

# Joint Committee on Human Rights Inquiry – Human Rights of Asylum Seekers in the UK

## Written response submitted on behalf of the Rights Lab, University of Nottingham, December 2022

This submission was prepared by Vicky Brotherton (Head of Policy Engagement and Impact) and Kate Garbers (Rights Lab Research Fellow in Policy Evidence and Survivor Support) and responds to questions 8 & 9 of the Inquiry related to modern slavery.

### About the Rights Lab

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

### Question 8. Is the UK's legal framework for tackling modern slavery and human trafficking effective, and is it compatible with our human rights obligations? Are there changes that should be made?

1. The main domestic legal instruments for tackling modern slavery in the UK are the Modern Slavery Act (2015) – labelled as world leading and the first of its kind in Europe when enacted<sup>i</sup> - the Human Trafficking and Exploitation (Scotland) Act 2015, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, and the more recent Nationality and Borders Act (2022). These legislative instruments contribute to the UK's implementation of the 2005 Council of Europe Trafficking Convention (ECAT) and the 2011 EU Trafficking Directive.<sup>ii</sup> **Given the focus of the Rights Lab's recent work<sup>iii</sup> to support and monitor the development and implementation of the Nationality and Borders Act 2022, we have focused on this legislation in our response.**
2. The Nationality and Borders Act 2022 (the 'Act') reached Royal Assent on the 28th April 2022. Part 5 of the Act (on 'Modern Slavery') requires changes and additions to the Modern Slavery Statutory Guidance for England and Wales (under Section 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, and the development of new regulations.<sup>iv</sup> At the time of this submission, Part 5 of the Act has not yet entered into force in its entirety.
3. There are concerns that the regulations and amended guidance stemming from Part 5 of the Act may:
  - Further destabilise and damage the National Referral Mechanism (NRM) system of identification and protection, reducing the support and protections available and accessible to all survivors.
  - Not meet the UK's international obligations under ECAT and European Convention on Human Rights (ECHR) in relation to survivor support and protections.
  - Be implemented without proper and formal consultation processes with parliamentarians, the antislavery sector, and those with lived experience.
  - Undermine prevention, policing, and prosecution efforts.<sup>v</sup>

4. As noted by Doughty Street Chambers in its written evidence to Parliament in November 2021, the Act is contrary to ECAT in six significant ways:
- the protective purposes;
  - the systems duty to put in place an effective mechanism of identification and support;
  - positive duties of identification, support and protection of victims and the investigation and prosecution of offences;
  - duties towards trafficked children;
  - the non-punishment principle;
  - the non-discrimination principle.<sup>vi</sup>

Below we have outlined five specific sections from Part 5 of the Act that highlight the Act's incompatibility with international legislation.

5. **Section 58 of the Act** allows for the serving of a 'slavery or trafficking information notice' (STIN) to individuals who have made a protection or a human rights claim. The notice requires them to provide any relevant information relating to their status as a victim of slavery or trafficking within a specified period. Information provided in the notices may be used to make decisions at both reasonable grounds (RG) and conclusive grounds (CG) stages within the National Referral Mechanism (NRM, the UK's framework for identifying and supporting victims of modern slavery). If information is provided late (on or after the specified date), the recipient must also provide a statement setting out the reasons for not providing the status information 'before' the specified date. If deemed to be late without 'good reasons', **Section 59** considers this to damage an individual's credibility. **These provisions conflate immigration and modern slavery decision-making, punish delayed disclosure by victims, and only apply to those who have made a protection claim or human rights claim. This is discriminatory and directly contravenes the prohibition of discrimination in Article 14 of the ECHR and Article 3 ECAT.**<sup>vii</sup>
6. **Section 63** states that a victim with a RG decision may be disqualified from protection if the Competent Authority (the body responsible for making decisions on the credibility of individual NRM cases) is satisfied that the person is a 'threat to public order' or has claimed victim status in 'bad faith'. Disqualification from protection means that the mandatory requirements to provide protection and support under the 'reflection and recovery period' (offered by the NRM and delivered via the Modern Slavery Victim Care Contract (MSVCC)), the prohibition on removal, and any requirement to grant limited leave to remain, will cease to apply (Sections 63(2), 64, and 65). Protection or leave may also be revoked. Section 63 is contrary to ECAT because it allows for removal and cessation of support for victims with a positive reasonable grounds decision, which is not part of ECAT. **If a victim identified on reasonable grounds is removed from the territory during the reflection and recovery period on 'public order/bad faith' grounds, without a conclusive grounds decision or in any circumstances where prompt and correct victim identification has not been completed, this will breach Article 10 ('Identification of the victims') of ECAT and the ECHR.**
7. **Section 65** outlines the circumstances in which leave will be granted to conclusively identified victims if the Secretary of State 'considers it necessary'. There are three reasons this could be considered; assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation; enabling the person to seek compensation in respect of the relevant exploitation; and enabling the person to co-operate with an investigation or criminal proceedings. Section 65 misinterprets the obligations outlined in ECAT as it:
- a) Narrows the scope of the personal circumstances in which a victim would be entitled to a period of discretionary leave.

