



January 2019

## **Joint submission to the Committee on the Elimination of all forms of Discrimination against Women, 72<sup>nd</sup> Session (18 February – 8 March 2019) – eighth periodic report of the United Kingdom of Great Britain and Northern Ireland (the UK).**

### **INTRODUCTION**

This is a joint submission to the Committee on the Elimination of all forms of Discrimination against Women (hereafter the Committee) by five civil society organisations: Anti-Slavery International<sup>1</sup>, the Anti Trafficking and Labour Exploitation Unit (ATLEU)<sup>2</sup>, the Anti-Trafficking Monitoring Group (ATMG)<sup>3</sup>, the Human Trafficking Foundation (HTF)<sup>4</sup>, and Kalayaan<sup>5</sup>. It provides information on trafficking and modern slavery in the UK, relevant to paragraphs 4, 11 and 21 of the List of Issues.<sup>6</sup> It outlines gaps in the identification, protection and support provided to victims of trafficking and modern slavery; barriers in access to legal advice, justice and remedy; and flaws in the legal and policy framework relating to migrant domestic workers, which renders them particularly vulnerable to abuse, exploitation, and trafficking.

<sup>1</sup> Anti-Slavery International, established in 1839 and in consultative status with ECOSOC since 1950, works to eradicate all contemporary forms of slavery.

<sup>2</sup> The Anti Trafficking and Labour Exploitation Unit (ATLEU) provides legal representation to victims of trafficking and modern slavery to help victims secure safety, recovery and redress.

<sup>3</sup> The Anti-Trafficking Monitoring Group (ATMG), a coalition of 14 organisations, was founded in May 2009 to monitor the UK's implementation of the Council of Europe Convention on Action against Trafficking in Human Beings (2005). The member organisations are AFRUCA, Amnesty International UK, Anti-Slavery International, Ashiana, Bawso, ECPAT UK, Focus on Labour Exploitation (FLEX), Helen Bamber Foundation, JustRight Scotland, Kalayaan, Law Centre (NI), Snowdrop Project, TARA (Trafficking Awareness Raising Alliance, a service run by Community Safety Glasgow), and UNICEF UK

<sup>4</sup> The Human Trafficking Foundation (HTF) grew out of the work of the All-Party Parliamentary Group on Human Trafficking and Modern Slavery. It was established to support and add value to the work of the many charities and agencies operating to combat human trafficking in the UK.

<sup>5</sup> Kalayaan, established in 1987, provides advice, support and advocacy services to migrant domestic workers in the UK. They are a UK designated First Responder to the National Referral Mechanism

<sup>6</sup> CEDAW/C/GBR/Q/8

## **EXECUTIVE SUMMARY**

Since the Committee examined the seventh periodic report of the UK in 2013, there has been a number of significant and positive improvements to the legislative and policy framework addressing modern slavery and trafficking in the UK, and increased action and focus by the Government.

However, despite notable efforts, obstacles persist in ensuring the effective identification and protection of victims of modern slavery, and their access to justice and remedy. The UK's official identification mechanism for victims of modern slavery, the National Referral Mechanism (NRM), remains flawed despite recent reforms and pilots. Victim support is largely absent from the Modern Slavery Act. Many victims fall through the gaps and struggle to access accommodation, medical services, and counselling. Access to legal advice for victims is particularly problematic. Legislation too narrowly defines what is in scope for legal aid, and procedural issues around how and when cases are funded, alongside poor decision making by the Legal Aid Agency, leaves victims unable to get legal advice when they need it. Levels of prosecutions and convictions for modern slavery offences are low. In theory, mechanisms to provide remedy, including compensation to victims are in place, but in practice these remain largely inaccessible. Finally, tensions with immigration and drugs legislation means that many victims are still criminalised.

Migrant domestic workers continue to suffer from widespread abuse, exploitation, trafficking and forced labour. The Overseas Domestic Worker visa (ODW visa) increases vulnerability to these abuses by restricting migrant domestic workers to a non-renewable six-month visa, against the recommendations of an independent review commissioned by the Government, which renders the right to change employer inaccessible in practice. Further changes announced by the Government as a result of the review, which have the potential to be positive, have not been implemented in practice.

