

LIBERTY80

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Second Reading Briefing on the
Modern Slavery Bill in the House of Lords**

November 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

Contact

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: sarao@liberty-human-rights.org.uk

“So enormous, so dreadful, so irremediable did the Trade's wickedness appear that my own mind was completely made up for Abolition. Let the consequences be what they would, I from this time determined that I would never rest until I had effected its abolition.”

**William Wilberforce
Abolition Speech to Parliament¹, 1789**

‘No one shall be held in slavery or servitude’

The Human Rights Act 1998²

1. Centuries after the abolition of the slave trade in this country, modern day slavery persists with many workers, often migrants, forced into labour while others profit from their exploitation. True to the legacy of William Wilberforce, the reforming British politician who lobbied for the abolition of the slave trade, the Human Rights Act is at the centre of efforts to end slavery in all its guises. Article 4 of the Convention on Human Rights, enshrined in our Human Rights Act, places a strong positive obligation on the Government to protect individuals from the trade in human misery. In addition to demanding the criminalisation of acts of modern slavery, it requires the state to protect and support victims. The Modern Slavery Bill responds to these obligations and is testament to the critical and enduring role played by the Human Rights Act in protecting the vulnerable. As the Prime Minister has stressed, modern day slavery is a *“vicious abuse of human rights”*,³ it has no place in our society and to reflect this, Article 4 is one of the few absolute rights protected by the Human Rights Act.

2. Eliminating slavery and protecting its victims have long been at the core of Liberty's work. In 2008, we represented Patience Asuquo, who escaped an abusive employer after being held in servitude, only to be confronted by a disinterested police who refused to consider her allegations. Using the Human Rights Act, Liberty forced the police to investigate and Patience's employer was eventually prosecuted for theft of her passport and assault occasioning actual bodily harm. We know that many vulnerable people - and particularly

¹ Available at: http://abolition.e2bn.org/people_24.html.

² Article 4 of the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998.

³ Exert from the Annual William Wilberforce Address available at: http://conservativehome.blogs.com/torydiary/2007/03/wilberforce_con.html.

women – have suffered in this way and in the wake of Patience’s battle for justice, Liberty and Anti-slavery International successfully campaigned for the creation of a criminal offence of holding another in slavery or servitude. This offence came into force in 2010 as section 71 of the *Coroners and Criminal Justice Act 2009* following an amendment to the Bill tabled by Crossbench Peer, Baroness Young of Hornsey. In the words of the Government this was “as a result of concerns that the UK was not compliant with its obligations under Article 4 [as enshrined in the Human Rights Act]”.⁴

3. Liberty welcomes the intention behind the Bill and we believe that the legislation contains a number of important protections for victims. We believe however, there are opportunities to go further in addressing ongoing gaps in protection.

The effect of the Bill

Part 1: offences and penalties

4. Part 1 of the Bill deals with offences and penalties. It consolidates existing criminal offences of holding somebody in slavery, servitude or forced labour (clause 1, which replaces section 71 of the Coroners and Justice Act 2009) and human trafficking for the purposes of exploitation (clauses 2 and 3, which replace sections 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004). These clauses broadly replicate current provision, however clause 1 clarifies that all the circumstances of a case are to be taken into account by the courts, including features such as age which render an individual particularly vulnerable. Clause 4 contains an offence of committing offences preparatory to the commission of a trafficking offence.

5. Clause 5 significantly increases the penalties available for those convicted of the two primary offences from 14 years to life imprisonment. Preparatory offences would be subject to 10 years imprisonment on indictment, save where kidnapping or false imprisonment is the preparatory offence, in which case a life sentence would be available. Clauses 6 and 7 bring the modern slavery offences within schemes providing for presumptive life sentences in prescribed circumstances and the confiscation of assets.⁵ Separate provision is made for

⁴ Government Response to the Report from the Joint Committee on the Draft Modern Slavery Bill, Session 2013-14 HL Paper 166/ HC 1019 (June 2014); pg 7.

⁵ Chapter 5, Part 12 of the Criminal Justice Act 2003 and Schedule 2 to the Proceeds of Crime Act 2002 respectively.

forfeiture of vehicles on conviction or detention of vehicles on arrest under the human trafficking offence.

