

## NATIONALITY AND BORDERS BILL – BRIEFING AND AMENDMENT FOR CLAUSE 62

### UPHOLDING THE MODERN SLAVERY ACT, NOT EMBOLDENING TRAFFICKERS

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*“My gravest concern lies in Clause 62 of the bill... we are suggesting that some victims are deserving of support and others are not – however awful or egregious the harm suffered”.*<sup>i</sup>

DAME SARA THORNTON, INDEPENDENT ANTI-SLAVERY COMMISSIONER

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#### Introduction:

The UK has a proud history since the days of Wilberforce of combatting slavery and human trafficking. In the last decade it has upheld this tradition; and its Modern Slavery Act 2015 and current victim identification and support provisions are recognised as world renowned. However, including modern slavery as Part 5 of the Nationality & Borders Bill conflates modern slavery and immigration. Over 100 CEOs from anti-slavery and human rights organisations believe this will negatively impact public order and national security and puts into jeopardy the UK’s legacy and status as a world leader in this fight against slavery.<sup>ii</sup>

One clause the anti-slavery sector is concerned about is Clause 62, which will disqualify from support any victim of modern slavery who is considered to be a ‘*threat to public order*’. The stated justification for this is to prevent criminals from using experiences of exploitation to avoid justice or deportation and reduce delays; but no data has been provided to evidence claims of misuse in the National Referral Mechanism (NRM) or to show how the reforms will have this effect. **In fact, on the contrary, 49% of victims of modern slavery in the UK last year were criminally exploited, suggesting that this clause has the potential to exclude almost half of all victims from support.**<sup>iii</sup>

This briefing sets out the anti-slavery sector’s concerns with Clause 62 of the Bill and presents amendment 68A, which gives the Government the powers it seeks, without endangering genuine victims of trafficking or enabling and protecting their traffickers.

#### Clause 62:

Through a wide-ranging ‘public order exemption’, currently Clause 62 of the Bill gives the Government the power to refuse vital support to trafficking victims and to deny victims the right to have their trafficking investigated, even if they are a child or British citizen. **Note that 47% of modern slavery victims identified in the UK last year were children and 34% of victims were British.**<sup>iv</sup> The overly broad exemption of public order also applies to any foreign national who has been sentenced to 12 months’ imprisonment or more, at anytime, anywhere in the world.

We are concerned that Clause 62 will enable victims of trafficking to be stripped of vital protections due to their previous convictions, which may be for historic crimes, or for crimes they’ve been forced to commit during their exploitation. As senior police officers have warned, this will make it more difficult for people to escape exploitation and gives the power to the exploiters.<sup>v</sup>

With so many victims of slavery at risk of falling under this wide disqualification umbrella, it will also impede prosecutions of traffickers who force their victims into criminal activities, such as those who run ‘county lines’ drugs operations with, often British, children as couriers. The Rt Hon Dominic Raab recently acknowledged that “We know that, if the victims who have gone through these awful crimes get the support they need, they are less likely to fall out of the justice system.”<sup>vi</sup>

Evidence repeatedly demonstrates this. For example, in Nusrat Uddin’s report on prosecutions and support, 73% of victims supported by the charity *Hope for Justice* engaged with the criminal justice process, and all but two of their cases that went to criminal trial ended with a successful conviction<sup>vii</sup>. Most victims don’t receive such support and in 2019, there were only a mere 256 modern slavery offence prosecutions, yet over 10,000 victims referred to the NRM, which is the Government’s framework for identifying victims of modern slavery. Removing NRM support will decrease the number of criminal prosecutions for trafficking offences as there is no incentive for victims trapped in criminal exploitation, or targeted by traffickers for their criminal conviction, from coming forward or supporting the police with their operations.

