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## **Human Rights Act Reform: A consultation to reform the Human Rights Act 1998**

***Anti-trafficking Sector Response to the Ministry of Justice's Human Rights Act reform Consultation***

8 March 2022

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## 1. Introduction

As a group of civil society organisations working in the anti-trafficking sector representing frontline organisations (including First Responders)<sup>1</sup> as well as research and policy organisations, we reject the premise that a Bill of Rights should replace the Human Rights Act 1998 (HRA). The suggestions put forward in the consultation document, together with the sensationalist and slanted understanding of the HRA contained within, demonstrate that this is an exercise to curtail fundamental rights and evade accountability and responsibility. The supposed ‘*case for change*’ set out in chapter 3 of the consultation document is nothing of the sort.

The existing human rights framework has had profound benefits for victims and survivors of human trafficking and modern slavery offences. It has been used by victims of trafficking to ensure that their rights are respected and protected,<sup>2</sup> has spurred the development of the UK’s anti-trafficking and modern slavery framework,<sup>3</sup> and has helped to ensure that victims have a better knowledge of and ability to exercise their rights, among other such benefits.

The proposals to reform the HRA should be read in the wider context of a raft of proposed legislation such as the Nationality and Borders Bill, the Police, Crime, Sentencing and Courts Bill and the Judicial Review and Courts Bill among others. Whilst they are individually of great concern and subject to much criticism from the anti-trafficking sector, when read together represent an even more serious threat to civil liberties, good governance and the support and protection of victims of human trafficking and modern slavery offences.

The 2021 report produced by the Independent Human Rights Act Review (IHRAR) put forward a number of considered recommendations. Whilst we do not agree with the entirety of the recommendations, it offers a good-faith approach to the reform of the HRA.<sup>4</sup> The present consultation document goes far beyond their recommendations, soliciting views on proposals explicitly rejected by the IHRAR and ignoring specific recommendations.<sup>5</sup> No justification for the present proposals were contained within the 2019 report, leading to concern over the reasons for the Ministry of Justice decisions, particularly where they would create significant difficulties for victims of human trafficking and of human rights abuses more generally.

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<sup>1</sup> A ‘First Responder’ organisation is an authority that is authorised to refer a potential victim of modern slavery offences into the National Referral Mechanism.

<sup>2</sup> e.g., *XPQ v The London Borough of Hammersmith & Fulham* [2018] EWHC 1391.

<sup>3</sup> See e.g., *CN v. United Kingdom* (2013) 56 EHRR 24; *Siliadin v France*, Application no. 73316/01; *VCL & AN v. United Kingdom*, Applications nos. 77587/12 and 74603/12;

Human Rights Joint Committee (2014) Third Report Legislative Scrutiny: (1) Modern Slavery Bill and (2) Social Action, Responsibility and Heroism Bill, Background. Available at:

<https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/62/6203.htm>

<sup>4</sup> For more discussion on the issues that exist with the IHRAR, please see Liberty’s 2021 response, available here: <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-response-to-the-IHRAR-call-for-evidence-March-2021.pdf>

<sup>5</sup> e.g., Independent Human Rights Act Review (2021), at sections 5.138-143 & 7.55-64.

Rather than seeking to address the structural drivers of modern slavery offences and create meaningful pathways out of exploitation, the Government is seeking to tweak the system to evade accountability. Protection and support have been deprioritised in favour of the Government's immigration enforcement agenda, and an effort to avoid fundamental human rights obligations. The Government has routinely failed to take the recommendations put forward by the anti-trafficking sector and their own anti-trafficking framework, such as failing to consult with the Independent Anti-Slavery Commissioner on key developments including the creation of the Immigration Enforcement Competent Authority for identifying victims of trafficking.<sup>6</sup> It is increasingly apparent that the Government is operating without due concern for victims of trafficking and isolating itself from the good faith and evidence-based recommendations of the anti-trafficking sector. For victims of human trafficking to be protected and supported, human rights principles must be further embedded in government responses, not stripped back and jettisoned.

## **2. Scope of Response**

Whilst our concern with the entirety of the reforms presented and the approach being taken in the consultation should be noted, this consultation response focuses on the questions which are likely to have the most impact on victims and survivors of trafficking and draws on the combined expertise of the anti-trafficking sector.

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<sup>6</sup> Independent Anti-Slavery Commissioner (2021), Letter to the Home Secretary, 4 November 2021. Accessible at: [https://www.antislaverycommissioner.co.uk/media/1695/letter\\_to\\_home\\_secretary\\_on\\_ieca\\_11\\_november\\_2021.pdf](https://www.antislaverycommissioner.co.uk/media/1695/letter_to_home_secretary_on_ieca_11_november_2021.pdf)

### 3. Question Responses

#### Interpretation of Convention rights: section 2 of the Human Rights Act

**Question 1:** We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this

Response: **We do not believe that a case has been made for legislative intervention.**

The two proposed options put forward in this question would change the relationship between domestic rights and Convention rights – likely causing a divergence in rights protection. This goes beyond the recommendations contained in the IHRAR (2021), which asked domestic courts to apply domestic statutory and case law prior to using European Court of Human Rights (ECtHR) case law to inform their interpretation of a Convention right.<sup>7</sup> Our concern is that the UK will adopt a narrower approach than the approaches contained in Strasbourg jurisprudence, leaving the UK out of step with other members of the Council of Europe.

This presents a serious concern for victims of trafficking, who have relied upon Strasbourg jurisprudence to help the UK courts understand how to interpret a number of articles of the Convention, including Article 4 (Prohibition of slavery and forced labour), and ensure consistency across member states.<sup>8</sup> This is particularly important in the context of human trafficking where offences often have international components due to the frequent cross-border nature of offences.

Strasbourg jurisprudence has been crucial to paving the way for robust protection and support for victims of human trafficking in the UK. For instance, the Convention does not contain explicit reference to human trafficking. Nevertheless, the ECtHR held in the case of *Rantsev v. Cyprus and Russia*<sup>9</sup> that there could be ‘no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention’ and

<sup>7</sup> Independent Human Rights Act Review (2021). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040525/ihrar-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf)

<sup>8</sup> Strasbourg jurisprudence has also been crucial in elucidating the content of other rights relevant to anti-trafficking, such as Article 3 (the prohibition of torture) and Article 6 (the right to a fair trial) in non-prosecution cases - see e.g., *V.C.L. and A.N. v. The United Kingdom* (2021) Applications nos. 77587/12 and 74603/12.

<sup>9</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04; *Siliadin v France* Application no. 73316/01.

concluded that trafficking fell within the scope of Article 4 of the Convention. Page 14 of the consultation document states that *"any reform will keep the Convention rights incorporated into the Northern Ireland law and indeed UK law."* We believe that it is imperative that rights read into the convention by the ECtHR, such as human trafficking, remain. The Government itself referred to Article 4 in establishing the Modern Slavery Act. In its draft Modern Slavery Bill command paper, the Government stated *'the introduction of the specific offence of slavery, servitude and forced or compulsory labour, in section 71 of the Coroners and Justice Act 2010, was as a result of concerns that the UK was not compliant with its obligations under Article 4.'*<sup>10</sup> This goes to show that the Convention (and indeed Strasbourg jurisprudence) has provided support in promoting positive legislative change, and is not simply about litigation.<sup>11</sup>

Victims and survivors of trafficking and modern slavery offences are an acutely vulnerable group. When supporting and advising survivors, clarity around their rights and entitlements is of real importance especially since access to specialist legal advice is not always available.<sup>12</sup> Without being able to clearly identify and explain the applicable legal protections resulting from divergence between domestic law and ECtHR jurisprudence, there is uncertainty resulting in a greater reluctance to both rely on those rights and interact with the state to ask for their fundamental rights to be upheld. This lack of certainty will often be costly due to the fact that it will typically result in greater satellite litigation, unwanted by the state and by victims and survivors themselves. Moreover, if there is a lack of legal certainty on rights and entitlements, victims are less likely to come forward and seek assistance in the first place and make the decision not to enter official systems as a result.