6. Clauses 8-10 require courts to order reparation in cases where the perpetrator is convicted of a modern slavery offence and is subject to a confiscation order. Clause 8 instructs the Court to have regard to the perpetrator's means and to prioritise compensation over fines where an individual has insufficient means to pay both. Where the courts have the power to make a reparation order, they must consider whether to do so.

Part 2: civil orders

7. Part 2 of the Bill introduces yet another raft of civil orders into an already complicated array of bizarre civil responses to serious criminal behaviour. Clause 14 allows for the imposition of preventative orders following conviction at the point when a sentence is handed down. Orders can be imposed where the Courts are satisfied that there is a risk an individual will commit another Part 1 offence and it is necessary to impose an order to prevent resulting harm. The Bill contains no prescriptions as to what those orders may provide, save for a vague requirement that prescriptions are necessary for protecting individuals (in general or in particular) from harm caused by the commission of a further Part 1 offence by the subject. Prescriptions in an order must specify a time period of at least 5 years (or until further order). Clause 15 makes provision for civil orders '*on application*' where an individual has been convicted or cautioned in relation to a Part 1 offence. Unlike the orders on sentencing, clause 15 orders depend on an application to the Magistrates' Court by a chief police officer, the Director General of the National Crime Agency (NCA) or, in a serious deterioration from the position in the Draft Bill, an immigration officer. There is no time restriction on the granting of such an order and, as with the other orders provided for in Part 2, there is no requirement to identify a threat to a specific individual. Orders are again only subject to the general requirement that a prescription in an order must be to prevent harm being perpetrated through the commission of a further Part 1 offence.

8. In addition to the orders provided for at clauses 14 and 15, clause 21 provides for interim slavery and trafficking prevention orders which are designed to operate while an application is considered under clause 15. Unlike with the main order, there is no requirement that the interim order be deemed '*necessary*' to prevent harm caused by a further offence – it is rather dependant on whether the court considers it just to make such

an order. It is for a fixed period which must be specified in the order (although there is no maximum limit) or until the application for the main order is determined.

9. Clause 19 places requirements on those subject to orders to provide their name and address and details of any change of address to prescribed persons. Clause 20 sets out the processes for varying or amending order and clause 22 provides for appeal rights.

10. Clauses 23-24 make provision for slavery and trafficking risk orders. Unlike the orders described above, these can be imposed on individuals who have never been convicted of any offence. Again, these orders can be made on application by an immigration officer in addition to a police constable or the Director General of the NCA. Prohibitions have effect for a fixed period of at least 2 years, or until further order, but can include foreign travel restrictions lasting for up to 5 years. There is no minimum age for the imposition of any of the orders listed in the Bill.

11. Foreign travel prohibitions may be included in the preventive orders provided for at Part 2. They must be for a fixed period not exceeding 5 years, but with the possibility of extension. Part 3 of the Bill contains provision on maritime enforcement inserted in the Commons.

Part 4: Anti-slavery Commissioner

12. Part 4 of the Bill creates and sets out the function of the Anti-slavery Commissioner. During the Bill's passage through the Commons, a number of changes were made to this part, including the insertion of requirements to consult with the devolved administrations on the appointment of a Commissioner. The general functions of the Commissioner would be to encourage good practice in the prevention, detection and investigation of modern slavery offences and the identification of victims. The specific activities the Commissioner may undertake in pursuit of these functions include consultation, joint working, information sharing and making recommendations to public bodies.⁶ The Commissioner would be required to produce a strategic plan for approval by the Secretary of State and to produce annual reports. There is a power for the Secretary of State to redact reports before they are laid before parliament. Clause 43 imposes a duty on public authorities to co-operate with the Commissioner, but makes clear that this does not extend to disclosing information which

⁶ Subclause 41(3).

would breach any duty of confidence. Clause 44 further makes clear that the Commissioner must not become involved with actions in relation to a particular case.

Part 5: protections for victims

13. Part 5 outlines new measures for the protection of victims, including a statutory defence against criminal conviction for victims of Part 1 offences where compulsion is directly attributable to slavery or relevant exploitation and a reasonable person sharing the victim's characteristics would have had no realistic alternative but to act in the same way (clause 45). Schedule 3 to the Bill, however, carves out a large number of exceptions from the scope of the defence, which include assault in resisting arrest, Theft Act offences and immigration and customs related offences.