In summary, our chief concerns with Clause 62 as currently drafted are:

- 1. By disqualifying victims from protection, Clause 62 effectively gives trafficking groups a license to traffic.** This clause sends a message to traffickers that they are free to exploit people with criminal records as they’ll no longer qualify for help. This could lead to a catastrophic increase in child criminal exploitation, with traffickers knowing once they’ve forced a young person to commit a crime, they will not ask for help as they are unlikely to receive it. Traffickers rely on and feed victims’ fears that authorities will not believe or assist them or may take action against them.<sup>viii</sup> This clause legitimises the traffickers’ claims, making it harder for victims to escape and giving license to traffickers to exploit those with criminal convictions, leading to more cases of modern slavery. As research by the University of Nottingham has expressly found Clause 62 “denies the police and prosecution of simple crime reporting and the most important witness in most cases—the victim”.<sup>ix</sup> This “sends a message to Organised Criminal Networks and criminals that their crimes and activities carry little or no risk.”<sup>x</sup>
- 2. It will significantly reduce the number of successful UK prosecutions against traffickers and leave some of the most dangerous criminals free. This is why so many senior police and prosecutors are voicing concern<sup>xi</sup>.** As highlighted by the Independent Anti-Slavery Commissioner, “there is a significant risk that this provision will undermine our ability to bring perpetrators to justice” as without support, victims are unlikely to be able to give evidence and participate effectively in criminal proceedings.<sup>xii</sup> By way of example, the UK’s most successful modern slavery case, Operation Fort, relied on the evidence from Polish slavery victims who had been initially targeted by traffickers for petty offences they had committed. The UK’s lead slavery prosecutor Caroline Haughey QC, who worked on that case and helped draft the Modern Slavery Act, has described this Bill, as it is presently drafted, as “catastrophic” and warned it risks “making already challenging cases all the more difficult to prosecute and wholly undermining the intentions of the Modern Slavery Act.”<sup>xiii</sup>
- 3. Clause 62 undermines the UK’s reputation as a world leader in combatting human trafficking and violates the UK’s international legal obligations.** The UK is seen as a world leader in tackling modern slavery, in part due to the Modern Slavery Act 2015. Clause 62 risks seriously undermining the achievements of the Modern Slavery Act by excluding victims from support, as well as breaching the European Convention on Action against Trafficking (ECAT) by removing the obligation to identify trafficking victims and investigate trafficking offences.<sup>xiv</sup>
- 4. Clause 62 would allow the Government to pick and choose which trafficking victims merit protection, penalising certain trafficking victims even for even crimes they’ve been forced to commit or for the acts of their traffickers.** Clause 62 creates deserving and undeserving

victims and undermines the UK's justice system by implying that by committing one crime you are not a victim of another. Under clause 62, a child made to carry a weapon by an organised crime gang could be denied protection due to their conviction for the crime they were forced to commit. We now know that many of the young British girls sexually abused by so-called 'grooming gangs' were both made to commit crimes, but also did so visibly, as a call for help. Yet as a result, they would now be at risk of being denied support under this clause. At the Bill's Committee stage, the Minister tried to reassure MPs that officials will use their discretion and judge victims 'case by case'. But it was the lack of clarity and use of 'discretion' that meant in the past police and social workers criminalised or labelled these girls as 'asking for it' and 'problems', rather than recognising them as victims of very serious exploitation.

### **Parliamentary update:**

There were multiple amendments to clause 62 raised at the committee stage in the House of Lords, including that clause 62 should not stand part of the Bill. Lord Randall tabled the amendment outlined in this briefing below with cross-party support and tabled it again as 68A for report stage.

Richard Fuller (Conservative MP) tabled the same amendment at report stage in the Commons. He was supported by Karen Bradley (Conservative MP, Co-chair of APPG on Trafficking), Darren Jones (Labour MP, member of APPG on trafficking) and Sarah Champion (Labour MP). The new clause was not pushed to a vote.

