

'Illegal Migration Bill' Briefing: Amendment 92A: Access to early legal aid, to inform consent, facilitate access to justice and to support disclosure

A cruel, inhuman and unworkable Bill: The 'Illegal Migration Bill' is bad law. It is cruel, inhuman and entirely unworkable. It breaks multiple domestic and international laws. It undermines the universality of human rights in the UK, creating a dangerous precedent that particular groups can be stripped of their rights.

A charter for exploitation, trafficking and modern slavery

The Illegal Migration Bill is a charter for exploitation, trafficking and modern slavery. It will effectively dismantle the UK's systems of trafficking and modern slavery protection, denying protection to victims of crime and enabling perpetrators to act with impunity.

Thousands of survivors will be excluded from NRM protections and face removal

Thousands of victims and survivors of trafficking and modern slavery will be denied access to safety and support under the National Referral Mechanism (NRM) and face detention and removal. This is primarily because so many will fall within the Clause 2 definition. Many victims of trafficking come to the UK by irregular routes, under force, fraud or threat and the abuse of their vulnerability. More still will be disqualified due to a prison sentence served, even if this was for a minor offence or they were prosecuted despite the offence being connected to their trafficking experience. On the basis of the information available, we estimate that at least half of victims and survivors who accessed identification, support and protection under the National Referral Mechanism (NRM) between January and March this year, would be denied this under the Bill.¹ Instead of the support and protection they can currently receive, they will face detention, removal, or a life in limbo.

Driving survivors underground and enabling trafficking

The Bill is a gift to human traffickers. It will enshrine in law the threats traffickers so often make about illegality, detention and removal should victims seek help. Those who escape their traffickers will be forced underground, avoiding contact with authorities or institutions that might have previously been able to assist them, without any means to access support and thereby being prey to those that have already trafficked them, or by others who will do so. Other victims will feel forced to remain in exploitation due to the fear of detention and removal.

Impunity for traffickers

¹This is based on the fact that 75% of referrals into the NRM in January to March 2023 were foreign nationals. Some two thirds of foreign nationals (50% of all referrals) are likely to have entered irregularly and will be disqualified. Of the remaining foreign nationals, it is likely that half (an additional 13%) will also be disqualified either because they committed a criminal offence as part of being trafficked and spent some time in prison and/or had their claim classed as a "bad faith" application. The victims and survivors of trafficking and modern slavery who would continue to be able to access the NRM in the usual way would largely be those who have flown directly to the UK from their country of origin or a country where they have resided, including those where the trafficker has obtained their visa, or where they arrive legally but are then trafficked within the UK, and those who entered the UK before the 7 March 2023, and British nationals.

By drastically reducing the likelihood that victims will come forward, assist investigations and act as witnesses in criminal prosecutions, the Bill also entirely undermines a criminal justice response to this grievous crime. The UK's record on holding traffickers to account for their crimes and securing justice and remedy for survivors has been woeful to date. In 2020, just 89 defendants were proceeded against under the Modern Slavery Act on a 'principal offence' basis, with just 10 convictions that year.² The Bill is entirely absent of measures to improve the prosecution and conviction of traffickers, or securing remedy for victims. While ignoring the need to tackle the criminals responsible for this crime, the Bill instead will drive trafficking and enable traffickers to act with impunity.

Amendment 92A: Access to early legal aid to inform consent, facilitate access to justice and to support disclosure

Access to legal aid for early, specialist legal advice and representation is essential for victims and survivors of trafficking and modern slavery.

People who have experienced trafficking and modern slavery have experienced a breach of their rights under Article 4 of the European Convention on Human Rights (ECHR). They have entitlements under the European Convention for Action Against Trafficking in Human Beings (ECAT), which includes access to advice. Without access to independent and confidential advice, individuals will lack confidence to disclose their trafficking experience. Early legal advice can help individuals understand what protection may be available to them under the NRM, which may include challenging their removal to their home country or an alleged 'safe country' due to the risk of serious and irreversible harm and risk of re-trafficking that this could cause. Early legal advice could counteract the disincentive to come forwards to the authorities, and might encourage cooperation which will ultimately assist investigations and prosecutions.