### **I. Trafficking and modern slavery (para 11 of the list of issues<sup>7</sup>)**

#### **1. Improvements to the legal and policy framework on trafficking and modern slavery**

In 2013, the Committee stated its concern at "...the lack of a comprehensive national framework on trafficking" and "...alleged weaknesses of the National Referral Mechanism in identifying victims of trafficking and the lack of adequate support provided to them."<sup>8</sup> It urged the UK "To identify any weaknesses in the National Referral Mechanism and ensure that victims of trafficking are properly identified and adequately supported and protected."<sup>9</sup> Since then, there have been a number of significant and positive improvements to the legislative and policy framework addressing modern slavery, including trafficking, and increased action and focus by the Government. In 2015, the Modern Slavery Act, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland), and the Human Trafficking and Exploitation (Scotland) Act came into force. The three Acts introduced new criminal offences for human trafficking, slavery, servitude,

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<sup>7</sup> Paragraph 11. In its previous concluding observations, the Committee expressed concern at weakness of the national referral mechanism in identifying victims of trafficking and the lack of adequate support provided to them (CEDAW/C/GBR/CO/7, para 38). In the light of the new legislative measures taken by the State party to combat human trafficking and slavery (paras. 54-57), please provide information on the measures being taken to identify and address weaknesses in the national referral mechanism, and to ensure that victims of trafficking are properly identified and adequately supported and protected.

<sup>8</sup> CEDAW/C/GBR/CO/7, para 38

<sup>9</sup> CEDAW/C/GBR/CO/7, para 39

and forced and compulsory labour, replacing earlier offences that were dispersed across a number of different laws. The Modern Slavery Act also established an Independent Anti-Slavery Commissioner.

In addition, new civil penalties were introduced designed to provide the courts with additional measures to prevent future offences. The Modern Slavery Act introduced the Slavery and Trafficking Prevention Order (STOP) and Slavery and Trafficking Risk Order (STRO), and the Scotland Act introduced the Trafficking and Exploitation Prevention Order (TEPO) and the Trafficking and Exploitation Risk Order (TERO). The Northern Ireland Act includes only a Slavery and Trafficking Prevention Order (STOP) and did not introduce a Risk Order.

However, despite progress, problems persist in the Government's response to trafficking and modern slavery, particularly in the areas of victim identification, protection and support, and access to justice and remedy. The Anti-Slavery Commissioner has struggled with independence and has no powers to affect substantial change. A number of the Modern Slavery Act's provisions are yet to come into force, including the full roll out of independent child trafficking advocates in England and Wales; and Section 49 and 50 of the Modern Slavery Act that sets out guidance and regulations on victim care. Further action is needed to secure the effective identification, protection and support of victims of modern slavery.

## **2. Obstacles to tackling trafficking and modern slavery in the UK**

### **2.1 Barriers to the adequate identification, protection and support of victims of trafficking and modern slavery**

The National Referral Mechanism (NRM) is the UK's official mechanism for identifying and providing care and support for trafficking victims. The initial referral to the system is generally made by a First Responder, such as the police, border patrol, or local authorities. Following the initial referral, the NRM has two steps for identification: a preliminary finding of "reasonable grounds" that an individual is likely a trafficking victim and a final decision of "conclusive grounds" that triggers victim protection measures. There is no formal appeal process for preliminary or final decisions, but a reconsideration of the decision can be requested. Only UK Visas and Immigration in the Home Office and the UK Human Trafficking Centre can make these decisions.

In its response to the List of Issues, the Government reports that it introduced a significant package of reforms to the NRM in 2017<sup>10</sup>. Including, the creation of a single expert unit in the Home Office to handle all cases; quality assurance panels to review negative conclusive grounds decisions; and extending the length of time that recognised victims receive support from 14 days to 45 days. To date, these reforms are yet to be implemented. Whilst welcome, we do not believe that they go far enough to address the persistent problems of low identification rates and insufficient support to victims. While there is an increase each year in referrals into the NRM, positive conclusive grounds decisions still remain fairly stagnant, it is clear that many victims of trafficking and modern slavery remain unidentified.

Most First Responders in statutory organisations are not specialists and have not been trained on how to identify and support potential victims or how to complete an NRM form and are often unaware that they have this role. Many professionals who may come across a trafficked person therefore lack the ability to identify and assist them. There is a need for statutory training to tackle this problem of

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<sup>10</sup> CEDAW/C/GBR/Q/8, Para 77

low identification. One of the proposed reforms will address the role of the first responders, however the consultation on this is being undertaken by two prescriptive questionnaires and will not take into consideration issues around informed consent and a victim's right to reconsideration on receipt of a negative decision in her trafficking case.