Theresa May also spoke at Report Stage, and in regard to the disqualification Clause 62 said, *"If we are to stop modern slavery, we must ensure that we catch the perpetrators, which requires victims to be able to come forward with evidence. She is outlining certain elements of the Bill that she fears will restrict victims' ability to come forward, and I am concerned that the public order disqualification threshold and the time period on slavery and trafficking information notices will also have that effect."*

### **Proposed Amendment to Clause 62:**

The Government has suggested in its Explanatory Notes to the Bill that Clause 62 is needed to implement Article 13 of the Convention Against Trafficking,<sup>xv</sup> providing a power to refuse to provide protection to some trafficking victims on grounds of public order. But the current draft of the Bill would in fact undermine the Convention, not implement it.

NGOs in the sector have worked closely with GRETA – the Council of Europe's (of which we are still part) monitoring body for the Convention Against Trafficking – along with senior legal advisers to draft a replacement for Clause 62 which would implement Article 13. This would preserve the Government's power to remove individuals from the UK who pose a genuine threat to national security or public safety, while not gravely undermining the protections in the Modern Slavery Act.

The proposed amendment would make the following crucial changes to Clause 62:

- i) It would faithfully implement the public order exemption found in Article 13 of ECAT, limiting the public order exemption's application to cases where there is a genuine, imminent and sufficiently serious threat to public order.
- ii) It would maintain the UK's obligation to investigate trafficking wherever it occurs, whoever it is committed by.

- iii) It would exclude children from the scope of the exemption, meaning the Government can remain committed to its obligations to child trafficking victims.
- iv) It would adopt the wording from ECAT 'improperly' rather than the accusatory 'bad faith'

To move the following Clause-

**Identified potential victims etc: disqualification from protection**

- (1) This section applies to the construction and application of Article 13 of the Trafficking Convention
- (2) The competent authority may determine that it is not bound to observe the minimum recovery period under section 60 of this Act in respect of a person in relation to whom a positive reasonable grounds decision has been made if the authority is satisfied that it is prevented from doing so:-
  - (a) as a result of an immediate, genuine, present and serious threat to public order; or
  - (b) the person is claiming to be a victim of modern slavery improperly.
- (3) Any determination made under subsection (2) must only be made:
  - (a) in exceptional circumstances;
  - (b) where necessary and proportionate to the threat posed; and
  - (c) following an assessment of all the circumstances of the case.
- (4) A determination made under subsection (2) must not be made where it would breach:
  - (a) a person's Human Rights Convention rights;
  - (b) the United Kingdom's obligations under the Trafficking Convention; or
  - (c) the United Kingdom's obligations under the Refugee Convention.
- (5) For the purposes of a determination under sub-section 2 (b) victim status is being claimed improperly if the person knowingly and dishonestly makes a false statement without good reason, and intends by making the false statement to make a gain for themselves.
- (6) A good reason for making a false statement includes, but is not limited to, circumstance where:
  - (a) the false statement is attributable to the person being or having been a victim of modern slavery; or
  - (b) where any means of trafficking were used to compel the person into making a false statement.
- (7) This section does not apply where the person is under 18 years at the time of the circumstances which gave rise to the positive reasonable grounds decision.
- (8) Nothing in this section shall affect the application of section 60(2) of this Act.

Explanatory Note:

This new clause is an alternative to clause 62. It ensures that the power currently provided for in clause 62 is exercised in line with the UK's obligations under Article 13 of the Trafficking Convention. This amendment also protects child victims of modern slavery from disqualification from protection.

## **Supporting Evidence:**

### **The law:**

UN Special Rapporteurs in a letter to the UK Government<sup>xvi</sup> on 5<sup>th</sup> November 2021 said, “We are concerned that Clause 62 would be in violation of the State’s obligation to identify victims of trafficking or contemporary forms of slavery and note that this obligation applies in all situations of trafficking and exploitation, and in respect of all victims, without exception.”

