specified. This is especially important as there is no existing statutory right of appeal against any NRM decision. The remedy lies in judicial review; and there is no specific trafficking returns procedure under Article 16 ECAT. How Clause 51 determinations would be made, by which official, and how they would operate relative to immigration powers and procedures are all unclear. What evidence may be required, or relied upon, including evidence in relation to offences abroad, evidence of foreign laws, and the use or disclosure of sensitive or open or closed material in

[81] *VCL & AN v UK* App Nos 77587/12 and 74603/12, judgment 15.2.2021 (final) 5.7.2021; Rights Lab §233.
[82] Rights Lab §226.
[83] Rights Lab §§173 and 240.

national security cases remains unexplained. Similarly, what proposals (if any) the Government has to record data in relation to disqualification/cessation and removal cases, including in the ONS statistics, is not mentioned.

67. **Clause 51 ignores the realities of trafficking**. The UN Special Rapporteur and OSCE,[84] have recognised that trafficking for forced criminality or terrorism is increasingly prevalent and:

> "*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."*

That is why the trafficking definition and the non-punishment provisions exist to protect victims; and to ensure traffickers do not operate with impunity. Clause 51 is to the opposite effect and improves the business conditions for trafficking to flourish.[85]

68. **Clause 51 will undermine prosecutions of traffickers.** According to evidence from The Prison Reform Trust and Hibiscus,[86] 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. As identified by the IASC, the statutory defence in s.45 MSA is not currently operating effectively to prevent victims being criminalised. Clause 51 will undermine this further (Rights Lab §§224-225). Clause 51 inevitably undermines that protective scheme *and* prosecutions further because without protection or conclusive recognition and/or a residence permit (implemented in the UK as time limited discretionary leave to remain in the UK),[87] a victim will likely face removal action. As ECATER makes clear:

> "*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 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"* (§181).

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[84] Rights Lab §175.
[85] Rights Lab §§167-246.
[86] The Prison Reform Trust & Hibiscus. (2018). Still No Way Out Foreign national women and trafficked women in the criminal justice system. p. 5.
[87] 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.

69. Moreover, unnecessary exclusion of a wide class of victims from identification procedures, is a boon for traffickers and is flatly contrary to the public interest in investigating trafficking and prosecuting traffickers. For example, someone who has been trafficked by a major criminal gang, many have committed a far less serious criminal offence, yet that trafficker will not be investigated or prosecuted because the victim and key witness is not identified as a trafficked person and is left without support and is summarily removed from the UK. Moreover, even those who are not in fact removed during that period will no longer be identified as victim and supported to give evidence, thus denying the investigation into the trafficker important evidence and a witness, when there is no benefit to the UK whatsoever.

70. **No evidence whatsoever has been presented to support the claimed need for Clause 51**. The evidence shows that Clause 51 is likely to undermine, not support, policing and also national security measures, as the Independent Anti Slavery Commissioner has warned. It has the "*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*"; and 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".* It duplicates existing measures as the SCA can simply not accept that a person is a victim if they themselves have made an improper claim, by making a negative RG or CG decision. There is a suite of existing statutory powers to enable the removal of those considered to pose a threat to the UK, not least the automatic deportation machinery under UK Borders Act 2007, even used to deport even recognised victims of trafficking.

**Clause 52 assistance and support**

71. Clause 52 is said to implement Article 13 ECAT (Explanatory Note §§561, 563), but does not do so. Clause 52(1) requires "*necessary assistance and support*" to be provided, but only to those with an RG decision. It does not apply to those with "*further RG decisions*" (Cl. 48&49, 52(3)&(4)), and Cl.50), or those disqualified from protection altogether (Cl.51 and 52(6)). Clause 52 is contrary to ECAT for the reasons given in relation to Clauses 48-51 above. Unlike in Northern Ireland and Scotland, victims in England and Wales have no legal right to support; which Clause 52 would change by amending the MSA with s.50A. Whilst a legal right to support under ECAT would be welcome, the Part 4 negative restrictions are contrary to the Convention.