If there does emerge a divergence between domestic rights protections and those provided by ECtHR jurisprudence, more people may be forced to go to Strasbourg to enforce their rights. However, individuals are likely to struggle in doing so due to lack of funds, with little free advice available on cases in the ECtHR. As a result, victims of trafficking will be unable to seek a remedy for violations of their human rights. Additionally, victims will already be deterred from taking a case to the ECtHR, given the length of the process, the greater uncertainty and the intimidating requirement to challenge the UK state as a whole. As a result of the options put forward in the consultation document, fewer victims of trafficking will be able to rely on and exercise their rights - making an unqualified fundamental right beyond the reach of victims in the UK.

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<sup>10</sup> The Government Response to the Report from the Joint Committee on the Draft Modern Slavery Bill, 'Draft Modern Slavery Bill,' Session 2013-2014, HL Paper 166/HC 1019. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/318771/CM8889DraftModernSlaveryBill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/318771/CM8889DraftModernSlaveryBill.pdf)

<sup>11</sup> Currie, S. & Young, M., 'Access to legal advice and representation for survivors of modern slavery: Research Summary' (2021) Modern Slavery and Human Rights Policy and Evidence Centre. Available at: <https://modernslaverypec.org/assets/downloads/Legal-advice-summary.pdf>

<sup>12</sup> *Id.*

## A permission stage for human rights claims

**Question 8:** Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters?

Response: **No.**

Victims of human rights abuses should not be required to prove '*significant disadvantage*' before they can seek justice. Victims of trafficking already face significant barriers when seeking to exercise their rights, including fear of engaging with or challenging authorities, and disclosing what has happened to them.<sup>13</sup>

Research in the UK has uncovered a culture of disbelief towards victims of human trafficking from particular authorities, not only has this been found to negatively impact and effect decision-making it also has a direct impact on victims' wellbeing.<sup>14</sup> The Government has contributed to this culture of disbelief by expounding unevidenced claims regarding the 'misuse' and 'abuse' of the National Referral Mechanism (NRM) system.<sup>15</sup> No evidence has been levied to support this claim.<sup>17</sup> The Government's discourse around 'vexatious' human trafficking claims designed to 'disrupt' immigration proceedings encourages a presumption of disbelief.

We fundamentally disagree with the framing of human rights claims as 'trivial.' In the context of human trafficking, such human rights claims represent an avenue for individuals to seek redress from the state where it has failed in its obligation to provide safe and secure

<sup>13</sup> Labour Exploitation Advisory Group (LEAG), 'Opportunity Knocks: Improving responses to labour exploitation with secure reporting', (2020) Focus on Labour Exploitation, p.42. Available at: <https://www.labourexploitation.org/publications/opportunity-knocks-improving-responses-labour-exploitation-secure-reporting>

<sup>14</sup> Jobe, A., 'Telling the Right Story at the Right Time: Women Seeking Asylum with Stories of Trafficking into the Sex Industry', *Sociology* (2020) Vol 54, Issue 5; Labour Exploitation Advisory Group (LEAG), 'Detaining Victims: Human Trafficking and the UK Immigration System', (2019) Focus on Labour Exploitation, p.11. Available at: <https://www.labourexploitation.org/publications/detaining-victims-human-trafficking-and-uk-immigration-system>

<sup>15</sup> The NRM is the framework for support and identification of potential victims of Modern Slavery. For further information on this process visit the following website: <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>

<sup>16</sup> After Exploitation, 'The Nationality & Borders Bill: Impact on survivors of modern slavery' (2021), p.4; HM Government. New Plan for Immigration – Policy Statement (2021). Available at: <https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible>

<sup>17</sup> Rights Lab & Human Trafficking Foundation (2021), 'Nationality and Borders Bill Part 5: Modern Slavery Consideration Paper'. 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>

accommodation and support and as a result of this a victim has experienced being re-trafficked.<sup>18</sup> This is not a trivial matter, but a fundamental right and necessity for any meaningful accountability.

The creation of a permission stage for human rights claims would undermine the concept of fundamental rights protection. Genuine and proven cases of human rights abuses would be left unremedied, and the culture of rights protection damaged. There is no justification for reducing the accountability of the state for its actions in this way. There is simply no evidence to suggest, as the government does in the consultation document, that large numbers of 'spurious' claims are being brought which 'devalue' the concept of rights. A similarly concerning narrative has been deployed against victims of trafficking in context of the Nationality & Borders Bill.<sup>19</sup> Despite the gaps in data, in part due to significant delays in NRM decision-making meaning low granting of conclusive grounds, or final stage, NRM decisions, it is apparent that positive reasonable grounds decisions are being upheld over time, indicating the decisions made at the reasonable grounds stage are of sound quality.<sup>20</sup> This, combined with a lack of supporting evidence for their claims, undermines the Government's position that the NRM is being 'abused' as a 'means of disrupting immigration proceedings.'<sup>21</sup>

NRM referrals are increasing year on year<sup>22</sup> (with the exception of the decrease in NRM referrals in 2020, likely as a result of the pandemic). Of the conclusive grounds decisions made in 2021, 91% were positive.<sup>23</sup> Data also shows that 78% of reconsiderations (for negative conclusive grounds decisions) were overturned.<sup>24</sup> This finding is supported by the sector, with the charity Hope for Justice who report that their clients have had negative

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<sup>18</sup> Rights Lab, (2021) 'Re-trafficking: The current state of play.' Available at: [https://www.antislaverycommissioner.co.uk/media/1705/iasc-and-rights-lab-re-trafficking-report\\_november-2021.pdf](https://www.antislaverycommissioner.co.uk/media/1705/iasc-and-rights-lab-re-trafficking-report_november-2021.pdf)

<sup>19</sup> Barrett, D., (2022) 'Slavery laws face review amid fears criminals are exploiting loophole to use it as 'get out of jail free' card,' *Daily Mail*; The Sun (2021) 'Child rapists and terrorists will be stopped from using modern slavery loophole to stay in UK.'

<sup>20</sup> Focus on Labour Exploitation (2022) 'Identifying victims of trafficking in immigration detention - National Referral Mechanism decision making between 2017-2022.' Available at: <https://www.labourexploitation.org/publications/identifying-victims-trafficking-immigration-detention-national-referral-mechanism>

<sup>21</sup> The Sun (2021) *Ibid.* note 18.

<sup>22</sup> Home Office (2021). Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, End of Year Summary, 2020. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/970995/modern-slavery-national-referral-mechanism-statistics-end-year-summary-2020-hosb0821.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970995/modern-slavery-national-referral-mechanism-statistics-end-year-summary-2020-hosb0821.pdf) ; Home Office (2022).

Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK, End of Year Summary, 2021. Available at: <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021>

<sup>23</sup> Home Office (2022). *Id.*

<sup>24</sup> Siddique, H., (2021) 'Four out of five trafficking claims were overturned in UK last year,' *The Guardian*. Available at: <https://www.theguardian.com/uk-news/2021/jul/02/four-out-of-five-rejected-trafficking-claims-overturned-uk-last-year>



reasonable grounds decisions which were subsequently overturned on review where it was quite clear the decision-maker lacked basic understanding of the definitions of human trafficking and modern slavery despite this being set out in Statutory Guidance. In addition, recent data from the NRM annual report shows a significant increase in Duty to Notify (DtN) submissions.<sup>25</sup> Between 2020 and 2021 submissions increased by 47% showing that more potential victims are choosing not to enter the NRM.<sup>26</sup> This data does not back the Government's claims of a system that is being misused. The Home Office policy is failing victims of modern slavery and contradicts the divisive and unevidenced assertions around 'false trafficking claims'.<sup>27</sup>

There is little evidence that the UK Government has provided sufficient meaningful training on human trafficking (including with regard to its nature and impacts) to decision-making staff across agencies, leading to considerable harm to victims.<sup>28</sup> Despite frequent calls for the Government to improve their training provision, the creation of bodies such as the Immigration Enforcement Competent Authority which adopt an immigration enforcement-centred lens, demonstrate that decision-makers operate in an environment that places immigration enforcement over the welfare of victims of trafficking and without the necessary knowledge of human trafficking and its impacts.<sup>29</sup>

We are gravely concerned that should a permission stage be implemented, it will follow this trend to the detriment of the needs and wellbeing of victims of trafficking. It is of note that judicial review cases are already subject to a permission stage, whether they are human rights challenges or not.<sup>30</sup> Many judicial review cases brought by victims of trafficking engage human rights arguments and therefore already require a high threshold be met in order for the claim to proceed. Instead of trying to stop people from challenging unfair decision-making, the Government should focus on trying to improve training for its frontline officials and institute meaningful support systems and reforms that will protect the rights of survivors and victims such as secure reporting procedures between the police, labour inspectors and immigration enforcement.<sup>31</sup>

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<sup>25</sup> Home Office (2022). *Ibid.* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> See Rights Lab & Human Trafficking Foundation (2021), 'Nationality and Borders Bill Part 5: Modern Slavery Consideration Paper'. 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>

<sup>28</sup> LEAG (2019). *Ibid.* note 14

<sup>29</sup> Taskforce on Victims of Trafficking in Immigration Detention (2021) 'Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime.' Available at: <https://labourexploitation.org/publications/bad-decisions-creation-immigration-enforcement-competent-authority-will-undermine>

<sup>30</sup> Details of the merits criteria are set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 and subsequent amendments. Information is also available in Lord Chancellor's guidance.