Adults need to give informed consent into the NRM. Yet it is difficult in practice for First Responders to achieve informed consent as there is no government-funding available to support victims, nor access to legal aid for immigration advice<sup>11</sup>, before a positive Reasonable Grounds decision. The Government's proposal of three days 'safe spaces', so that adult victims leaving immediate situations of exploitation can be given assistance and advice for up to 3 days before deciding on whether to enter the NRM, may help to remedy this challenge around informed consent. However, we understand that this provision will only be made available to victims who are subject to enforcement operations by police officers. This raises concerns for victims and their ability to consent to entering a place of safety if they are arrested during enforcement operations such as raids. It is also important that these 'safe spaces' run according to minimum standards and provide specialist legal and advice.<sup>12</sup>

We are anecdotally aware that a number of victims do not consent to referral into the NRM. This is due to fears about the involvement of immigration services and that it may lead to their detention, concern that it might cause an additional delay in obtaining an asylum decision, and also due to uncertainties around any support provided, likely dispersal away from any legal representatives and other support providers and networks, the lack of impact of a positive decision and the detrimental impact of any negative decision.

Following a positive Reasonable Grounds decision, in England and Wales care is provided by the Government for a limited, non-statutory period while the Competent Authority conclusively determines if a person is a victim of trafficking and modern slavery (a Conclusive Grounds decision). This process should take forty-five days but in reality, takes on average 150 days and can be up to 800 days. Again, the lack of statutory support prior to a Conclusive Grounds decision, leaves victims facing homelessness, destitution, and vulnerability to further exploitation.

Even once an individual has received a positive Conclusive Grounds, there are significant gaps in protection and support – indeed this is when the support within the NRM ends. Whilst the increase in the length of time - from 14 days to 45 days - before recognised victims are 'moved on' from NRM support is welcome, it is still not a sufficient length of time, and as yet this policy has not been introduced. Most victims have to move out of a safe house without any further support as they attempt to rebuild their lives away from slavery. The NRM structure for adults presumes that local authorities will provide housing and support prior to, and following, the NRM. Yet no additional funding has been provided to councils, outside of new Home Office pilots, and so most local authorities' teams simply refuse to support victims.<sup>13</sup> There is currently no presumption that a

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<sup>11</sup> In theory, if a potential victim of trafficking is also an asylum seeker, then they may be able to access legal advice. However, in practice, unless they already have an immigration advisor, it is unlikely that they will be able to get advice prior to referral due to the lack of provision available.

<sup>12</sup> Principles that underpin early support provision for survivors of trafficking, by British Red Cross, ATLEU, ATMG and Human Trafficking Foundation,  
[https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/5c08f8f54ae2375db96f6713/1544091902062/Places+of+Safety\\_BRC\\_ATLEU\\_HTF\\_ATMG.pdf](https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/5c08f8f54ae2375db96f6713/1544091902062/Places+of+Safety_BRC_ATLEU_HTF_ATMG.pdf)

<sup>13</sup> In *R (AK) v Bristol City Council* (CO/1574/2015), it was accepted by the local authority in a consent judgement that they were not prevented from providing assistance to victims of Modern Slavery under the Localism Act. These principles are also reflected in a contested case of *R (GS) v Camden* [2016] EWHC 1762

positively identified victim of trafficking is in ‘priority need’ for housing<sup>14</sup>. There are no statutory pathways or ongoing care plans in place for survivors of trafficking and modern slavery to be referred and supported as a vulnerable adult. This leaves people vulnerable to further exploitation due to a lack of options. Police have told the Human Trafficking Foundation that they have re-referred individuals into the NRM multiple times, as each time they left the NRM they became destitute and fell into exploitation again.

Victims of trafficking are not automatically entitled to grants of leave to remain in the UK, which means that they are often without further or additional support. Instead, victims must apply for discretionary leave to remain and this is frequently denied.

Many EEA nationals who have been trafficked are not considered eligible for public funds due to being unable to prove that they have been working in the UK. The irony is that this lack of proof is itself an indicator of exploitation. This has resulted in cases such as Galdikas and Subatkis<sup>15</sup>, where individuals, found to have been trafficked, and who are cooperating with the police, are still left destitute.

Migrant domestic workers not granted discretionary leave to remain can apply for further leave as a domestic worker up to a maximum of two years. This leave is issued with no recourse to public funds. Workers must provide evidence of their finances and demonstrate how they will be self-sufficient without recourse to public funds which is nigh impossible for those who have been denied permission to work and made reliant on support whilst they have been in the NRM and which ends 14 days after being recognised as a victim. They cannot work until their visa is issued but have no access or entitlement to any support whilst they wait, leaving them vulnerable to further exploitation as means to survive.