- b) Limits the compensation/cooperation with the police grounds if the victim can seek compensation from outside the UK (so a victim can be returned home whilst these processes are on-going).
  - c) Overlooks the connection between secure status, recovery, and cooperation with law enforcement.
  - d) Is silent on non-exhaustive factors such as the risk of reprisals or re-trafficking upon return.<sup>viii</sup>
8. Limiting the reasons to grant leave is concerning and presents a risk to victims' right to remedy and redress. It will also hamper efforts to tackle the perpetrators of this crime. If victims do not feel supported, are returned home and not provided leave, their engagement in criminal justice processes against their traffickers will reduce and prosecutions are likely to fail.
  9. **Section 68** disapplies the EU Trafficking Directive. Section 68 intends to; disapply the Trafficking Directive where is incompatible with provisions in the Act, bring legislative clarity to the modern slavery clauses in the Act and avoid any duplication of rights, as well as provide clarity to victims on their rights and entitlements.<sup>ix</sup> The Directive was adopted by the UK on 5th April 2011. It was intended to build on ECAT. Like ECAT, the Directive aims to prevent and combat trafficking by imposing obligations on member states to investigate and prosecute trafficking as a serious organised crime and a gross violation of fundamental rights. The main concern with the disapplication of the Directive is that it has had direct effect in UK law, providing victims with enforceable rights and remedies in UK courts. Existing UK legislation does not enshrine specific assistance and support measures included in the Directive.<sup>x</sup>
  10. The Trafficking Directive was retained in UK law after the UK's withdrawal from the European Union (EU) by section 4 of the EU (Withdrawal Act) 2018, and therefore it continues to apply. So does the case law in relation to the Directive. It is therefore surprising that the Government consider that the Directive is already disappplied. The Government have stated that the Section 68 will not remove any entitlements from victims, nor will it have an impact on victim identification, protection and support, however have not specified which elements (which include rights, powers, liabilities, obligations, restrictions, remedies, and procedures) of the Trafficking Directive it considers incompatible with the Act. Nor have they offered clarity as to which sections of the Trafficking Directive would cease to apply under Section 68.<sup>xi</sup>
  11. In summary, there are ongoing and significant concerns regarding the impact that the Nationality and Borders Act will have on victim support, protection and access to justice in the UK. UN human rights experts in January 2022 warned that the legislation fails to respect the UK's obligations under international human rights and refugee law, and fails to ensure the rights of trafficked persons.<sup>xii</sup> In December 2022, these warnings still ring true; **the Act undermines the effectiveness of the UK's efforts to tackle modern slavery.**
  12. Whilst the government have incorporated some of the ECAT's articles into domestic law, some are notably absent, including specific victim assistance and support measures, as detailed in Article 12 of ECAT and Article 11 of the Trafficking Directive. At present, support measures and entitlements are only detailed in guidance and policy documents, which can be altered by the government with limited scrutiny. The announcement in the 2022 Queen's speech of a new Modern Slavery Bill that will '*strengthen the protection and support for victims of human trafficking and modern slavery*' provides an opportunity for the government to address the disparities between international legislation and UK law, and transpose victim support entitlements into primary legislation.

**Question 9. Is there any evidence that modern slavery laws are being abused by people “gaming” the system?**

13. Launched in 2021, The New Plan for Immigration Policy Statement clearly stated the government’s intention to link the issues of immigration and modern slavery.<sup>xiii</sup> The government justified this connection claiming that support systems in place for survivors of modern slavery were being misused by Foreign National Offenders (FNOs), and those who pose a national security risk, wishing to frustrate their removal from the UK.<sup>xiv</sup> Since the launch of this policy and the introduction of the Nationality and Borders Act, UK Government representatives, including the Home Secretary and the Prime Minister, have on multiple occasions stated that the UK’s modern slavery laws are being abused.<sup>xv</sup> This line has been repeated by some in the British media, with the majority of focus of this accusation, most recently, being placed on Albanian nationals arriving in small boats via the English Channel. However, as detailed below, there is no evidence that modern slavery laws are being abused by people ‘gaming’ the system.