<sup>31</sup> Latin American Women Rights Service (LAWRS) & Focus on Labour Exploitation (FLEX), (2022) 'Preventing and Addressing Abuse & Exploitation: A guide for police and labour inspectors working with migrants.' Available at: <https://www.labourexploitation.org/publications/preventing-and-addressing-abuse-and-exploitation-guide-police-and-labour-inspectors>

A permission stage places a greater burden on claimants. They may have to demonstrate the merits of their claim before they have received full disclosure from the defendant public body. In cases where there is a parallel criminal investigation or an inquest, it may be years after the claim is issued that full disclosure is revealed. It is well evidenced that victims' narratives are likely to emerge in a piecemeal fashion and become more coherent as trust and relationships are established as well as the fact that victims may initially recall their experiences with contradictions or inconsistencies. The expectation for an immediate list of every impact and feature of their exploitation in a manner that meets an arbitrary marker of 'significant disadvantage' cuts against the reality of victims' experiences.<sup>32</sup>

We reject both the suggestion for a permission stage and the framing of '*genuine human rights matters*.' The consultation does not provide any evidence of frivolous or spurious claims which are causing problems for the courts. Victims of trafficking already tend to underreport their claims, and there are serious concerns stemming from a culture of disbelief around their claims. Parallels can be drawn here between Government claims in the Immigration Plan and subsequent Nationality and Borders Bill and Slavery and Trafficking Notices (Clauses 57 & 58). As identified in a Rights Lab paper, whilst Government has discussed their commitment to '*minimising misuse*' of the NRM, no evidence or data has been provided or published to support claims that the NRM system is currently being misused yet extra hurdles are appearing to be added to the systems.<sup>33</sup>

The meaning of '*significant disadvantage*' is unclear in this context. Ultimately, the introduction of a permission stage in human rights claims would be of serious concern to the anti-trafficking sector. A permission stage will create a barrier to accessing the courts, and make it harder for individuals to enforce their rights, especially people who already experience barriers in accessing justice. Where an individual claims that there has been a breach of a fundamental right, such as Article 4, it is essential that this claim is properly considered by the courts. The introduction of a permission stage will create an additional barrier for individuals to access justice. In practice, access depends on multiple factors, including the availability of legal representatives who are willing and able to work for free or substantially below the market rate. This means the ability to enforce one's human rights as a victim of trafficking is already limited due to the difficulties in obtaining representation.<sup>34</sup> Additional barriers, such as being fearful of engaging with or challenging authorities or disclosing what has happened to them in practice means many victims are often reluctant to pursue claims. This proposal will further undermine the ability of the highly vulnerable – the

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<sup>32</sup> Rights Lab & Human Trafficking Foundation, (2021), 'Nationality and Borders Bill Part 5: Modern Slavery - Consideration paper,' p.9. 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>

<sup>33</sup> Rights Lab & Human Trafficking Foundation, (2021). *Ibid*.

<sup>34</sup> University of Liverpool, ATLEU, and Rights Lab, (2021), 'Access to Legal Advice and Representation for Survivors of Modern Slavery'. Available at: <https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf>.

groups that we should be particularly concerned are able to enforce their human rights – from doing just that in the face of the abuse of state power.

Almost all victims of trafficking are represented under legal aid due to the nature of the crime perpetrated against them. In England and Wales, the Legal Aid Agency already requires legal aid providers to review the merits of the case, including the likelihood of success and benefit to the client before making an application on behalf of a client.<sup>35</sup> The Anti Trafficking and Labour Exploitation Unit (ATLEU), who provide advice to professionals working with survivors of trafficking and slavery in England and Wales, have found that the Legal Aid Agency is robust in applying this test and has refused funding even where counsel has assessed the chances of success as moderate or good.

A permission stage will place a significant burden on the claimant. They will have to demonstrate the merits of a claim before they have received full disclosure from the defendant public body. We already find obtaining disclosure from public bodies in judicial review cases can be immensely challenging and a public body's failure to disclose key documents at the permission stage can lead to a strong case being prevented from going forward. Victims of trafficking often have low levels of formal education, poor literacy, limited English language skills and a limited understanding of the UK systems.<sup>36</sup> Most will usually rely heavily on disclosure from public bodies when bringing a human rights claim. Victims of trafficking usually have very limited documentation of their own. It can be further complicated by the fact that many documents held by public bodies are heavily redacted (e.g., where the individual is a victim of a crime or where details of an employer, who may also be involved in their trafficking, are held in connection with an immigration application). A requirement which introduces another hurdle in enforcing a victim's rights will inevitably lead to many being unable to provide sufficient evidence at this early stage, at a time when they have only limited disclosure from the public authority, to enable their case to proceed.<sup>37</sup>

The proposed new threshold introduces new complexities and as such, a chilling effect where not sufficiently funded. We refer to the example of the new fixed fees for immigration practitioners to work under the online appeals system.<sup>38</sup> Victims of trafficking (in relation to

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<sup>35</sup> Details of the merits criteria are set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 and subsequent amendments. Information is also available in Lord Chancellor's guidance.

<sup>36</sup> See e.g.,: International Organization for Migration (IOM), (2019) *'Between Two Fires': Understanding Vulnerabilities and the Support Needs of People from Albania, Viet Nam and Nigeria who have experienced Human Trafficking into the UK.* Available at: <https://www.antislaverycommissioner.co.uk/media/1277/between-two-fires-understanding-vulnerabilities-and-the-support-needs-of-people-from-albania-viet-nam-and-nigeria-who-have-experienced-human-trafficking-into-the-uk.pdf>.

<sup>37</sup> This is particularly disturbing considering the Government's intention to introduce Subject Access Requests fees as laid out in the descriptions of their data protection reforms, see: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1022315/Data\\_Reform\\_Consultation\\_Document\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022315/Data_Reform_Consultation_Document_Accessible.pdf)

<sup>38</sup> Immigration Law Practitioners Association (ILPA), (2020), 'ILPA's statement on the new immigration and asylum legal aid fixed fee.' Available at: <https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/>.

their case complexity) were a key client group highlighted in the evidence provided by practitioners about why these low fees would lead to widening advice deserts, as providers could not afford to do the work.<sup>39</sup> The government conceded after a judicial review brought by Duncan Lewis Solicitors that the proposed structure would not work as set out at that time and hourly rates of payment were brought in. We anticipate a similar trend and expense for the government with additional complexity in these plans. Such issues are widely documented in research, for instance the recent research completed by the University of Liverpool, ATLEU, and Rights Lab on access to legal advice and representation for survivors of modern slavery offences.<sup>40</sup>

It is difficult to understand how the 'significant disadvantage' test will interact with a claim for a potential breach, for example, in relation to a judicial review case, and whether this measure is even anticipated to apply in such circumstances. Human rights are frequently engaged where a claimant is seeking injunctive relief, for example, requiring the state to take action to prevent a breach of their rights from occurring. This by its very nature means that the individual will not have suffered any disadvantage yet. In the context of human trafficking, this may relate to the Government seeking to cease support including additional financial payments, accommodation and support worker assistance.<sup>41</sup> The importance of such support is highlighted by the international anti-trafficking framework,<sup>42</sup> and indeed, there have been instances where individuals have been susceptible to re-trafficking without such support.<sup>43</sup> This demonstrates that 'significant disadvantages' may be prevented from materialising as a result of proactive claims prior to actual harm.