There are also inherent flaws within the NRM model itself. The Government ignored the recommendations of a 2014 review to remove responsibility for the NRM from the Home Office and establish multi-disciplinary expert panels to make decisions. The multi-disciplinary quality assurance panels subsequently put in place are not be able to review negative Reasonable Grounds decisions, only negative Conclusive Grounds decisions. If the panel recommends that a Conclusive Grounds decision has been made incorrectly, they can only request that the Home Office Competent Authority review the decision and therefore the final decision remains with the Government. There is no formal challenge to a Conclusive Grounds decision. The caseworker can make an informal reconsideration request; however, this is currently not viable in the Government’s adult victim care contract; providers of victim care must submit reconsideration requests pro-bono and are not paid for the time and considerable expertise need to challenge a negative conclusive decision. If a reconsideration request is rejected, the decision can be Judicially Reviewed if a lawyer can be found. Many victims cannot access the reconsideration process at all. For example, those who have exited the NRM will no longer have a support provider and will often be unable to advocate for a referral by themselves. Access to reconsideration is therefore currently arbitrary.

Therefore, while dealing with their recent trauma, victims face destitution, homelessness, and are vulnerable to further exploitation or re-trafficking. The lack of sustainable support for victims impacts significantly on the potential to successfully prosecute perpetrators and secure justice and remedy for victims.

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<sup>14</sup> Section 189 of the Housing Act 1996

<sup>15</sup> <https://www.theguardian.com/global-development/2016/mar/30/we-are-hopeful-now-brothers-freed-from-slavery-seek-british-policy-change>

## 2.2 Victim care missing from the Modern Slavery Act

The Modern Slavery Act, unlike its counterpart legislation in Scotland and Northern Ireland, does not contain provisions regarding victim support for adults. Section 49 of the Modern Slavery Act does not explicitly place a duty on the State to provide support and assistance to victims, nor set out victims' support entitlements. Rather, the arrangements for identifying and supporting victims are to be set out in guidance to be issued by the Secretary of State, which may be revised from 'time to time'. The Secretary of State may also make regulations in this regard, namely through section 50 of the Act.

In April 2017 the Work and Pensions Select Committee concluded that the Modern Slavery Act "*did not secure a pathway for [victims] recovery*" and recommended that "*all confirmed victims of modern slavery be given at least one year's leave to remain with recourse to benefits and services.*"<sup>16</sup>

To date, Sections 49 and 50 of the Act have not been implemented. The drafting of the statutory guidance under Section 49 commenced in 2016 and then ceased in summer 2017 with the Minister announcing that regulations will not 'be subject to a public consultation prior to being laid before parliament.' However, on 8 November 2018, a High Court judgement in respect of *K & Anor, R v Secretary of State for the Home Department* stated that 'It is the Home Secretary's absolute duty immediately to issue the guidance that Parliament has required of him' [at Paragraph 8], in reference to Modern Slavery Act Section 49 '*Guidance about identifying and assisting victims*'. Consequently, we understand that the Home Secretary is to publish interim guidance under Section 49 of the Modern Slavery Act 2015 in the next few months, with the plan to publish more comprehensive guidance, to replace this interim iteration, in due course.

Whilst we strongly support the publication of guidance pursuant to Section 49 of the Modern Slavery Act, we are concerned that the Government, in its haste to comply with the recent judgment, is missing an opportunity to develop robust and comprehensive guidance, and in doing so may jeopardise the protection and safety of modern slavery victims. The publication of limited guidance, which does not fully set out the roles and responsibilities of front-line practitioners, nor fully reflect the rights and entitlements of victims, will be of limited use and may even be detrimental.

In recognition of the importance of long-term support provisions for victims' recovery and safety from further exploitation, Lord McColl introduced the Modern Slavery Victim Support Bill in Parliament, to strengthen victim protection provisions. If passed, it will provide protection and support for victims of trafficking in the short- and long-term, by guaranteeing the right to access specialised support and assistance during the recovery and reflection period, in line with international obligations, and for a further 12 months afterwards. Regrettably, the Government has not supported the provisions of the bill.

The Government has commissioned an Independent Review of the Modern Slavery Act. Although welcome, it will not consider the provision of victim support because Section 49 and 50 have not been implemented yet.

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<sup>16</sup> House of Commons Work and Pensions Committee, Victims of Modern Slavery (12th Report of Session 2016-17) 26 April 2017 page 3

## **2.3 Contradiction in legislation and criminalisation of trafficked people**

The Government continues to bring in legislation that is likely to contradict or undermine the Modern Slavery Act. For example, provisions in the Immigration Act 2016 are likely to directly undermine it by creating the offence of illegal working, despite ample evidence presented that many victims are made illegal by their traffickers to make it easier for them to be controlled and to detract the attention of law enforcement from the perpetrators.