**Misuse of the National Referral Mechanism (NRM)**

14. The National Referral Mechanism (NRM) is the UK’s framework for identifying and supporting victims of modern slavery,<sup>xvi</sup> and is detailed in Statutory Guidance published under Section 49 of the Modern Slavery Act 2015. Despite this existing framework provided through the Modern Slavery Act, the government maintained that the inclusion of Part 5 (on ‘Modern Slavery’) in the Nationality and Borders Act 2022 was necessary for a range of reasons, including preventing misuse of the NRM by serious criminals.<sup>xvii</sup> In its attempt to evidence misuse, the government pointed to the fact that between 2017 and 2019, the number of individuals in immigration detention referred to the NRM increased from 3% (501) to 16% (1,767).
15. This increase in NRM referrals alone is insufficient to support the government’s claim. Firstly, there is no evidence to suggest that all immigration detainees referred to the NRM are serious criminals. To the contrary, many victims of modern slavery in immigration detention have committed no crimes at all. Some victims may wrongfully have been accused of crimes related to their own trafficking experience, for instance, as victims of criminal exploitation. Secondly, an explanation for this increase could be greater awareness and improved training of detention centre staff on modern slavery indicators. These indicators may have been missed before the individual was sent to immigration detention, or the victim may not have disclosed their experience of exploitation before arriving in immigration detention. It is worth noting that of the 1,767 potential victims referred to the NRM in 2019 from detention, 90% received a positive reasonable grounds decision, i.e. in 90% of cases, Home Office case workers agreed with the first responder agency that there were reasons to believe the individual referred was a victim of modern slavery. NRM statistical data for the whole of 2021 shows that of the 12,665 reasonable grounds decision made in the year, 90% were positive, and of conclusive grounds decisions made, 91% were positive. This would suggest that modern slavery legislation and the NRM are not being misused or ‘gamed’ in the majority of cases.
16. On the 8th December 2022, Ed Humpherson (Director General for Regulation, Office for National Statistics) wrote in his letter to Jennifer Ruben (Chief Scientific Adviser at the Home Office) that the increasing number of potential modern slavery victims referred to the NRM in recent years may reflect increasing awareness of modern slavery identifiers by first responder organisations.<sup>xviii</sup> Whilst it could also represent a ‘gaming’ of the system, Humpherson stated that, *‘policy officials in the department could not point to any specific evidence for this when we enquired’*. Moreover, the proportion of positive CG decisions that have been issued by the

Home Office has risen year by year, from 58 per cent in 2016 to 91 per cent in 2021. Again, suggesting that in the vast majority of cases, Home Office case workers found there to be, 'on the balance of probabilities', sufficient grounds to believe the person is a victim of modern slavery.