**Question 9:** Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons

Response: **The proposed test of 'overriding public importance' would be a serious barrier to accessing to justice for victims of human trafficking and modern slavery offences.**

Human rights claims will often raise issues of overriding public importance, however, the introduction of a second limb will not sufficiently address the harm done through the introduction of a permission stage with such a high threshold for those seeking redress for breaches of their rights. As highlighted above, the impact of a permission stage will be

<sup>39</sup> Young Legal Aid Lawyers (2020)., 'A sector at breaking point: Justice denied for victims of trafficking.' Available at: <http://www.younglegalaidlawyers.org/sites/default/files/200621%20YLAL%20trafficking%20report.pdf>

<sup>40</sup> Currie, S. & Young, M., *Ibid.* note 11.

<sup>41</sup> e.g., *NN and LP v SSHD* [2019] EWHC 1003 (Admin)

<sup>42</sup> Article 12, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197.

<sup>43</sup> LEAG (2019) *Ibid.* note 14, p.18.

extremely detrimental. It will not be sufficiently mitigated by the introduction of the proposed second limb of an 'overriding public importance' for exceptional cases.

Victims of trafficking have often experienced discrimination and are marginalised in society. Human rights provide necessary protection from institutions, especially where political motivations cause disproportionate infringements on their rights or a lack of concern over their welfare causes their individual circumstances to be overlooked. This provides an important balance within a democracy.

### **Judicial Remedies: section 8 of the Human Rights Act**

**Question 10:** How else could the government best ensure that the courts can focus on genuine human rights abuses?

Response: **We reject the implication of genuine and non-genuine abuses proposed in this question and do not believe further action is required or warranted.**

The Government's proposed approach of requiring non-human rights claims to be heard before a rights-based claim is considered is of real concern. The Government suggestion is demonstrative of a 'bean-counting' exercise more concerned with the number of claimants, than addressing the causal roots of such claims being taken in the first instance.

We agree with Liberty's statement that:

*'the goal should be to work towards eliminating the conditions that create violations of human rights by improving governance and public service delivery, and enhancing (rather than stripping away) access to justice and avenues of accountability.'*<sup>44</sup>

Additionally, victims of human trafficking will typically face a number of hurdles in bringing private law claims, and as such, human rights claims are often more appropriate in their contexts. Such challenges, as identified by the aforementioned ATLEU, include their all-too-frequent lack of meaningful access to advice, fear of reprisal, the possibility that they may face their exploiter, fear of having their location revealed, among other such issues. We do not believe that the case for further action has been made, and in the absence of any

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<sup>44</sup> Liberty, 'Human Rights Act Reform: A Modern Bill of Rights - A power grab that threatens us all Liberty's short guide to responding to the consultation on Human Rights Act Reform,' p.7. Available at: <https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-HRA-consultation-tip-sheet-Feb-22.pdf>

meaningful evidence of widespread non-genuine claims, measures which would create additional barriers are not required nor warranted.

## Positive obligations

**Question 11:** How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

Response: **Positive obligations are a fundamental and necessary component of human rights law, preventing modern slavery offences and providing support for victims of human trafficking.**

The consultation provides no reliable evidence or data for its claim that the HRA has promoted 'costly human rights litigation' via 'the imposition and expansion of positive obligations.' Instead, the consultation abounds with generic assertions, referencing a small number of academic positions that also fail to provide any cost assessments. Positive obligations may come with cost however there is no acknowledgement of the importance of the rights being defended, by which public bodies, for whom and in what situations.

### Case study:

*M had been subjected to trafficking for forced labour and had only recently disclosed that she had also been trafficked for sexual exploitation across Europe. As a result of her trauma, she abruptly left her accommodation. She disconnected with Hope for Justice, who had been providing her with support, and subsequently ended up in a potential situation of further exploitation. Quickly realising this, M contacted the police as well as Hope for Justice. Hope for Justice contacted the local authority and additionally a number of women's refuges to find emergency temporary accommodation whilst long-term accommodation was found. Despite having 'retained worker' status (and was thus able to access benefits) as soon as the women's hostels found out about her nationality, they refused to take a referral on the basis that it was too difficult to access welfare benefits for EEA Nationals or they felt that all EEA Nationals had no recourse to public funds. Although a safeguarding referral was made to the local authority, the response of the local authority was that homelessness was not a safeguarding issue despite the victim having significant care and support needs as well as complex mental health issues. This completely failed to take into account the risk of re-trafficking and the wider support needs of the victim. Significant*

*independent and wider specialist legal advocacy around the international rights of the victim including around the Human Rights Act resulted in the victim receiving the housing and wider support she required. Without this, Hope for Justice would have had grave concerns that M would have ended up in a situation of re-trafficking or an even worse situation due to her complex mental health issues.*<sup>45</sup>

Positive obligations are an essential and inherent part of effective human rights protection, and integral to human rights protection frameworks found in international law. Failure to comply with such obligations must be open to challenge, as with any other human rights violation. Already safeguards exist - it is a standard in human rights law that positive obligations must not be interpreted in a way which puts '*an impossible or disproportionate burden*' on public authorities.<sup>46</sup> How to comply with a positive obligation is a decision for the authority to make, given the specific circumstances. We contest the framing used in the present proposal which makes no reference to these safeguards.

The UK has a number of positive obligations relating to human trafficking that stem from international law, such as the obligation to protect and provide assistance to victims of slavery or human trafficking under both the Council of Europe Convention on Action Against Trafficking in Human Beings<sup>47</sup> and the positive protective obligation under the prohibition on slavery (Article 4 ECHR). These provide the backbone to anti-trafficking measures and highlight the centrality of positive obligations. Human trafficking is an offence that cannot simply be addressed by refraining from certain activities. Positive action is necessary to ensure that positive protection measures are meaningfully put into place. The much lauded Modern Slavery Act 2015, championed by the Government as 'world-leading'<sup>49</sup> provides one such positive example of an Act that sought to action the UK's positive obligations stemming from ECAT and the domestication of ECtHR case law<sup>50</sup> to prosecute and investigate human trafficking. The *Siliadin*, *CN, VCL* and *AN* cases<sup>51</sup> pertain to child victims of modern slavery offences and exemplify how positive obligations are essential in the context of children, particularly regarding the failure to protect children from various forms of child abuse such as child trafficking. Additionally, positive obligations jurisprudence in the ECtHR has set out

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<sup>45</sup> This case study was provided by Hope for Justice.

<sup>46</sup> *Osman v UK* (2000) 29 EHRR 245, para 116.

<sup>47</sup> Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

<sup>48</sup> e.g., Article 12 ( Assistance to victims) creates positive obligations to adopt 'such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery.' Positive obligations are also contained across a number of articles in this Convention, covering issues ranging from compensation and legal redress (Article 15) to the adoption and strengthening of legislative, administrative, educational, social, cultural or other measures to discourage demand (Article 6).

<sup>49</sup> The Guardian, (2016), 'Theresa May pledges £33m boost for fight against slavery in Britain.' Available at: <https://www.theguardian.com/politics/2016/jul/31/theresa-may-pledges-33m-boost-for-fight-against-slavery-in-britain>

<sup>50</sup> See: *Siliadin v France*, Application no. 73316/01; *VCL and AN v. United Kingdom*, Applications nos. 77587/12 and 74603/12.

<sup>51</sup> *Id.*



standards to protect children from on-line recruitment for sexual exploitation as a violation of Article 8 of the Convention in the case of *KU v Finland*<sup>52</sup> and the protection of children in institutions or institutional care from exploitation such as in the case of *VC v Italy*.<sup>53</sup>

The approach of the ECtHR to positive obligations in cases related to article 4 is also reflected in the jurisprudence of other regional human rights courts. In the *Brasil Verde* case, the Inter-American Court of Human Rights echoed the ECtHR's approach to positive obligations in the context of the prohibition against slavery, servitude, forced labour and human trafficking.<sup>54</sup> Likewise, the Economic Community of West African States (ECOWAS) Court of Justice applying the African Charter on Human and Peoples' Rights confirmed the positive obligations of the state in relation to slavery.<sup>55</sup> Contraction of positive obligations in relation to modern slavery offences and trafficking would therefore put the UK out of step with other international actors.