Despite existing guidance from the Crown Prosecution Service, victims of trafficking and modern slavery continue to be wrongly criminalised for drug, benefits or immigration offences that were the result of their exploitation. Although section 45 of the Modern Slavery Act introduces a defence for victims, including children, who are compelled to commit criminal offences, it can only be relied upon once the prosecution process has commenced. Therefore, it does not protect victims from being prosecuted in the first instance and is not compliant with the international definition of non-prosecution - that victims should not be prosecuted for criminal activities that they were compelled to commit as a direct consequence of being trafficked.

### **RECOMMENDATIONS**

- Address obstacles in the effective identification and protection of victims of modern slavery and trafficking in order to ensure a system that is non-discriminatory and has the best interests of victims at its heart. The Government should introduce statutory training for first responders, and all potential victims of trafficking should have the right to request a reconsideration of a negative decision in their case with the appropriate support of their advocate or legal representative. All potential victims identified should have access to free legal advice, prior to consenting to enter the NRM.
- Formalise the NRM reconsideration process with clear guidance so that it can be accessible to all victims, with set time scales, a different decision maker for reconsideration, and explanations given for decisions reached.
- Address the current gaps in victim support and care, and ensure access to accommodation, medical services, and free legal advice, regardless of immigration status. Access to services should not be conditional on engaging with law enforcement. The Government should increase funding for specialised services for victims of trafficking, including to ensure that accommodation is available both prior to entry into the NRM and during.
- Extend the period of time before victims are 'moved on' from NRM support based on the individual need of victims.
- Increase training for law and judicial system actors to improve responses to trafficking victims and ensure victims are not prosecuted for crimes committed as a result of being subjected to trafficking;
- Ensure that comprehensive statutory guidance pursuant to Section 49 of the Modern Slavery Act is developed in consultation with expert practitioners to ensure the protection and safety of modern slavery victims.
- Provide a trafficking-specific long-term alternative to deportation or repatriation for foreign victims.
- In light of the on-going independent review of the Modern Slavery Act, the Government should commit to implementing all recommendations from this reviews' conclusions. In addition, the Government of Scotland and Northern Ireland should commit to reviewing their respective anti-trafficking legislation as enacted in 2015.
- Support the passage of the Modern Slavery (Victim Support) Bill, currently waiting for second reading in the House of Commons.

**3. Abuse and exploitation of migrant domestic workers (please note that as a disadvantaged group of women, this information is also relevant to paragraph 21 of the List of Issues)**

Migrant domestic workers in the UK continue to suffer from widespread abuse, exploitation, and situations amounting to trafficking and forced labour. The policy framework in place in the UK, the Overseas Domestic Worker visa (ODW visa), increases their vulnerability to these abuses as migrant domestic workers are restricted to a non-renewable six-month visa, which renders the right to change employer (reinstated in 2016) inaccessible and meaningless in practice.

**Protection gaps continue**

Approximately 17,000 ODW visas are issued annually to migrant domestic workers from non-EU countries to accompany their employers to the UK. Migrant domestic workers, the vast majority of whom are women and predominantly live in their employer's household, are particularly vulnerable to abuse, exploitation, trafficking, and forced labour.

In 2012, the government removed the right of migrant domestic workers to change employer, thus making the ODW visa a 'tied' visa. This decision was deeply damaging for the protection of ODWs, leaving them to face abuse, exploitation and forced labour with no escape route. A comparison of Kalayaan's records under the tied visa with those collected from workers on the original visa shows clearly that abuse increased profoundly after migrant domestic workers lost the right to change employer and renew their visa.

In 2015, the Government commissioned an independent review of the ODW visa by James Ewins QC and stated that it intended to implement the review's findings. The independent review recommended that all migrant domestic workers be granted the right to change employer, and to be allowed to renew their visa for a period totalling two and a half years. It concluded that visa extensions allowing a period of stay in the UK totalling two and half years equalled "the minimum required to give effective protection to those overseas domestic workers who are being abused while in the UK".<sup>17</sup>

Regrettably, the Government decided not to implement the review's recommendations in full. The Immigration Rules 2016 allowed for people on the ODW visa to change employer but does not allow any extensions of the visa beyond six months. While appearing to 'untie' migrant domestic workers this did not, in reality, reinstate meaningful options for mistreated workers to challenge abuse as the options for finding a new full-time job in a private household with only a few months left on their visa with no reference are inevitably extremely limited. This conclusion is strongly supported in the review itself, which stated "In order to make the right to change employer effective in practice, the duration of any extensions must be of sufficient length to give the overseas domestic worker both sufficient incentive and reasonable prospects of finding such alternative employment."<sup>18</sup>

Further changes introduced as a consequence of the independent review are positive but have not been adequately implemented in practice. The Government committed to the introduction of compulsory information meetings for migrant domestic workers with the authorities in a neutral space, where they can be given advice and an opportunity to report any abuse or exploitation yet has since stated that they cannot make attendance compulsory. The Government has repeatedly stated