Early legal advice is currently out of scope for legal aid apart from for a very limited group. The vast majority of survivors who are unable to get legal aid will therefore be forced to go without any access to legal advice and representation.

Amendment 92 would give potential victims of trafficking and modern slavery who are subject to, or who might reasonably suspect they are subject to, removal under the Bill access to early specialist legal advice which is not means- or merits-tested.

The Illegal Migration Bill makes early legal advice more important than ever for victims and survivors of trafficking and modern slavery

The Bill is complex, with drastic harmful consequences for those within its scope. Access to early specialist legal advice will be more critical than ever because:

- Awareness of the Bill will create fear amongst victims, including those who would not be subject to removal under the Bill but would reasonably believe that they are. Access to legal advice is essential to enable those victims of trafficking, who are still entitled to NRM support and protection, to access this.
- A decision to consent to a referral into a NRM by a First Responder Organisation carries grave risks for a victim who is potentially subject to disqualification and removal under the Bill, as it is at this stage at which victims will become known/ identified to the Home Office. Without access to early

²<https://www.gov.uk/government/publications/2021-uk-annual-report-on-modern-slavery/2021-uk-annual-report-on-modern-slavery-accessible-version#fnref:7>, para 2.1.32

legal advice it is likely most will be deterred from consenting to their referral into the NRM. Legal advice is a critical component in enabling an individual to provide a full, accurate and evidenced account of their trafficking.

- The early emerging impacts of the entry into force of Part 5 of the Nationality and Borders Act show how crucial access to early specialist legal advice is. Frontline organisations have seen a trend whereby those who are able to access specialist legal advice have been able to successfully challenge negative RG decisions under the raised threshold.
- Access to early legal advice would encourage victims and survivors to come forwards, seek assistance, and report this crime. It would therefore help to counter the very damaging impact of the Bill which is that it will deter victims from seeking support and reporting the crime against them, driving trafficking and modern slavery underground and playing into the hands of traffickers. We are already seeing the chilling effect that the threat of disqualification from protection and support has on the likelihood that victims will come forward and seek assistance with the entry into force of the Nationality and Borders Act's public order disqualification provisions. Frontline organisations have said that service users who receive a letter that the Home Office is 'minded to apply' the public order disqualification, have become afraid and go underground, too fearful to remain in contact with their support provider.

Out of scope for legal aid: Early advice prior to an NRM referral

Legal aid is not available for early advice prior to a referral into the NRM. The only exception is for a very limited group of survivors who are eligible under the provision in the Nationality and Borders Act which provides legal aid for advice prior to a referral into the NRM and prior to receipt of a Reasonable Grounds decision where the individual is already accessing advice on certain in scope immigration matters or advice about judicial review (advice that falls within Part 1 Schedule 1 of LASPO). This only benefits a very small cohort of survivors who are eligible and aware of the provision, and also not the people most acutely at risk from this Bill.

Can victims and survivors of trafficking and modern slavery access early legal advice before an NRM referral in any other way?

In practice Exceptional Case Funding (pursuant to section 10 LASPO) is not available for immigration advice prior to an NRM referral. In the instances that ATLEU has sought Exceptional Case Funding for pre-NRM advice, individuals' applications have taken periods of over 18 months to be considered by the Legal Aid Agency. Applications for ECF are typically very slow, are frequently refused by the Legal Aid Agency, and are viewed as an unacceptable risk by most legal aid providers. For victims of trafficking and modern slavery to have meaningful access to early legal advice before an NRM referral it must be brought into scope for legal aid.

Early advice under the Bill: Not available prior to receipt of a removal notice

Clause 54 only ensures that provision of civil legal services to a person in receipt of a removal notice is in scope of legal aid. Prior to receipt of a removal notice, the provision does not confirm or secure access to free legal advice in relation to making an asylum or human rights claim, regardless of whether the individual has entered the NRM. This is despite the fact that once a removal notice is received, the time frame to challenge it is very short.

Please contact Kate Elsayed-Ali, Policy Manager, kate@atleu.org.uk, for further information.