72. Clause 52 is contrary to Articles 10, 12 and 13 ECAT; and the protective scheme they operate under Chapter III ECAT. The Explanatory Notes to the Bill rely on Article 13 in relation to

support but fail to mention Articles 10 and 12 at all. Unlike ECAT, Clause 52 does not provide support as of right, but limits the provision of support only where it is "*necessary*" (Cl. 52(2)) or "*appropriate*" (Cl 52.(4) or (5)). However, under Articles 12 and 13, assistance and support *"shall*" be provided as of right, given the importance of recovering and escaping the influence of traffickers (ECATER p.28).

73. The test of what is "*necessary*" is met "*if the Secretary of State considers that it is necessary for the purpose of assisting the person receiving it in their recovery from any harm to their physical and mental health and their social well-being arising from the conduct which resulted in the positive reasonable grounds decision in question"*. This is a causation test which seeks to separate needs arising from trafficking which has been accepted by the SCA, from any other, or pre-existing trauma and vulnerability. This notion or criteria is not found in ECAT.

74. It is not explained how the Secretary of State or a caseworker would operate this definition, because trafficking and the harm caused does not fit into a neat category. The Home Office has previously accepted that 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: "*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."*[88] Victims may be targeted by traffickers due to pre-existing vulnerabilities, mental illness or even substance abuse, which "*makes recovery even more challenging as the initial vulnerability is then compounded by the trauma of being exploited and abused"*.[89]

75. Clause 52(8) defines "*conclusive grounds decision*" and "*recovery period*" by reference to Clauses 57 and 49 respectively (or ss.57 and 49 NAB).[90] Whilst Cl. 52(7) defines "*assistance and support*" by reference to arrangements under s.49(1)(b) MSA (the MSSG) (Cl.52(7)(a)) or regulations under s.50 MSA (Cl. 52(7)(b)), no regulations under the MSA have ever been issued; and any future regulations will have to be issued by reference to the NAB not the MSA. This compounds the tethering of immigration and trafficking and the piecemeal approach to trafficking legislation in the UK.

76. Clause 52 will undermine the well-established benefits of support for victims and their ability to assist the police, as well as society as a whole. A cost-benefit analysis conducted by the Rights

[88] Rights Lab §272; Home Office. (2017). A Typology of Modern Slavery Offences in the UK, p.3.
[89] Rights Lab §271, Centre for Social Justice. (2020). It Still Happens Here. Fighting Modern Slavery in the 2020s.
[90] Cl 52(7)(a) by reference to s.49(1)(b) and Cl 52(7)(b) by reference to s.50.

Lab showed 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.[91] Existing evidence on effective modern slavery and trafficking policy consistently calls for improved and increased victim care and support (Rights Lab §123).

77. Positive legislative change would be welcome, but this is apparently not the Government's intention at all, as it is not taking up progressive opportunities already presented. The Government could and should provide a legal right to safehouse accommodation and support during the reflection and recovery period and after, including 12 months leave to remain as of right following a positive CG decision, by way of amendments to s.48 MSA as proposed in the Modern Slavery (Victim Support) Bill by Lord McColl in 2017 (and reintroduced in October 2020). The Government has stated that they do not support that Bill in its current form, nor do they agree that victims should automatically be granted leave to remain for 12 months.[92] Further, after the enactment of the MSA, the Slavery and Trafficking Survivor Care Standards were published to ensure consistent care to adult victims in the UK. The Minister responsible, Sarah Newton MP, in 2017 announced that these would be adopted "*as a minimum standard for victim support"*.[93] The Home Office commissioned Care Quality Commission (CQC) inspection of safe houses to implement the Care Standards announced in January 2021. However, the Part 4 proposals undermine these agreed Standards and fail even to provide for the minimum support, in particular for victims deemed ineligible of disqualified from it. **The Government should be making progressive not regressive reforms.**

**<u>Clause 53: leave to remain for victims of slavery or human trafficking</u>**

78. The Government says that Clause 53 "*sets out the circumstances in which the Secretary of State must grant temporary, limited leave to remain to confirmed victims of modern slavery*" and those when it is not (Explanatory Notes §565). The Government claims that this proposal, in part, "*reflects"* ECAT obligations (Explanatory Notes §566, 569, 570). This is misleading and legally wrong; and is a selective and restrictive interpretation of the Convention.