### **Abuse of modern slavery laws by Albanian nationals**

17. As noted above, there has been a significant uptick in claims made by government representatives and media commentators that migrants crossing the English Channel, in particular Albanian nationals, are abusing modern slavery laws and making false claims to be modern slavery victims.
18. In March 2021, the then Independent Antislavery Commissioner wrote to the Head of the Single Competent Authority to make a formal data request to better understand the extent to which potential victims of modern slavery are among those arriving via small boats and lorries.<sup>xix</sup> The data request – on the number of NRM/Duty to Notify (MS1) process referrals for those that have arrived in the UK via small boat crossings between 01 January 2021 and 10 December 2021 – was refused. This data was however received via a subsequent Freedom of Information Request (FOIR)<sup>xx</sup>, and showed that:
  - In 2021, 28,526 migrants are known to have crossed the English Channel in small boats. Of these, 1,099 were referred to the NRM = 4% of the total
  - Of the 1,099 referred, 956 (87%) were adults and 143 (13%) were children (990 were male and 109 were female)
  - The most common nationality of those referred was Vietnamese (n361 = 33%), Sudanese (n144 = 13%), Eritrean (n133 = 12%), Iranian (112 = 10%) and Albanian (n108 = 10%).
19. An FOIR to request the data on the number of NRM/duty to notify referrals from small boats in 2022, as well as the breakdown of positive and negative RG and CG decisions granted via the NRM to Albanian nationals in this period, has been submitted but a response has not yet been received.
20. It is important to note that an individual cannot self-refer into the NRM; they must be referred by a 'first responder' organisation which is an authority authorised by the UK Government to refer a potential victim, and includes police forces, UK Visa and Immigration, Immigration Enforcement, local authorities, Border Force, the GLAA and a number of specialist NGOs. The full list of First Responder agencies is listed on the gov.uk website.<sup>xxi</sup> Of the 1,099 referrals made into the NRM from small boat crossing in 2021, 54% were made by UK Visas and Immigration, 22% by UK Immigration Enforcement (22%) and Local Authority staff (9%), and the remainder by specialist NGO police and UK Border Force.
21. As detailed in official Home Office statistics<sup>xxii</sup>, Albanians made up 18% of the 12,747 people crossing in small boats in the period between 1 January - 30 June 2022, which equates to (an estimated) 2,294 Albanian nationals making this journey in the first half of 2022. In his letter to the Chair of the Home Affairs Select Committee (HASC), dated 22 November 2022, the Minister of State for Immigration stated that, '*5% of Albanian arrivals between 1 January and 30 June 2022 have been referred to the National Referral Mechanism (NRM) so far. Albanians make up over half of all modern slavery referrals from small boats arrivals during this period.*'<sup>xxiii</sup> If the information provided by the Minister is correct, and 5% of the 2,294 Albanians who

crossed the Channel were referred into the NRM, this would equate to approximately 115 individuals, a tiny proportion of all of the 7,948 NRM referrals made between January - June 2022.

22. The Minister for Immigration then further noted in his letter to the HASC Chair that, *'In the first two quarters of 2022...Of the Reasonable Grounds decisions made by the Home Office Competent Authorities since the start of 2021 for Albanian nationals, 92% have been positive.'* Again, this high percentage rate suggests that in the vast majority of cases, Home Office case workers were presented with evidence to suggest that the person referred had experienced exploitation which constituted modern slavery.
23. In summary, the year-on-year increase in people being referred to the NRM may be due to a number of factors, including an increased awareness of the NRM, and therefore this data alone is insufficient evidence to show a misuse or gaming of the system. Persisting data gaps mean that we don't yet know the full picture, however the high rates of positive NRM decisions issued to date would suggest that the vast majority of those being referred have a credible claim, and therefore statements regarding the abuse of modern slavery laws are exaggerations, if not, potentially, falsehoods.

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<sup>i</sup> Defeating modern slavery: article by Theresa May, July 2016. <https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article>

<sup>ii</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series No. 197, 2005; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>iii</sup> See the following Rights Lab research and policy papers - Nationality and Borders Bill, Part 5: Modern Slavery - Consideration paper (December 2021). Available at: <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/october/consideration-paper-nationality-and-borders-bill.pdf> Policy paper - Confirmations, Commitments & Concerns - How will Part 5 of the Nationality and Borders Act on Modern Slavery be enacted? October, 2022. Available at: <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2022/november/confirmations-commitments-concerns-how-will-part-5-of-the-nationality-and-borders-act-on-modern-slavery-be-enacted.pdf>; Quick Reference Guide Modern Slavery: Commitments by the UK Government. October, 2022. Available at: <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2022/november/quick-reference-guide-%E2%80%93-uk-government-modern-slavery-commitments-in-the-nationality-and-borders-act.pdf>;

<sup>iv</sup> Modern Slavery: statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and non-statutory guidance for Scotland and Northern Ireland <https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims>

<sup>v</sup> Rights Lab, October 2022. Policy Paper - Confirmations, Commitments & Concerns - How will Part 5 of the Nationality and Borders Act on Modern Slavery be enacted? Available at: <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2022/november/confirmations-commitments-concerns-how-will-part-5-of-the-nationality-and-borders-act-on-modern-slavery-be-enacted.pdf> See p. 4 & 5

<sup>vi</sup> Part 4 of The Nationality And Borders Bill 141 Of 2021-22, Doughty Street Chambers Anti-Trafficking Team, Written Evidence, 2 Nov 2021 <https://bills.parliament.uk/publications/43467/documents/889>, see p 6 & 7

<sup>vii</sup> Rights Lab, October 2022. Policy Paper - Confirmations, Commitments & Concerns - How will Part 5 of the Nationality and Borders Act on Modern Slavery be enacted? <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2022/november/confirmations-commitments-concerns-how-will-part-5-of-the-nationality-and-borders-act-on-modern-slavery-be-enacted.pdf> See p. 7

<sup>viii</sup> *Ibid*, p. 21

<sup>ix</sup> HMG, 2021. Nationality and Borders Bill Explanatory Notes. Available at: <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf>, Section 56, p.66.