14. Clause 46(2) extends the scope of special measures (for victims who fear testifying) e.g. screens, video links – to all adult victims of modern slavery offences. Currently, this provision is made for adult victims of trafficking, but not for victims of slavery, servitude and forced labour. Clause 46(3) similarly extends provision which allows evidence to be given in private. For the purposes of special measures in cases of modern slavery offences, where there are reasons to believe a person is a child, they should be treated as such (clause 46(4)).

15. Clause 47 makes provision for child trafficking advocates, to represent and support children who are believed to be victims of trafficking. The scheme does not extend to child victims of the clause 1 offence of holding an individual in slavery or servitude. All the detail of the scheme is left to secondary legislation, shaped only by a few legislative suggestions as to what regulations may contain. Within 9 months from the Bill receiving Royal Assent, the Secretary of State is required to publish a report on the steps taken under clause 47. An additional provision was added to the Bill during its Commons passage, requiring the child trafficking advocate to act in the best interest of the child when carrying out his or her functions.⁷

16. Clause 48 is a vague provision requiring the Secretary of State to produce guidance about identification of, and support for, victims of modern slavery. There are no prescriptions in the clause about those public authorities to whom guidance must be provided and provision at subclauses 1(a)-(c) about the scope of the guidance is conspicuously broad and

⁷ Subclause 47(5).

vague (e.g. guidance must deal with *'the sorts of things which indicate that a person may be a victims of slavery or human trafficking'*).

17. Clause 49 creates a statutory presumption that where age is uncertain, but there is reason to believe a person may be under 18, he or she is to be treated as a child for the purposes of access to assistance and support provided by public authorities for those who are believed to be victims of trafficking. Clause 49(2) makes clear that this presumption will only operate until such time as an age assessment is carried out by a local authority, or age is otherwise 'determined'.

18. Clause 50 requires specified public authorities to notify the National Crime Agency ("the NCA") if it has reason to believe it has identified a victim of trafficking. Details of the information to be provided to the NCA is left to secondary legislation, with only a broad restriction specifying that information should not allow an individual to be identified without his or her consent. It is unclear how far this provision will protect against accumulation of information which constructively identifies an individual. Clause 50(4) makes clear that disclosures must not contravene the Data Protection Act 1998.

19. New clause 51 was introduced by Government amendment at Report stage in the House of Commons. It requires certain businesses, with a turnover of a scale prescribed in regulations, to prepare a slavery and human trafficking report for each financial year. The report would comprise a statement of the steps taken during that financial year to ensure that slavery and human trafficking is not taking place in the organisation's supply chains or its own business. Reports must be published on the organisation's website and a prominent link must be included on its homepage. Those organisations without a website must provide a copy of the statement to anyone who makes a written request. Further guidance may be issued by the Secretary of State about the duty placed on companies, including around the type of information to be included in a statement. A failure to comply with the duty is actionable by the Secretary of State.

Real progress for victims

Victims in the criminal justice system

20. Liberty is pleased to see that the Government have implemented a number of the Draft Bill Committee's recommendations on additional protections for victims of modern slavery. Amongst these protections is a statutory defence for victims of trafficking who are

directly compelled to commit crimes by their experience of slavery or exploitation.⁸ This addition follows the recommendation of the Committee that a defence apply in circumstances where a strong causative link can be established between an individual's experience of modern slavery and a subsequent offence.

21. Liberty believes that clause 45 will provide a measure of protection for vulnerable victims, it will also help to secure prosecutions by encouraging witnesses to come forward. The CPS has produced successive pieces of guidance, most recently in February 2014, designed to reflect the UK's international obligations to refrain from prosecuting those who commit crimes as a direct result of their exploitation. Unfortunately, recent Court of Appeal judgments bear witness to the fact it is has not provided sufficient protection in practice.