The Government's framing of positive obligations as costly, uncertain, improper and burdensome is both unsubstantiated and ideological. Such positive obligations can in fact reduce costs by ensuring that a situation does not deteriorate to the level where costly after-the-fact interventions are required once human trafficking has materialised. We are keen to emphasise that positive preventative measures are essential to anti-trafficking efforts, and must sit alongside reactive measures.

Case study:

*H was identified by the police as a victim of human trafficking for forced labour and was provided with assistance by Hope for Justice. He had significant problems accessing welfare benefits because of a huge delay issuing a national insurance number. Following the NRM, he was staying with friends whilst ongoing accommodation was sought by a support provider. Subsequently, due to the economic situation in his country of origin (and unknown to Hope for Justice) he brought over his wife and children who were facing destitution in the country of origin. Subsequently, they were presented as homeless and Hope for Justice provided a support letter confirming the situation, his international rights including risks of re-exploitation and potential breaches of Articles 3 and 4 if he was not housed. The victim was also involved as a key witness in a prosecution case which involved wider risks.*

*H then contacted Hope for Justice, in tears, as he had been advised by the local authority*

<sup>52</sup> *KU v Finland*, Application no. 2872/02.

<sup>53</sup> *VC v Italy*, Application no. 54227/14.

<sup>54</sup> *Case of the Hacienda Brasil Verde Workers v Brazil* (Preliminary objections, merits, reparations and costs) 20 October 2016.

<sup>55</sup> *Hadijatou Mani Koraou v The Republic of Niger* (Judgment) ECW/CCJ/APP/0808, 27 October 2008.



*that they would take his children into care as they had a duty towards his children and not him (a breach of Article 8). As he was homeless and couldn't care for his children he was advised they would be removed. Initially, no decision was confirmed in writing by the local authority. Hope for Justice advocated for the victim to be housed in emergency accommodation and referred him to a legally aided housing solicitor. Subsequently, H and his family were housed pending review and the local authority conceded and housed the victim and his family long term. He subsequently found employment in the UK after Hope for Justice referred him to an appropriate project. H's traffickers were successfully prosecuted.<sup>56</sup>*

Question 11's proposals do not clearly outline how positive obligations would be considered. It is unclear whether public authorities would be entitled to ignore positive human rights obligations where they have other priorities, or whether the obligations remain intact, but the authorities cannot be challenged for failing to meet them.

Both ideas would have an inevitable and serious impact on victims of human trafficking. With regard to the former, the Government's consistent prioritisation of counterproductive immigration enforcement measures over victim support and protection demonstrates how necessary human rights scrutiny is over such decisions – especially given the potential impacts on victims such as resulting from the failure to identify instances of trafficking or the absence of robust protection or support processes.<sup>57</sup> With regard to the latter, the ability to ignore positive obligations will leave victims in conditions of exploitation and without adequate protection or support.

It is apparent from the consultation document that positive obligations are being weaponised, when in fact the court has taken a very measured, nuanced view of rights protection based on the strength of the public interests at stake, the importance of the right in issue, the degree of interference and any interference with the rights of others as well as the resource limitations of public bodies.

It is important to recognise that we have not witnessed a drastic and unwieldy expansion of positive obligations following the implementation of the HRA. In relation to human trafficking, cases concerning positive obligations often concern very serious violations of important and even absolute rights, such as violations of the rights laid out in Articles 2, 3 and 4 which protect the right to life, the right not to be tortured and the right not to be subjected to slavery, servitude or forced labour.<sup>58</sup>

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<sup>56</sup> This case study was provided by Hope for Justice.

<sup>57</sup> After Exploitation (2020), 'The Referral 'Lottery''. Available at: <https://afterexploitation.com/national-referral-mechanism/>

<sup>58</sup> e.g., *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9; *Siliadin v France* Application no. 73316/01; *VCL and AN v. United Kingdom* (Applications nos. 77587/12 and 74603/12).

## When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act

**Question 15:** Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

Response: **No.**

Declarations of incompatibility seek to preserve the dualist constitutional system<sup>59</sup> in the UK in which parliamentary sovereignty is central to the human rights protection framework. Under this system Parliament is able to pass laws which contravene human rights standards, but a declaration of incompatibility can be issued to ensure that parliament is aware that it is contravening human rights standards. Parliament is then provided with an opportunity to change the legislation to incorporate the human rights law principles; and to impose a political cost through the reputational damage of being seen to contravene human rights law should Parliament seek to continue the rights-violating law.<sup>60</sup> Presently, declarations of incompatibility are reserved to primary legislation – *i.e.*, laws that have passed through both Houses of Parliament.

'Secondary legislation' on the other hand, is law created by ministers (or other bodies). Secondary legislation often receives little scrutiny and is not subject to parliamentary voting or attention. It can range from minor technical rules to issues of major public importance such as the coronavirus regulations. Such legislation is implemented by government ministers and subject to a range of weak oversight mechanisms and cannot be considered to have full parliamentary approval.<sup>61</sup>

The *raison d'être* for declarations of incompatibility (*i.e.*, the preservation of parliamentary sovereignty) does not apply in the case of secondary legislation. It is entirely proper that the courts remain able to strike down or amend secondary legislation where it fails to comply with human rights standards.

Anti-trafficking efforts in the UK are enmeshed with secondary legislation, which underpins central tenets of the Governmental response. For instance, the NRM is set out in statutory guidance.<sup>62</sup> Similar secondary legislation includes the Immigration (Guidance on Detention

<sup>59</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>60</sup> Section 4, Human Rights Act 1998.

<sup>61</sup> For more information on secondary legislation please see: <https://www.parliament.uk/about/how/laws/secondary-legislation/>.

<sup>62</sup> Home Office (2022), '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 2.7 Available at:

of Vulnerable Persons) Regulations 2021 (SI 2021/184) which sets for the conditions by which vulnerable individuals can be detained, and the Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015). The rules for discretionary leave to remain for victims of human trafficking are also currently set out in guidance, though this may change should Clause 64 of the Nationality & Borders Bill be passed despite the sector's opposition.<sup>63</sup>

In this sense, secondary legislation setting out anti-trafficking protections and processes in the UK has a significant bearing on the fundamental rights of victims of modern slavery. Removing the courts' ability to strike down and amend secondary legislation would have significant repercussions for victim support and protection as well as accountability more generally. Recently, the Independent Anti-Slavery Commissioner (IASC) has highlighted her concerns around update to the Modern Slavery Statutory Guidance which set out the creation of the Immigration Enforcement Competent Authority (IECA).<sup>64</sup> Within her letter to the Home Secretary, she warns that the IECA marks *'a step backwards in our response to modern slavery with considerable implications for victims,'* as well as highlighting the Home Secretary's lack of consultation with the Statutory Guidance Reference Group, the various Modern Slavery Strategy Implementation Groups or the wider anti-trafficking sector when developing and implementing this change.<sup>65</sup> This provides just one example of the potential lack of proper oversight and accountability for secondary legislation, that should not warrant the judicial deference offered by declarations of incompatibility.