<sup>x</sup> Hope for Justice & Rights Lab, February 2022. Nationality And Borders Bill – Briefing And Amendment for Clause 67, Disapplication Of Retained EU Law Deriving From Trafficking Directive <https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/621f9a65638c8c56346a502a/1646238310466/Retained+EU+Directive+Amendment+Briefing+01.02.22+Updated+and+finalised.pdf>

<sup>xi</sup> See written PQ by Lord Vernon Coaker to the Home Office, 6 September 2022.

<https://www.parliament.uk/question/HL2212/human-trafficking-eu-law>

<sup>xii</sup> Electronic Immigration Network, 18 January 2022. 'UN rights experts say Nationality and Borders Bill fails to respect the UK's obligations under international human rights and refugee law'. <https://www.ein.org.uk/news/un-rights-experts-say-nationality-and-borders-bill-fails-respect-uks-obligations-under#:~:text=By%20penalising%20asylum%20seekers%20and,migrant%20and%20asylum%2Dseeking%20children>

<sup>xiii</sup> HMG. 2021. New Plan for Immigration Policy Statement. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/972517/CCS207\\_CCS08200\\_91708-001\\_Sovereign\\_Borders\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS08200_91708-001_Sovereign_Borders_Web_Accessible.pdf)

<sup>xiv</sup> *Ibid*, p. 31

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- <sup>xv</sup> See, for instance, the Home Secretary's speech to the Conservative party conference, October 2022  
<https://www.conservatives.com/news/2022/our-plan-for-law-and-order>
- <sup>xvi</sup> Home Office, Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, Version 2.12.  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1124031/Modern\\_Slavery\\_Statutory\\_Guidance\\_EW\\_Non-Statutory\\_Guidance\\_SNI\\_v2.12.docx\\_FINAL\\_amended.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1124031/Modern_Slavery_Statutory_Guidance_EW_Non-Statutory_Guidance_SNI_v2.12.docx_FINAL_amended.pdf)
- <sup>xvii</sup> Rights Lab, October 2022. Policy Paper - Confirmations, Commitments & Concerns - How will Part 5 of the Nationality and Borders Act on Modern Slavery be enacted? Available at: <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2022/november/confirmations-commitments-concerns-how-will-part-5-of-the-nationality-and-borders-act-on-modern-slavery-be-enacted.pdf>
- <sup>xviii</sup> Ed Humpherson to Jennifer Rubin: use of National Referral Mechanism statistics, 8<sup>th</sup> December 2022  
<https://osr.statisticsauthority.gov.uk/correspondence/ed-humpherson-to-jennifer-rubin-use-of-national-referral-mechanism-statistics/>
- <sup>xix</sup> IASC exchange of letters with Head of Single Competent Authority, March 2021.  
<https://www.antislaverycommissioner.co.uk/media/1750/iasc-exchange-of-letters-with-the-home-office-requesting-information-about-nrm-referrals-linked-to-small-boats-and-clandestine-entry-by-lorry-january-2022.pdf>
- <sup>xx</sup> The FOIR data received on 2nd September 2021 has been summarised and is available on the Rights Lab website <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2022/october/foi-request-%E2%80%93-small-boat-crossings-modern-slavery-referrals.pdf>.
- <sup>xxi</sup> HMG Guidance on the NRM <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales#first-responder-organisations> [Accessed on 15<sup>th</sup> December, 2022]
- <sup>xxii</sup> UK Government statistics, Irregular migration to the UK, year ending June 2022 - <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-june-2022/irregular-migration-to-the-uk-year-ending-june-2022#how-many-migrants-were-detected-arriving-in-the-uk-via-small-boats>
- <sup>xxiii</sup> Letter from Minister for Immigration to Chair of Home Affairs Select Committee, 22 November 2022  
<https://committees.parliament.uk/publications/31774/documents/178754/default/>