22. In 2008, in the case of *R v O*, the Court of Appeal considered the appeal of a minor trafficked into the UK for the purposes of prostitution and prosecuted for an offence of possessing a false identity card.⁹ Here, and in what was described as a "*shameful set of circumstances*",¹⁰ the Court found that international standards enshrined in the Prosecution Code of Practice had not been followed, meaning "*there was no fair trial*" for this victim.¹¹ Last year, in the case of *L, HVN, THN, and T v R*, the Court of Appeal considered the appeal of three child victims and one adult victim of trafficking, erroneously prosecuted for offences related to the production of cannabis and possession of a false identity document respectively. The Court sought to stress that:

*"[t]he criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases, effectively extinguished, not merely because of age...but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual or group of individuals."*¹²

23. It is clear that these cases are not isolated failures. A report produced by RACE in Europe Partners in January this year found that trafficking victims continue to be prosecuted for crimes they are forced to commit, including some 142 cases of Vietnamese nationals prosecuted and convicted of crimes relating to cannabis production since the beginning of

⁸ Specifically slavery offence as defined in Part 1 of the Bill. The defence requires circumstances where a reasonable person, sharing specified characteristics of the victim, would have felt themselves to have no realistic alternative.

⁹ *R v O* [2008] EWCA Crim. 2835.

¹⁰ *Ibid.* para 26.

¹¹ *Ibid.* para 26.

¹² [2013] EWCA Crim 991, para 13.

2011, in circumstances where “*there were significant indicators present to suggest that they were in fact trafficking victims forced to undertake this criminal activity.*”¹³

24. The case for a statutory defence is clear and Liberty welcomes clause 45 of the Bill. We are concerned, however, by the formulation of sub-clause 45(1)(c) and 45(2) which, read together, require that a reasonable person sharing the victims “*relevant characteristics*” would have felt themselves to have no realistic alternative but to act in the same way as the victim. “*Relevant characteristics*” are narrowly defined in the Bill as including age, sex and physical or mental disability. This formulation would exclude other factors liable to have a powerful and understandable impact on an individual’s actions, such as religious belief, cultural background or physical stature. It is at least unclear whether factors like this would be accommodated by a reference to the hypothetical actions of somebody in the “*same situation*” as the victim.¹⁴

25. Liberty is further concerned by the number and nature of criminal offences excluded from the scope of the defence. The list of exceptions set out at Schedule 3 includes Theft Act offences, immigration and customs related offences as well as an offence related to resisting arrest.¹⁵ There is a great deal of research which suggests that vulnerable people, and in particular members of the Roma community, are trafficked into the UK from countries such as Romania, Bulgaria and Slovakia and forced into committing acts of theft.¹⁶ We are concerned that the exclusion of Theft Act offences from the operation of the defence fails to acknowledge the desperate realities of life for these victims. Similarly it is easy to understand why a victim may seek to resist arrest as a direct result of his or her exploitation, or become embroiled in offences around customs or the facilitation of illegal immigration. We believe the list of offences set out in Schedule 3 should be revisited to ensure the protection of the defence is sensitive to widely acknowledged patterns of exploitation and the realities of life for victims. Liberty is also sensitive to the need to ensure that prosecutorial guidance makes clear that exclusion from the scope of the defence should not be taken as an indication that a prosecution against a victim of modern slavery should proceed.

¹³ RACE in Europe Partners, *Victim or Criminal? Trafficking for Forced Criminal Exploitation in Europe, UK Chapter, January 2014*, p18.

¹⁴ As required by subclause 45(1)(c).

¹⁵ Specifically, those offences excluded include robbery or assault with intent to rob, burglary with intent to do unlawful damage to property and assault with intent to resist arrest, criminal damage, assisting unlawful immigration to an EU member state and fraudulent evasion of customs duty.

¹⁶ See e.g. RACE in Europe Partners, *Victim or Criminal? Trafficking for Forced Criminal Exploitation in Europe, UK Chapter, January 2014*, section on *Trafficking for exploitation through petty crime and begging*, beginning at p.8.

26. Part 4 of the Bill includes protections designed to help victims come forward and give evidence in Court. Liberty welcomes clause 46 of the Bill which, when combined with the defence provided for at clause 45, will not only recognise and reduce the trauma experienced by victims, but better facilitate their participation in the criminal justice system, helping to secure successful prosecutions.

Child victims

27. Liberty welcomes the Government's attempt, through the creation of a child trafficking advocate scheme at clause 47 of Bill, to introduce much needed co-ordination in responses to the complex needs of child trafficking victims. We are further pleased to see that this provision will operate in conjunction with clause 48 which provides that an individual must be presumed to be a child, for the purpose of accessing assistance and support, where age is unclear, but there is reason to believe an individual is under 18. At present, we do not have a coherent and joined-up system designed to meet the needs of trafficked children. Minors are frequently parcelled from agency to agency and have no one person with responsibility for ensuring their voice is heard. More disturbing still, many are lost in the system and are then exceptionally vulnerable to further exploitation.