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<sup>17</sup> Independent Review of the Overseas Domestic Workers Visa, by James Ewins, 16 December 2015. Para 11

<sup>18</sup> *Ibid*, para 101



that safeguards are in place for workers as part of the visa application process, including the requirement to be seen alone and that they receive an information leaflet setting out their rights in the UK and who they can contact should they experience abuse. Kalayaan's evidence disputes that these safeguards are operating effectively. Of those workers who registered with Kalayaan after 6 April 2016, 65% were accompanied to an interview with their employer, and 94% of workers issued a domestic worker visa after 6 April 2016 were not issued any information regarding their rights in the UK. Many domestic workers have reported to Kalayaan that they did not know that they had the right to leave an abusive employer.

The Government also amended the immigration rules to increase the length of visa granted to a conclusively-identified victim of trafficking from 6 months to 2 years. This is welcome but does nothing to prevent trafficking or provide any safety net for workers who are being exploited and have to take the risk of leaving without knowing whether or not they will be identified as trafficked and thus eligible to apply for the two-year visa allowing them to work, support their families and pay off debts.

Therefore, migrant domestic workers in the UK continue to suffer high levels of abuse and exploitation, and as a consequence of the policy framework in place, are forced to remain with abusive employers rather than lose their livelihood, accommodation and permission to stay in the UK. Under the amended visa regime in place since 6 April 2016, rates of abuse have been consistent with and in some cases higher than those who arrived in the UK on the 'tied visa'. From 1 April 2016 – 31 March 2017, Kalayaan registered 100 new workers. Workers reported prolonged periods of physical, psychological and in some cases sexual abuse carried out by their employers. Workers reported instances where they were hit, kicked and spat at, and described being grabbed by their clothes and having their hair pulled. They are regularly shouted and screamed at, insulted and sworn at, denied adequate food, received low or no pay and have restrictions placed on their movement and contact with others. Many report that they are threatened by their employers that they will be handed to the authorities and deported. Only 17% of workers who arrived on a visa after 6 April 2016 had possession of their passport when they registered at Kalayaan. Without proof of their leave to remain and permission to work, workers are left in a very precarious position. Without recourse to public funds and without knowing whether or not they have valid leave to remain, they are resigned to having to accept any work offered to them or face becoming destitute. Some unscrupulous employers exploit this vulnerability and offer exploitative work by telling workers they are taking a risk in hiring them without their documents and others refuse to hire with the introduction of the offence of illegal working in the Immigration Act 2016.

## **RECOMMENDATIONS**

- Fully implement the recommendations of the independent review of the Overseas Domestic Worker Visa by granting all migrant domestic workers the right to change employer and to renew their visa for a period that should total at least two and a half years.
- Fully implement the minimum standards developed by Kalayaan and advisory group of experts with regards to the visa application process and scope and delivery of information meetings, including making them compulsory for all workers<sup>19</sup> Establish a system where migrant domestic workers can confirm when their visa expires to ensure they are kept safe and not put at risk. This needs to be quicker than making disclosure requests under the Data Protection Act 2018 which could now be refused given the inclusion of an immigration exemption.
- Require Overseas Domestic Workers to be employed by Embassies and not by diplomats.

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<sup>19</sup> <http://www.kalayaan.org.uk/news/kalayaan-and-experts-publish-minimum-standards-for-odw-information-meetings/>

## **II. Access to justice for victims of trafficking and modern slavery (para 4 of the List of Issues<sup>20</sup>)**

Legal advice is critical part of the support that victims of trafficking and modern slavery need and is crucial to their recovery. Without early and adequate legal advice, progress towards recovery made under NRM support is undermined, and victims are at risk of destitution, deportation and ultimately re-exploitation.

Regrettably, victims of trafficking and modern slavery are currently unable to get legal advice when they need it. This is because legislation too narrowly defines what is in scope for legal aid, procedural issues around how and when cases are funded, alongside poor decision making by the Legal Aid Agency on modern slavery cases. This is compounded by a lack of guidance, training and monitoring of modern slavery and trafficking cases. Immigration cases with a trafficking element are considered financially unviable by many legal aid providers due to their length and the lack of clarity around whether the work will be funded by the Legal Aid Agency. As a result, many providers are deterred from undertaking this work, which leaves victims and support workers struggling to secure lawyers, with some victims waiting up to a year to see an immigration lawyer and less than one percent of victims referred into the NRM accessing non-asylum immigration advice. The lack of legal advice provision is an issue across all of England and Wales, with the north of England being especially poorly served. As it stands, the system is not fit for the purpose.