Additionally, where legislation created in the devolved assemblies in the UK are able to be struck down and/or amended by the courts, creating a system whereby Westminster secondary legislation is immune to such powers creates an anomaly that is both inappropriate and unjustified.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1055834/Modern\\_Slavery\\_Statutory\\_Guidance\\_EW\\_Non-Statutory\\_Guidance\\_SNI\\_v2.7.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055834/Modern_Slavery_Statutory_Guidance_EW_Non-Statutory_Guidance_SNI_v2.7.pdf)

<sup>63</sup> Home Office (2021), 'Discretionary leave considerations for victims of modern slavery' Version 5.0. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040852/Discretionary\\_leave\\_for\\_victims\\_of\\_modern\\_slavery.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040852/Discretionary_leave_for_victims_of_modern_slavery.pdf)

<sup>64</sup> Independent Anti-Slavery Commissioner (2021), Letter to the Home Secretary, 4 November 2021. Accessible at: [https://www.antislaverycommissioner.co.uk/media/1695/letter\\_to\\_home\\_secretary\\_on\\_ieca\\_11\\_november\\_2021.pdf](https://www.antislaverycommissioner.co.uk/media/1695/letter_to_home_secretary_on_ieca_11_november_2021.pdf)

<sup>65</sup> *Id.*

**Question 16:** Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights?

Response: **No.**

At para. [252], the consultation reads that:

*Clause 1 of the Judicial Review and Courts Bill will (if enacted) allow courts making quashing orders in judicial review proceedings in England and Wales to include provision suspending the effects of the order for a limited period of time, or removing or limiting any retrospective effect of the quashing. The clause sets out a presumption that these powers will be exercised if it appears to the court that including such provision would, as a matter of substance, offer adequate redress. It specifies a number of factors to which the court is required to have due regard.*

This is all correct. However, later at para. [252], the consultation adds that: ‘*The IHRAR Panel recommended that these powers should be made available in all proceedings where secondary legislation is challenged under the Human Rights Act.*’ This is a partial reading of the report. The report makes no reference to favouring a presumption; indeed, the word ‘presumption’ is not used at all in this context in the report. The only references made are to granting a court the *option* of suspended or prospective-only quashing orders.<sup>66</sup>

It is unlikely that significant changes will be made to the Judicial Review and Courts Bill. However, we would oppose the extension of clause 1 to all proceedings where a court has found that secondary legislation is incompatible with a human right.

#### *Prospective-only quashing orders*

Clause 1 of the Bill empowers a court to suspend or make prospective only quashing orders - where the public body has made an unlawful decision. Simply, this would mean that despite being unlawful, the act would not be quashed - i.e. set aside or invalidated with immediate effect. Instead, the act would only be quashed at some point in future, after the public body has been given time to remedy their unlawfulness.

Prospective quashing orders have the potential to create opportunities for injustice in individual cases, disincentivise future cases, weaken the rule of law, and introduce unnecessary layers of complexity into an already functioning system. They remove a

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<sup>66</sup> Chapter 7, The Independent Human Rights Act Review 2021. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/104052/5/ihrar-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/104052/5/ihrar-final-report.pdf).

significant degree of practical 'bite' and consequence following the court's finding of illegality.

Prospective quashing orders present a number of serious concerns, namely, they:

1. Place victims of unlawful action in a position where they may not be afforded redress for violation of their human rights, as remedies which are prospective-only may not extend to their case. This is of real significance for victims of human trafficking who may suffer real consequences from the lack of remedy, even potentially placing them in dire situations where they may be vulnerable to exploitation. As many victims of human trafficking will be reluctant to take forward a claim due to issues such as trauma, the existence of prospective only quashing orders will further disincentivise them from coming forward.
2. Create a chilling effect on individuals seeking to bring a claim, as they may be dissuaded from bringing their claim forward where the specific decision related to their case will not be rectified. This dynamic risks insulating the Government from scrutiny for unlawful decisions.
3. Make it more likely that judges will be forced to make overtly political decisions. Suspended or prospective-only quashing orders may validate actions which on their face contravene Acts of Parliament. This provides a judicial solution for unlawful acts from the government, removing this away from the power of Parliament to address this as is currently the case. As judges must consider the likely future actions of public bodies when deciding on whether a suspended or prospective-only quashing order is appropriate, they are undertaking a consideration that they are '*ill-equipped to undertake*.'<sup>67</sup> This ultimately cuts against the government's stated aim of preventing judges from engaging into the political realm.<sup>68</sup>
4. Undermine the simplicity of the existing quashing order system. The benefits of this system have been acknowledged by senior judges.<sup>69</sup> The suggested system will introduce uncertainty, particularly in relation to how they operate, likely leading to expensive post-judgement satellite litigation. Together, the legal uncertainty and increase in costs will act as an additional impediment for victims of human rights violations seeking to bring a claim.
5. Create a situation in which otherwise identical cases are treated differently depending on whether they were affected before or after a court judgement. Those impacted by an unlawful decision before the court judgement would have no recourse to remedy. Within this set up, a claimant may help to overturn an

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<sup>67</sup> John Howell QC sitting as Deputy High Court Judge in *R (Cooper) v Ashford Borough Council* [2016] EWHC 1525 (Admin) at [86]. See also Blake J in *R (Logan) v Havering London Borough Council* [2015] EWHC 3193 (Admin) at [59].

<sup>68</sup> Ministry of Justice (2021), Human Rights Act Reform: A Modern Bill of Rights, at [111] and [155].

<sup>69</sup> As Lord Nicholls put it in *Re Spectrum Plus* [2005] UKHL 41, "*whatever its faults the retrospective application of court rulings is straightforward*," at [26].

unjust decision whilst not being able to benefit from this decision. This has serious repercussions for the rule of law.

6. Given the impacts on the ability to receive remedies, the potential for continued injustice, the weakened rule of law, and the introduction of unnecessary complexity, we believe that the introduction of a prospective quashing order system would be entirely inappropriate and a cause of considerable concern. Additionally, we are entirely opposed to the creation of a presumption in favour of suspending a quashing order, which will amount to an inappropriate constraint on judicial discretion.

### *Suspended quashing orders*

This suggestion seeks to expand the policies put forward in the Judicial Review and Courts Bill and apply them to cases under the proposed Bill of Rights. However, the proposed quashing orders framework goes significantly further than the recommendations made by the Independent Review of Administrative Law ('IRAL') established by the Government in 2020. The IRAL panel made no recommendation for prospective-only quashing orders, and recommended against a presumption of limiting the effect of a quashing order in this way. Within this system, anyone impacted by the unlawful decision/policy will continue to feel the effects even after it was declared unlawful, and the court can change the date the suspended order comes into effect.

We are entirely opposed to any presumption in favour of suspending a quashing order which constitutes a clear fettering of judicial discretion, contrary to the stated aims set out in the present consultation document.

Suspended quashing orders will introduce uncertainty, particularly in relation to how they operate, likely leading to expensive post-judgement satellite litigation. Together, the legal uncertainty and increase in costs will act as additional impediment for victims of human rights violations seeking to bring a claim.

Quashing orders are important because they give courts the ability to nullify the illegal decisions of the Government. The alternative is that illegal public decisions will continue to have serious consequences for people's rights and lives, despite violating the law. In the context of human rights, the proposals are even more problematic and serious. The suggestion is that, despite a court finding that a public body has violated a human right, that finding should have no immediate practical consequences for the public body. This would be a serious reduction in domestic human rights protection.

The Judicial Review and Courts Bill is yet to achieve Royal Assent, nor has it been interpreted by senior courts. There has been no time to assess the practical consequences of Clause 1. Clause 1 is already of considerable concern, and should not be implemented nor extended.

Further, there is an important point concerning parliamentary sovereignty. Should suspended or prospective only orders become commonplace, this would undermine and frustrate the practical effect of human rights that Parliament itself has legislated to provide to individuals. Simply put, it would mean that even if a court were to find that secondary legislation is unlawful, the court could or would not invalidate the unlawful secondary legislation that violates human rights. This would significantly undermine the practical enforceability of rights that Parliament has created.

### **Deportations ‘in the public interest’**

**Question 24:** How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

**Option 1:** Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

**Option 2:** Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.

**Option 3:** Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

Response: **We oppose all three options as well as the assumption that removals are frustrated by human rights claims as proposed in Question 24.**

To date, there has not been a convincing argument to warrant the proposed reform options, as listed above. We contest the framing of the question. The 2014 Immigration Act has already produced the preferred legal position of the Government, a point they themselves have recognised. Further reform is unnecessary. A review of the relevant domestic jurisprudence reveals a cautious approach by the courts.

It is already the case that appeals against deportation must overcome many significant procedural hurdles and be able to demonstrate personal circumstances that meet a high threshold to outweigh the broad statutory codification of ‘public interest’ and be successful. All three options contravene the fundamental principles of universal human rights law and the rule of law.