79. 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*

[91] Rights Lab §260-262; §§263-277;
[92] Rights Lab §223.
[93] Rights Lab §264.

*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. A grant of discretionary leave to remain (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. Existing data shows that the number of grants of DLR to victims is already very low. The restrictions and exemptions in Clause 53 threaten grants for victims even further (Rights Lab §287-289).

80. Under Clause 53(1) leave to remain "*must***"** be granted if a victim with a positive CG decision who is not British and does not have leave to remain, provided, if under Cl.53(2), the Secretary of State "*considers it necessary*" for three specified purposes:

(a) "*assisting the person in their recovery from any harm arising from the relevant exploitation to their physical and mental health and their social well-being*";
(b) *enabling the person to seek compensation in respect of the relevant exploitation, or*
(c) *enabling the person to co-operate with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation."*

This is concerning for several reasons.

81. First, *"the relevant exploitation" means the conduct resulting in* ***the positive reasonable grounds decision*****"**; oddly, not the positive CG decision (Cl. 57(9)). Caseworkers may require a higher level of certainty about "*the relevant exploitation*" at the RG stage if it will lead to leave to remain. This compounds the concerns both in relation to no "*further RG decisions*" (Cl. 49 and 51); and the raising of the RG threshold (Cl.48); which cannot simply be passed off as "minor" when looking at the NAB scheme overall.

82. Second, the personal circumstances criteria in Article 14(1)(a) ECAT is restricted; it does not "*clarify*" it, contrary to the Explanatory Notes at §569). It imports a causation test "*harm arising from the relevant exploitation"*, which is both legally wrong and complex, for the reasons given above in relation to Clause 52 (§§ 73-74), particularly where there are pre-existing vulnerabilities or conditions which are targeted by the trafficker and exacerbated by the trafficking situation and exploitation. It is also unworkable and is likely to lead to absurd results. The Secretary of State could deem it "*unnecessary*" to grant leave if unable to positively establish (with or without evidence) that harm arose from the "*relevant exploitation*", separate from a pre-existing vulnerability, even if that person had increased need for support and recovery and leave to remain owing to their personal situation.

83. Third, the circumstances in which leave is deemed ***"not necessary***" – giving rise to potential summary removal of the person not only to their home country but a third country, or by agreement with foreign states is acutely concerning. Leave to remain is deemed "*not necessary*" if "*the persons need for assistance is capable of being met in a country or territory*" outside the UK (Cl. 53(3)(a), (4)(a),(b)); or the Secretary of State considers that the "*person is capable of seeking compensation outside the [UK]"* (Cl/ 53(a)(i)) *"and" "it would be reasonable for the person to do so in the circumstances."* (Cl.53(3)(b)(i) and (ii)). The "*country or territory … is a country of which the person is a national or a citizen"* or "*is one to which the person may be removed in accordance with an agreement contemplated between that country or territory and the United Kingdom (as contemplated by Article 40(2) of the Trafficking Convention."* (Cl.53(4)).

84. Article 40(2) ECAT does not "*envisage*" removal contrary to its terms. Article 40 ECAT deals with the relationship between ECAT and other international instruments aimed at ensuring "greater protection and assistance" for victims. As ECATER explains:

> *"Indeed, this Convention intends to strengthen victims' affect rights and obligations (2) ECAT provides: The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it. Protection and assistance and for this reason paragraph 1 of Article 40 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which Parties to the present Convention are also Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for victims of trafficking. This provision clearly shows, once more, the overall aim of this Convention, which is to protect and promote the human rights of victims of trafficking and to ensure the highest level of protection to them."* (§373)
>
> *"Paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other international instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from the Convention.*" (§374).

85. Fourth, the Secretary of State is "*not required to give leave*" or may revoke any leave granted, if satisfied that the person is a threat to public order or has claimed to be a victim in bad faith (Cl.53(6) and (7)). Clause 51(3)-(7) applies by virtue of Clause 53(8).