In relation to children they state, “We are concerned that Clause 62 would appear to apply also to child victims of trafficking and contemporary forms of slavery and children at risk of trafficking. We remind Your Excellency’s Government of the obligation under the Convention on the Rights of the Child (CRC), to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind.”

Furthermore, they state, “We are concerned that Clause 62(3) would be in violation of the State’s obligation to ensure non-punishment of victims of trafficking or contemporary forms of slavery for any unlawful acts that that are a direct consequence of trafficking.”

In relation to disqualification due to ‘bad faith’ they state, “We are concerned that if delays in disclosure and/or difficulties in providing a full and consistent account of the trafficking or slavery experience were considered as evidencing bad faith, there would be a serious risk that victims would not be identified and would be denied assistance, and protection.”

### **The data:**

The West Midlands police dismantled the UK’s biggest modern slavery network under Operation Fort. 11 members of a trafficking gang were convicted thanks to the witness testimony of 60 victims. One third of these victims had criminal convictions and had been targeted by the traffickers because they were prison leavers and therefore vulnerable. Under clause 62 these 20 victims may have been excluded from protection due to their criminal records, and therefore would not have supported with the investigation, risking the trafficking gang still being at large.

The charity Hope for Justice found that 29% of the victims of modern slavery that they support have committed offences that would meet the criteria under public order grounds, and a further 13% have committed wider offences that may/may not meet the criteria. This is a huge number of victims currently being supported who could be excluded from protection under this Bill.

Furthermore, Justice and Care found 89% of victims supported by their navigators engaged with the police. Hope for Justice has similar data; between 2013-2021, 73% of victims supported by their Independent Modern Slavery Advocates engaging with reporting and criminal investigation. Since 2013, 100% of victims supported by an IMSA attended court when requested to do so and all bar two cases (one of which was discontinued on a point of law) led to successful prosecution when the IMSA was supporting the victim with this process. This data demonstrates how vital victim support is in modern slavery prosecutions and removing this support means less traffickers behind bars.

Almost 5,000 children were exploited in the UK last year<sup>xvii</sup>. The majority of these were criminal exploitation cases including children being made to traffic drugs through ‘County lines.’ Clause 62 will

mean that a child forced to commit certain crimes as a result of their own exploitation has no escape; giving a green light to traffickers and leading to more children being criminally exploited.

### **Anticipated Responses:**

#### **“On a ‘Case by Case’ Basis”:**

The minister says the above concerns will be able to be resolved on with discretion and on a ‘case by case’ basis. But we sadly know from experience that safeguarding requires clear procedures to avoid tragedy. See the above example regarding the child grooming gangs and note the reliance at the time by authorities on the discretion of officials. This ‘discretion’ meant that the young British girls being physically and sexually abused by groups of adult men, were labelled by police and social workers as ‘easy’ and effectively deserving of their abuse. Instead we should start from a position of support and use discretion to disqualify people on occasion when they are a serious genuine threat.

#### **“It will be laid out in Guidance”:**

Statutory Guidance for Modern Slavery in England and Wales, as required under section 49 of the Modern Slavery Act (2015) was first launched in 2020, five years after the act was enacted. If the same is found to be true for the Nationality & Borders Bill, what information should victims and decision makers rely on in the meantime?

Furthermore, despite the Minister’s promise to work with the Anti-Slavery Sector on the guidance for Part 5, a recent example shows the Government’s consultation on statutory guidance disappointing: The Modern Slavery Unit within the Home Office co-ordinates a Modern Slavery Strategy and Implementation Group (MSSIG), related thematic groups and a Statutory Guidance reference group. These groups are intended to provide external partners the opportunity to work with government to inform and support development of strategy and guidance on relation to modern slavery. On the 8<sup>th</sup> November 2021 the Modern Slavery Statutory Guidance was updated with multiple amendments including a major policy change – the creation of an Immigration Enforcement Competent Authority to make NRM decisions for foreign national offenders. Members of the Statutory Guidance reference group were first informed of changes only once the updated guidance was already online and publicly available. No member of the group had been consulted and no meeting to discuss these changes or seek input before publication convened.