The proposal to provide that ‘*certain rights cannot prevent deportation of a certain category of individual*’ seeks to exclude whole classes of people from the protection of human rights

law, including children of those subject to deportation, politically unpopular and often vulnerable groups. The proposed options would create a situation in which the law does not apply equally to everyone. As highlighted above, rights are universal. While recognising the ability to limit rights in accordance with strict processes, the removal of rights from particular people or in particular situations is entirely inappropriate and raises significant concerns.

The framing of the question assumes that deportations that are in the public interest are frustrated by human rights claims. However, the consultation provides little to no evidence to support this assertion.

Case study:

*Nadine was trafficked to the UK where she was exploited. She was then arrested and detained for immigration offences, despite having a live asylum claim. While in detention, Nadine was not asked questions designed to uncover the abuses she experienced in the UK. This meant the Home Office did not pick up on her human trafficking indicators and Nadine was removed from the UK. After being removed, Nadine was re-trafficked to different European countries where she faced destitution and homelessness. She was then trafficked back to the UK, where a charity identified her as a potential victim of human trafficking and signposted her to Ashiana Sheffield. Nadine has now entered the NRM. Authorities missed a series of opportunities to identify Nadine as a potential victim of human trafficking; when she was arrested, when she was being considered for detention, while in detention and before removal, which meant she did not receive the support she needed and was later re-trafficked.<sup>70</sup>*

For example, an anonymised case with the pseudonym 'X' is central to the government's illustration of the issue posed by Article 8 to the deportation of FNOs. This anonymisation means that respondents to the consultation are unable to analyse the case, identify if it was decided prior to 2014 and the amendments in the Immigration Act or confirm if the case was successfully appealed.

Moreover, the facts surrounding Case X do not compare to other cases. Case X appears to be an anomaly amongst identifiable case law. If this case pre-dates the 2014 amendments, it would no longer be the authority for the undertaking of proportionality assessment within deportation appeals on human rights grounds, as it would be superseded by the current legislative framework and is highly unlikely to have allowed an appeal on the facts provided. Alternatively, if the case was decided post-2014, it is plausible that a subsequent appeal would have been lodged (and have been successful) as it is difficult to find compatibility

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<sup>70</sup> Case study provided by Ashiana Sheffield for the report, in LEAG (2019) *ibid.* note 14 at p.18.



with the decision and post-2014 authority. We remain concerned that the anonymisation of Case X has been used as part of an effort to insulate itself from proper scrutiny of the poorly justified proposals contained within the consultation document.

The three proposed options undermine judicial discretion and independence in determining human rights (and indeed, on other questions of law). The proffered approaches would place politically unpopular groups' rights in the hands of government ministers and officials, providing serious opportunity for state abuse.

All three options are by-their-nature discriminatory. People from black and Asian backgrounds are disproportionately affected by the use of criminal sentencing and deportation powers. Increasing the use of powers to strip British citizens of their citizenship prior to deportation will likely follow this discriminatory trend. Given that victims of human trafficking are frequently subjected to deportation proceedings,<sup>71</sup> the presented options may have serious consequences.

The consultation's cavalier approach to evidence continues into the figures presented by the government to illustrate that *'the UK courts have expanded the scope for challenging deportation orders under Article 8'*. Internal Home Office figures are cited, indicating that within the twelve-year period from April 2008 to June 2021, 21,521 appeals against deportations were lodged by Foreign National Offenders (FNOs) – of which around 11% were allowed at the First Tier Tribunal on human rights grounds. Criminal exploitation is a considerable issue for non-UK national victims of human trafficking.<sup>72</sup> Already the lack of trauma-informed opportunities to disclose and inadequate screening processes lead to an under disclosure of victimhood<sup>73</sup> - insulating deportation proceedings from scrutiny and meaningful accountability will inevitably result in the deportation of victims of trafficking and modern slavery offences. These flaws produce a system that creates a significant risk of re-trafficking, and plays into the hands of traffickers by creating a category of people whom exploiters can victimise with impunity.

The majority of appeals are not human rights based. Home Office figures provide that around 89% of the appeals lodged by FNOs against deportations were allowed at the First Tier Tribunal on grounds other than human rights. In addition, 'human rights grounds' is used as an aggregate term, not only to rights protected by the HRA, for appeals brought under the Convention in addition to those lodged under other international, rights based provisions.

These proposals are clearly contrary to the UK's duties under the European Convention on Human Rights, particularly Article 13 which creates a right to an effective remedy for a breach of human rights. They would directly remove rights that people have under the

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<sup>71</sup> LEAG (2019) *ibid.* note 14.

<sup>72</sup> Home Office (2022), *ibid.* note 22.

<sup>73</sup> LEAG (2019) *ibid.* note 14.

Convention, and leave them with no option but to go to the Strasbourg court to secure the protections they are entitled to.

We entirely reject the framing that human rights claims are used to “frustrate” deportations. As highlighted above, in contrast to the Home Office’s view of human trafficking claims as ‘delaying tactics’ to postpone deportations, the NAO duly notes that this is entirely unevidenced.<sup>74</sup> Their report on Immigration Enforcement highlights the absence of ‘systematic analysis’ which could ‘*help the Department understand why claims are increasing, or to rule out if Immigration Enforcement’s own actions might have contributed to the increase.*’<sup>75</sup> Being able to claim one’s most fundamental rights - including the right not to be subject to torture, or one’s right to private and family life - is of paramount importance. We reiterate our concern over the concerted efforts to delegitimise claims of human trafficking, which can only serve to harm victims of trafficking and impede the UK’s ability to protect and support those in exploitation. Moreover, the systems necessary to implement this provision and verify criminal histories (including in third countries) may result in considerable delays to a system which is already severely backlogged. This will include backlogs in the criminal court as well, an already strained system.<sup>76</sup>

Case study:

*G was identified as a victim of trafficking and was entered into the NRM. He was placed in accommodation under the Home Office contract for the provision of services to victims. He subsequently received a positive conclusive grounds decision recognising that he was a victim of human trafficking. G decided he wanted to stay in the UK but felt that his only option was to live with friends in another part of the country as there was the possibility of a job there. The job offer subsequently turned out to be further exploitative work. The victim began to attend a homeless day-shelter and whilst he was there a person from the UK Visas & Immigration attended the homeless shelter and spoke to all the residents. G was served with an administrative removal notice for not exercising his treaty rights. He was advised he would have to pay £140 to appeal the decision - money which he did not have. At this point, G contacted Hope for Justice, whose advocacy team signposted him for immigration advice. There was no easy route to obtain legal aid funding and a large proportion of immigration advisors will not accept a case involving administrative removal. After rigorous advocacy from Hope for Justice and assistance from a housing solicitor, he was placed in a homeless shelter. The police made an application for Discretionary Leave to Remain on the basis that G was potentially a key prosecution witness in a large*

<sup>74</sup> National Audit Office (2020), ‘Report by the Comptroller and Auditor General, Immigration enforcement’ HC 110 Session 2019–2021, p.38. Available at:

<https://www.nao.org.uk/wp-content/uploads/2020/06/Immigration-enforcement.pdf>

<sup>75</sup> *Id.*

<sup>76</sup> National Audit Office (2021) ‘Report by the Comptroller and Auditor General, Reducing the backlog in criminal courts Ministry of Justice and HM Courts & Tribunals Service’ HC 732 Session 2021–22 22, p.6. Available at: <https://www.nao.org.uk/wp-content/uploads/2021/10/Reducing-the-backlog-in-criminal-courts.pdf>.

*criminal investigation. Removal proceedings were subsequently dropped. G is now in stable accommodation and full-time employment. Had an agency not been involved, G (a key prosecution witness) would have been 'removed'. His vulnerabilities would have placed him at risk of being re-trafficked or re-exploited in his country of origin and, given that he had already been re-exploited in the UK, these were genuine and significant risks. G subsequently gave evidence in a large prosecution case.<sup>77</sup>*

## **'Illegal' and irregular migration**

**Question 25:** While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

Response: **We reject the assumption behind Question 25.**

The consultation document uses vague language, with the 'impediments arising from the Convention and the Human Rights Act' being entirely unclear. We reiterate that a human rights claim is no less valid where it is made in the context of irregular migration. It is wholly inappropriate to seek to evade scrutiny and impede access to justice in order to achieve a political aim without impediment. Human rights law was developed to constrain state abuses of power, particularly in relation to politically unpopular groups such as irregular migrants. The assumptions behind question 25 cuts against this core purpose and exemplifies a worrying thread woven throughout this consultation document.