86. Fifth, these powers are excessively broad and confusing and the Explanatory Notes do provide any necessary explanation as to how this power will operate. The Notes state that "*Further detail pertaining to the **grant of leave** will be set out in the Immigration Rules*" (Explanatory Notes §565); however Clause 53(7) states that Clause 53(2) leave given "***may be revoked** in such other circumstances as may be prescribed in immigration rules"*. Further, what the removal or

repatriation agreements will be, their terms, the "*countries or territories*" they are concluded with, or their human rights record or standing in relation to trafficking in persons are not specified.

87. Clause 53 on its face enables summary removal of confirmed victims of trafficking not granted leave, contrary to the safeguards of Articles 14, 16, 40 ECAT, and potentially the person's rights under the ECHR/Refugee Convention. Those rights will only be considered in pre-existing asylum or immigration processes, but not absent such outstanding claims. Further, Clause 53 directly conflates trafficking protection criteria with leave to remain criteria, for example under medical leave exemptions, which is a public law error and unlawful under domestic law.[94]

88. Finally, Clause 53 (like the rest of Part 4) ignores all available existing evidence. Research shows the benefits of extended support to the victim and criminal justice, and also to society and the economy as a whole, ultimately saving the Government money. It also shows re-trafficking is a risk facing those identified as victims but not granted support. The Rights Lab and the Office of the Independent Anti-Slavery Commissioner have investigated the issue of re-trafficking and the fact that without effective reintegration strategies, dedicated returns programmes, and viable, stable options for victims, re-trafficking is a significant risk (Rights Lab §§294-295, 302).

**Clauses 54-55: Civil legal aid NRM "add-ons" to existing grants of legal aid for certain immigration and asylum matters**

89. Under Clauses 54 and 55, 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) (Cl.54), or by way of exceptional case funding (ECF) under s.10 LASPO (Cl.55) for matters which are "out" of scope (Explanatory Notes §579). This will amend LASPO Part 1 Schedule 1 in relation to matters "in scope" of legal aid, and s.10 in relation to out of scope matters subject to the ECF regime. "*The aim of this clause is to identify and support individuals who may be potential victims of modern slavery or human trafficking by ensuring they receive advice on referral into the NRM to understand what it does and how it could help them*" (Explanatory Notes §588 (Cl. 55) and §580 (Cl. 54)).

[94] *PK Ghana* at §§43, 46, 54, 55.

90. Clauses 54-55 do not provide for standalone pre-NRM advice for all victims not already in receipt of legal aid for other immigration and asylum matters. Whilst the "add-on" to legal aid pre-NRM is welcome, it should not be restricted in the way that it is. There should be free legal aid as of right at the earliest stage pre-NRM for all victims to ensure their access, participation, and the effective protection of their rights. 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 – see *Rantsev v. Cyprus and Russia*.

91. There are already extensive difficulties in relation to access to justice under the LASPO regime (Rights Lab §311-322). 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. GRETA has commented on the importance of free legal aid provision in the UK in its Evaluation Reports of both 2012 and 2016. 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."*

92. The importance of and need for free legal aid at the earliest stage is significantly increased by the complexity of the Part 4 proposals and the risks of breaches of victims rights and access to justice. **All trafficking matters including pre NRM should be brought in scope of legal aid.**

**<u>Clause 56 disapplication of retained EU law deriving from the Trafficking Directive</u>**

93. As the Explanatory Notes make clear, Clause 56 "*states that the Trafficking Directive should be disapplied in so far as it is incompatible with any provisions in this Bill"* (§§590, 592). Clause 51(1) states that the Trafficking Directive "*ceases to apply to rights, powers, liabilities,*

*obligations, restrictions, remedies and procedures derived from the Trafficking Directive so far as their continued existence would otherwise be incompatible with provision made by or under this Act*." Whilst the Trafficking Directive was saved in domestic law after Brexit under s.4 Withdrawal Act 2018 (referred to in Cl.56(1)), Clause 51 provides a wide power to disapply the Trafficking Directive if compatible not only with the Bill, or secondary legislation or statutory guidance *"under this Act*", for example under s.50 or the MSSG. **The full legal concerns in relation to the WA and fundamental rights are beyond the scope of this submission.**