#### **“It will help prevent traffickers from taking advantage of the NRM”:**

The Government is yet to publish any data that demonstrates people taking advantage of the NRM. By saying clause 62 will help prevent traffickers from taking advantage of the NRM makes the assumption that traffickers all have convictions while victims do not. The Anti-Slavery sector sadly sees the opposite. As described above, a significant number of victims of modern slavery have been targeted precisely because of vulnerabilities such as petty convictions. Meanwhile in much of the world, traffickers are connected with the authorities and they themselves therefore avoid any convictions. By way of example, Romania is seen as a country that is fairly incorrupt – hence why the UK police work closely with them. However, after the first joint modern slavery investigation between the UK and Romania, Operation Golf in 2010, over a hundred traffickers were jailed in the UK for child exploitation; however, on the Romanian side, no one is yet to go to jail.<sup>xviii</sup>

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- <sup>i</sup> <https://www.thetimes.co.uk/article/rushed-borders-bill-will-fail-victims-of-modern-slavery-mxzd8vxf>
- <sup>ii</sup> <https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/61c0aa9e56dfd651a636d1b/1640016543056/Antislavery+Sector+Letter+to+MPs+on+the+Nationality+Borders+Bill+%28final%29.pdf>
- <sup>iii</sup> <https://www.gov.uk/government/collections/national-referral-mechanism-statistics>
- <sup>iv</sup> *ibid*
- <sup>v</sup> <https://www.independent.co.uk/news/uk/home-news/modern-slavery-immigration-bill-tories-b1951648.html>
- <sup>vi</sup> <https://www.theyworkforyou.com/debates/?id=2021-11-09a.164.4&s=%28%22modern+slavery%22+OR+%22human+trafficking%22%29#g166.1>
- <sup>vii</sup> <https://www.antislaverycommissioner.co.uk/media/1268/the-fight-against-modern-slavery-and-human-trafficking.pdf>
- <sup>viii</sup> Traffickers use “threats of physical harm to the victim or her family and friends or threatening to call the police to have the victim arrested or deported if they do not submit to the trafficker’s demands”. *Seeking Effective Remedies for Criminalized Trafficking Victims*, International Women’s Human Rights Clinic at City University of New York <https://ncjtc-static.fvtc.edu/Resources/RS00002861.pdf>.
- <sup>ix</sup> Rights Lab, Nottingham University, *Consideration Paper; Nationality and Borders Bill*, 18 October 2021, para. 179 <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>x</sup> *Ibid*, para. 179.
- <sup>xi</sup> [Top police warn Patel’s immigration bill will make life easier for traffickers | The Independent](https://www.independent.co.uk/news/uk/home-news/modern-slavery-immigration-bill-will-make-life-easier-for-traffickers-the-independent)
- <sup>xii</sup> <https://www.thetimes.co.uk/article/rushed-borders-bill-will-fail-victims-of-modern-slavery-mxzd8vxf>
- <sup>xiii</sup> <https://www.independent.co.uk/independentpremium/voices/modern-slavery-borders-bill-priti-patel-b1957431.html>
- <sup>xiv</sup> Rights Lab, Nottingham University, *Consideration Paper; Nationality and Borders Bill*, 18 October 2021, para. <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>xv</sup> Article 13 only allows for an exemption to the rest and recovery period, not from the obligation to identify. Available at: <https://rm.coe.int/168008371d>
- <sup>xvi</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26788>
- <sup>xvii</sup> <https://www.gov.uk/government/collections/national-referral-mechanism-statistics>
- <sup>xviii</sup> [The luxury town where rich Romanian gangsters build mega mansions from British money and child slavery \(thesun.co.uk\)](https://www.thesun.co.uk)