### **The scope of legal aid is too narrow**

Advice before entering the NRM is not within the scope of legal aid, in spite of NRM decisions having a direct effect on immigration decisions. A lack of advice at the pre-NRM stage may leave victims unwilling to enter the NRM if they are not clear about its impact on their immigration status. Many support organisations find it impossible to fund interpreters and without access to interpreters, victims' accounts will necessarily be incomplete or perhaps erroneous. Legal aid should therefore be made available for pre-NRM advice so that victims can make a fully informed decision before entering the NRM.

The positive identification of a victim of trafficking and modern slavery (a Conclusive Grounds decision) will rely heavily on the account given by the victim themselves. For good decisions to be made, it is vital that victims are given support to provide the Competent Authority with the most complete picture possible. Victims of trafficking cannot be expected to provide adequate evidence without legal advice and support. Many victims do not speak English, and thus require interpreters; many are traumatised and have difficulty disclosing until they are in a safe, therapeutic environment; and many will simply struggle to put forward a coherent account of their experiences orally or in writing. Moreover, victims require a lawyer to engage with complex legal frameworks to demonstrate how their circumstances fulfil the necessary criteria for identification. It is increasingly necessary to obtain costly independent medical and expert evidence to overcome negative decisions by the Competent Authority or their failure to take into account alternative supporting evidence.

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<sup>20</sup> Para 4. Please provide an update on the progress made to review the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 in order to facilitate women's access to legal aid for litigation concerning, inter alia, divorce, property disputes, housing and immigration matters. What specific steps are being taken to ensure that disadvantaged groups of women, in particular "black, Asian and minority ethnic" women, asylum-seeking and migrant women, and women with disabilities, have access to legal aid?

Yet, legal assistance at this stage is not within scope for legal aid unless a lawyer can successfully argue that the evidence being obtained is an integral part of an immigration application that is within the scope of legal aid. This kind of case by case approach is expensive for the lawyers making the applications, causes delays for the victims and is an unnecessary administrative burden on government.

EEA Nationals are excluded from legal aid for advice on their rights under EU law. Yet, as highlighted previously, it is difficult for an EEA national who is a victim of trafficking to prove they have been working in the UK and exercising treaty rights. They require legal assistance in order to be able to successfully do so. EEA nationals are also treated less favourably under the NRM. They are not automatically considered for Discretionary Leave as a victim of trafficking due to their EEA status, which means they face a gap in support following positive identification as Discretionary leave has not been considered before NRM support is terminated. Even when Discretionary Leave is expressly applied for during the NRM, it will not always be considered.

It is imperative that legal advice on conclusive grounds identification be brought explicitly within the scope of legal aid. The lack of clarity around what is in scope leads many providers to refuse cases for victims of modern slavery and this is a significant factor in why victims of modern slavery so often struggle to access legal advice.

### **Problematic decision-making by the Legal Aid Agency**

The Government's stated commitment to support the victims of modern slavery is undermined by poor decision making by the Legal Aid Agency (LAA) on modern slavery victims' cases. Refusals of applications are frequent, often due to a failure to understand the applicable law or apply lawfully the legal aid regulations. There is a lack of clarity within the LAA on how cases for victims of trafficking and modern slavery should be handled. There is also evidence of more obstructive conduct. Both are wasteful, resulting in unnecessary and adversarial litigation against the state at significant expense, whilst denying legal aid to those who need it most.

The way applications for legal aid are treated has a profound impact on victims. The need for satellite litigation frequently protracts proceedings, sometimes for several years, during which time victims are unable to access compensation and move on from their trauma. Many report feeling that they are held in a limbo during this time. For many victims the prospect of pursuing a challenge that may take over a year before they can commence their compensation claim is too distressing and difficult to contemplate; others find it difficult to grasp the cause of the delay. Many victims come from countries where a legal challenge against the government would result in repercussions for them. Whilst every effort is made to explain that they will not experience such repercussions in the UK many are deterred from pursuing this course of action.

### **Barriers in access to compensation**

Compensation plays an important role in assisting victims to hold those responsible to account, provide for their families, and rebuild their lives. A victim's right to compensation is expressly stated within the Council of Europe Convention on Trafficking and the EU Directive on Trafficking. Yet, victims of trafficking and modern slavery in the UK experience numerous barriers in accessing their right to compensation.

The number of victims accessing legal aid for advice on obtaining compensation is minimal and a fraction of what is needed. A Parliamentary question<sup>21</sup> shows that between 2014 and 2017 a total of 124 victims accessed compensation or non-asylum immigration legal advice, an average of just 41 per year. Over that same 3-year period there were 9,404 victims referred into the NRM. These numbers suggest that less than 1% of those referred into the NRM are currently able to access legal aid in respect of a potential compensation claim against their trafficker.<sup>22</sup> Where victims do recover compensation, the Government recovers the cost of running their case on legal aid from the total award, in some cases almost entirely extinguishing their compensation.