94. 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 and the Explanatory Notes to the Bill. The express power to cease the application of rights derived from the Trafficking Directive, if incompatible with the Bill, runs counter to the Government's stated commitments. Clause 56 will also undermine existing trafficking efforts and the response to criminal justice and the rights of victims of trafficking as victims of crime in the Victims of Crime Directive[95] and relevant Codes of Practice.[96]

95. Clause 56 will weaken the protection of victims' rights in UK law. The EU adopted the Trafficking Directive on 5 April 2011. 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."* The deadline to transpose the Directive into domestic law was 6 April 2013, but the Government broadly took the view that the UK already complied with the Directive either in law, or in relation to support duties "in practice" through the NRM and victim care model, so did not deem it necessary to adopt further implementing legislation. [97]

96. As a result, the Directive applies directly in UK law, as the Government conceded in 2013, and as found by the Courts.[98] By contrast, the Government has consistently argued against the direct application of ECAT, arguing that victims cannot rely on it directly and it cannot be enforced in

[95] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
[96] Ministry of Justice. (2020). Code of Practice for Victims of Crime: England and Wales .
[97] Rights Lab §§335-337.
[98] E.g. *Hounga v Allen & Anor* [2014] UKSC 47.

the Courts.[99] ECAT only applies in UK law indirectly through Guidance, which governs the NRM. In its first ever evaluation report of the UK, GRETA recommended that all parts of the NRM should be placed on a statutory footing instead of being covered by piecemeal legislation. The inclusion of Clause 56 would not be necessary if the Government did not already envisage a conflict between the Bill and the rights of victims of trafficking, whether under the Directive or ECAT. The Explanatory Notes, Equality Impact Assessment and Human Rights Memorandum are completely silent on the issue. Conflict is readily foreseen, not least in relation to the definition itself for the purpose of forced criminality and terrorism (Article 2), identification (Article 9), assistance and support (Articles 11-17) or non-punishment (Article 8).

97. The trafficking definition and identification and support duties are not contained in the MSA, so reliance must be placed on the MSSG and the Guidance. Guidance can easily be amended, by downgrading of the rights of victims, without any Parliamentary or any scrutiny as previously been seen (e.g., on issues such as the cut to support rates or DLR). **The Government must openly publish its proposals and an impact assessment on incompatibility forthwith.**

**Clause 57. Part 4: interpretation**

98. Clause 57 provides definitions of terms used in Part 4 of the NAB including a CG decision and states that "*positive reasonable grounds decision*" has the meaning given by section 49(1) NAB (Cl. 49). It refers to ECAT, but as stated above the proposals in Part 4 of the Bill are contrary to it, the Trafficking Directive, the ECHR, and the UK's international obligations. Further, it confers a power on the Secretary of State to set out the meaning of "*victim of slavery*" and "*victim of human trafficking*" in Regulations made by the Secretary of State, subject to affirmative resolution procedure (Cl. 57(1) and (2)). This underlines both the conflation between trafficking and immigration, by containing trafficking definitions and duties in an immigration bill, and the fact that none of the powers in Part 4 are in fact necessary and simply duplicate of existing powers.

[99] Most recently see KTT, *R (on the application of) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin).

## SECTION 3. CONCLUSION AND RECOMMENTATIONS

99. **The Bill undermines the Government's stated goals, ECAT and the UK's legal obligations towards victims of trafficking. The Government should be making progressive not regressive changes; and it is recommended that:**

**(1) Part 4 be removed from the Bill;**

**(2) ECAT be properly incorporated in full into domestic law, including the definition of trafficking and legal rights in relation to identification, support, and protection;**

**(3) Trafficking-specific legislation be passed on victim identification and protection, including for example under the existing provision of s.50 MSA, or via the Victim Support Bill, not through this immigration Bill;**

**(4) Home Office policies and resources be improved to combat delay and detriment suffered by victims, including by prioritised decision-making for the most vulnerable;**

**(5) All trafficking matters including pre-NRM be in scope of legal aid under LASPO; and that any civil legal services that the Government is seeking to fund are not confined to those cases with an existing immigration or asylum grant.**

**2 November 2021**

**DOUGHTY STREET CHAMBERS ANTI-TRAFFICKING TEAM**