However, the consultation document reaffirms the UK's commitment to international provisions, for instance to the Refugee Convention,<sup>78</sup> and would remain obligated to adhere to them. Any attempts to curtail human rights protections in order to insulate deportation orders from challenge are extremely concerning and are of considerable threat to victims of trafficking. The Labour Exploitation Advisory Group's research has uncovered the barriers that exist regarding identification and access to legal aid in immigration detention settings<sup>79</sup>

Such trends will be exacerbated by the newly created Immigration Enforcement Competent Authority who are set up to take an immigration-enforcement lens to their

<sup>77</sup> This case study was provided by Hope for Justice.

<sup>78</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>79</sup> LEAG (2019) *ibid.* note 14.

decision-making.<sup>80</sup> We note the Government's own recognition of informal migration status producing vulnerabilities to human trafficking within the National Referral Mechanism's own referral document. Emboldening the Government's already heavy-handed immigration enforcement system and insulating it from scrutiny and accountability will do nothing for victims of human trafficking. Rather it will further entrench victims' fears of coming forward or seeking to exit their exploitation. Research undertaken by the European Union Agency for Fundamental Rights in eight European countries, including the UK, uncovered that migrant workers rank their insecure status as the primary reason they were made vulnerable to exploitation while in Europe as well as the main reason this group chose not to report exploitation.<sup>81</sup> To reduce vulnerability to exploitation, victims with insecure status should not be subjected to additional harm through deportation orders which are insulated from scrutiny.

We are concerned that there does not appear to be a recognition of the fact that the Government's refugee and asylum policies have frequently acted as a driver of exploitation including human trafficking.<sup>82</sup> Where refugees and asylum seekers are not provided with safe routes, they are more likely to be pushed towards exploiters, where they are not provided with permission to work, they are more likely to end up in exploitative conditions. The use of language of 'illegal' migration slots into the wider milieu of governmental rhetoric that seeks to criminalise migration and delegitimise refugees and asylum seekers, for instance through the Nationality & Borders Bill. We fundamentally reject this approach and the overarching framing.

The proposal that deportation orders will not be able to be overturned unless 'obviously flawed', with no further explanation of the relevant criteria, amounts to an effective removal of appeal routes in all but extremely limited (and unspecified) circumstances. Such proposals are concerning and if given effect, would significantly undermine access to justice and weaken the accountability of public bodies.

### **Emphasising the role of responsibilities within the human rights framework**

**Question 27:** We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

**Option 1:** Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

<sup>80</sup> Taskforce on Victims of Trafficking in Immigration Detention, (2021) *ibid.* note 29.

<sup>81</sup> European Union Agency for Fundamental Rights (2019), 'Protecting migrant workers from exploitation in the EU: workers' perspectives,' p.74.

<sup>82</sup> Group of Experts on Action against Trafficking in Human Beings (GRETA) (2021), Evaluation Report - United Kingdom: Third evaluation round, Access to justice and effective remedies for victims of trafficking in human beings at [46-48]. Available at: <https://rm.coe.int/greta-third-evaluation-report-on-the-united-kingdom/1680a43b36>.

**Option 2:** Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal **or** otherwise, as to the conduct to be considered.

Response: **We reject both options 1 & 2 as well as the assumption behind Question 27.**

We entirely reject the Ministry of Justice's deeply concerning proposals on limiting compensation. Human rights should not be contingent on an individual's conduct. This is particularly concerning in relation to human trafficking where individuals may have been subject to criminal exploitation. Over the last two years the NRM shows 48% and 49% of identified victims' experiences included some form of criminal exploitation as part of their exploitation.<sup>83</sup><sup>84</sup> Given the 'referral lottery' as well as victims' own frequent difficulty in self-identifying as a victim of human trafficking,<sup>85</sup> victims of criminal exploitation are often not recognised as such. Moreover, the UK's own international obligations regarding human trafficking oblige the Government to protect and assist *all* victims of human trafficking, without discrimination - making no distinction between those with or without criminal records.<sup>86</sup> Seeking to create a standard of behaviour will act to exclude individuals who do not match the arbitrary expected characteristics and could make them a target for exploiters. There is no one way by which an individual may come to be trafficked. The existence of a criminal history should never be used as a reason to avoid enforcing their human rights. To do so would create a 'deserving' and 'undeserving victim of human rights violations' which cuts against the very core of the concept of human rights.

This question puts forward two options for limiting compensation for human rights violations, both based on the victim's conduct. We reject both options.

Beyond this, the consultation document's framing of human rights litigation as a vehicle for compensation is not evidenced. No reference is made to the fact that compensation payments in human rights civil cases are considerably smaller than ordinary civil litigation, and often do not result in compensation orders. Such a framing seems to be part of an effort on the part of the Government to delegitimise human rights claims and present claimants as 'undeserving' individuals with ulterior motives.

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<sup>83</sup> Home Office (2021), *ibid.* note 22.

<sup>84</sup> Home Office (2022), *ibid.* note 22.

<sup>85</sup> After Exploitation (2020), *ibid.* note 57.

<sup>86</sup> See e.g., UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000; Council of Europe *Convention on Action against Trafficking in Human Beings*, CETS No. 197.

Additionally, we hold that human rights legislation is not the correct means for regulating individual behaviours. Areas such as criminal law, for instance, offer a more appropriate avenue for such ambitions. Human rights law seeks to protect individuals and communities from abusive powers of the state. We reject the reframing of human rights law as a tool to sculpt individual conduct.

We are concerned that the second option, which allows compensation to be reduced or ruled out on the basis of a broad assessment of a person's past behaviour, offers no indication of the types of behaviour that would be considered or if this assessment would be backdated, how far into someone's past conduct would be considered under this assessment. This option would introduce a morality test for compensation payments – an effort which we entirely reject.

Case study:

*K was arrested by police and subsequently identified as a potential victim of modern slavery. Even though he was identified as a potential victim, the police continued to treat him as if he was a criminal. A police report was opened, but quickly closed. The CPS also did not drop charges against the victim, even after arguments were made on the grounds of public interest and mental health concerns. K had wanted to engage with the police as a victim and give evidence against his traffickers, but the reports were continuously being closed without an adequate explanation. Two police forces were involved in the K's case. Both police forces shifted the responsibility over to the other regarding who was meant to deal with the case; for example, one police force stated that the other police force was already managing the case. However, in that case, K was considered a criminal, and not as a potential victim of modern slavery. Consequently, a public lawyer challenged the situation in the form of a letter, arguing his treatment was in breach of his human rights according to Article 6 which entitles him to a fair trial.<sup>87</sup>*

We know from our work with survivors that one of the most effective ways to keep victims of trafficking in fear is to force them to commit crimes, so they will be criminalised if they come forward to the authorities. If vulnerable adults and children are denied access to the NRM system on the basis of previous convictions they are unlikely to come forward in the first place and their exploitation will not be addressed. Moreover, individuals with criminal records are vulnerable to exploitation, and excluding them from being able to receive appropriate compensation, would further compound their vulnerability.

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<sup>87</sup> This case study was provided by Hope for Justice.

Signatories:

**Focus on Labour Exploitation (FLEX)**  
**Latin American Women's Rights Service (LAWRS)**  
**Love 146**  
**Kanlungan**  
**Africans Unite Against Child Abuse (AFRUCA)**  
**The UK BME Anti-Slavery Network (BASNET)**  
**Labour Exploitation Advisory Group (LEAG)**  
**Taskforce on Victims of Human Trafficking in Immigration Detention**  
**Every Child Protected Against Trafficking (ECPAT)**  
**Helen Bamber Foundation**  
**Hope for Justice**  
**Anti Trafficking and Labour Exploitation Unit (ATLEU)**  
**Kalayaan**  
**Unseen**  
**Migrant Help**  
**City Hearts**  
**Anti-Slavery International**  
**The Anti-Trafficking Monitoring Group (ATMG)**  
**The Rights Lab, University of Nottingham**

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