There is still no civil remedy for victims of trafficking and modern slavery. Without a civil remedy, victims rely on civil lawyers to shoehorn their case into existing causes of action and remain unable to recover damages for the specific act of being trafficked or held in slavery.

The current employment tribunal and High Court and County Court claims for victims of trafficking are remarkably lengthy and complex. It is frequently in excess of 18 months to reach a full trial and requires very considerable tenacity and courage on behalf of the victim, many of whom receive threats to themselves and their families back home. Due to the complexity and uncertainty of the law, it is effective only for those who are able to access specialist representation, which is rare. For many victims, an application to the Criminal Injuries Compensation Authority (CICA) is their only route to obtain compensation. Typically, because they are unable to identify their trafficker, or their trafficker has no significant assets, or because they are simply too vulnerable to face their trafficker in court. Yet, those who seek to make claims under the CICA experience multiple obstacles. An application must be made within two years of the criminal injury suffered. Many victims make an application outside of the two-year time limit, due to trauma, lack of knowledge and assistance, and most do not realise that they need to do this on top of being referred into the NRM. There is no legal aid available for victims of trafficking to apply to CICA or to challenge their decisions. The scheme requires a victim to have suffered a “crime of violence”. Trafficking or modern slavery is not of itself considered a crime of violence and many victims are denied compensation. CICA is able to withhold awards of compensation where an applicant has “*failed to cooperate so far as is reasonably practicable in bringing the assailant to justice.*”, and routinely does so without any consideration of the Applicant’s reasons or circumstances.

The Modern Slavery Act introduced a bespoke Reparation Order, purportedly to enable the courts to ensure that more money from those convicted of slavery goes directly to their victims. However, at the time of writing it appears that no reparation orders have yet been made. Reparation orders require the conviction of the defendant, and convictions for modern slavery offences remain low.

The Deduction from Wages (Limitation) Regulations 2014, introduced as secondary legislation during the passage of the Modern Slavery Act with no parliamentary oversight, significantly limits the ability of victims of trafficking to recover the National Minimum Wage (NMW). It prevents victims from obtaining more than two years owed in National Minimum Wage, despite the fact that they may have been paid little or nothing for several years. Prior to the introduction of this legislation, a victim of trafficking or servitude could recover wages for the entire period that they were held in servitude.

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<sup>21</sup> Answered by Dominic Raab on 1 September 2017 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-11-21/114965/>

<sup>22</sup> Hestia identify barriers to accessing compensation in their last report "[Underground Lives: Male Victims of Modern Slavery](#)"

The ‘Family Worker Exemption’, contained in the NMW Regulations 2015<sup>23</sup>, provides that live-in domestic workers are not entitled to receive the national minimum wage or any payment at all, if the worker is “treated as a member of the family”. This Exemption overwhelmingly affects women and creates a significant barrier to justice. It is used by traffickers to justify their failure to pay their workers the NMW or any wage at all. It is frequently used as a litigation tool by traffickers to defend court or tribunal claims and to deter workers from seeking to recover their unpaid wages.

The only claim that has in practice given rise to substantial damages over and above the financial losses suffered by a victim of trafficking is a claim for discrimination. However, the judgement in *Taiwo v Olaigbe and another (2016) UKSC 31* means that many victims of trafficking are now unable to bring a claim for race discrimination, as it found that workers who are vulnerable due to their immigration status are not protected by race discrimination legislation.

## **RECOMMENDATIONS**

- Ensure that victims of trafficking and modern slavery have access to legal aid. Advice about entering the NRM (therefore prior to a Reasonable Grounds decision) and advice and expenses (such as expert medical reports) relating to the conclusive identification as a victim should be brought within the scope of legal aid.
- Revise legal aid payments, in order to make interim payments to legal aid providers for cases involving trafficking and modern slavery; to pay legal advice for victims of trafficking and modern slavery at an hourly rate rather than a fixed fee, in recognition of the complexity of the cases; and to increase the threshold for the expenses that a provider can incur on a case without having to seek permission first.
- Introduce a legal aid contract for compensation claims relating to trafficking and modern slavery cases.
- Improve and monitor Legal Aid Agency decision making. There should be guidance and training about how cases involving victims of trafficking and slavery should be handled, with particular attention to immigration and compensation work, and data should be collected on legal aid provided to victims of trafficking and slavery.

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<sup>23</sup> Regulation 57 of the National Minimum Wage Regulations 2015