28. Clause 47 is an important acknowledgment of the problem and Liberty further welcomes the addition of a provision which ties the functions of advocate to the best interests of the child.¹⁷ We believe, however, that there are vital additional steps which could be taken to develop and build on the provision. The scheme would have a more powerful and definite impact if certain key requirements were set out in primary legislation, ensuring greater clarity, consistency and enforceability. Firstly, the Bill should clarify, in accordance with the recommendations of the Committee, that advocates should be appointed as soon as a child victim is identified as a potential victim.¹⁸ Secondly, clause 47 could be strengthened by the inclusion of a stricter requirement that advocates be independent from those involved in the decision making process in that child's case, including local authorities.¹⁹ Thirdly, the scheme would be significantly strengthened by the inclusion of a statutory list of core functions, which would then be clearly enforceable in the best interests of the child. A

¹⁷ Subclause 47(5)

¹⁸ Such an addition would meet the requirement of the EU Directive on Preventing and Combatting Trafficking in Human Beings (Directive 2011/36) which requires that guardians or representatives designed to pursue the interest of vulnerable children are appointed "*from the moment the child is identified by the authorities*". Article 14(2).

¹⁹ Local authorities responsibilities include age assessments. In requiring, at clause 49(2), that an advocate be independent "in as far as practicable", the Bill leaves the issue of independence uncomfortably open.

statutory provision to this effect could be guided by established international standards for the assistance and support of trafficked children, including furthering their physical and psycho-social recovery and ensuring access to education.²⁰ Finally and crucially, Liberty also understands that lawyers are often hampered in their ability to represent child victims of trafficking, we therefore consider that giving legal instructions in a child's best interests should form an important part of the role outlined at clause 47.

29. Liberty further welcomes the inclusion in the Bill of provision for guidance around the identification and support of victims of trafficking.²¹ As with the child advocates scheme, however, we consider the provision would benefit considerably from greater prescription. As drafted, the clause is vague, including a requirement to provide guidance about *'the sorts of things which indicate that a person is a victim of trafficking'* and *'arrangements for providing assistance and support.'*²² Again, well established international legal protections exist which could help to give greater rigour to the guidance proposed at clause 48. The Trafficking Directive, for example, makes prescriptions about the minimum assistance to be provided to victims, including standards of living capable of assuring a victims' subsistence, the provision of safe accommodation, medical treatment, psychological assistance, counselling and translation or interpretation services.²³ We can see no reason why prescriptions identifying these basic sorts of support and assistance should not be included in the Bill as a floor of protection.

Unsafe and unfair: civil responses to serious criminality

30. The Bill provides for 4 types of order. Orders made on sentence, provided for at clause 14 of the Bill, are the least offensive of these, as they are made by sentencing judges on an individual being convicted of a modern slavery offence. These orders remain problematic from the perspective of legal certainty as, save for references to foreign travel prohibitions and requirements to provide details of the subject's name and address, the Bill does not make any prescriptions about the kind of restrictions which can be imposed on individuals.

31. Next on the scale are orders on application for individuals who have – at some point in the near or distant past – been convicted of a modern slavery offence.²⁴ Inexplicably, the

²⁰ Directive 2011/36, Article 14(1).

²¹ Clause 48.

²² Subclause 48(1)(a).

²³ Directive 2011/36, Article 11(5).

²⁴ Clause 15.

Bill goes further than its draft by allowing immigration officers, as well as chief police officers and the Director General of the National Crime Agency to apply to a judge for restrictions to be placed on an individual. As with all the orders provided for in Part 2, the clause 15 orders need not be aimed at preventing harm to an identifiable individual and may bear no relationship to the historic offence. Provision for interim orders is made at clause 21 of the Bill. These orders are apparently aimed at situations where a clause 15 order on application is being considered by the courts. As distinct from other of the orders provided for in Part 2, the judge need only consider it *'just'* rather than necessary, to impose such an order.

32. Finally, clause 23 makes provision for so-called 'risk orders'. These orders are the least principled of those posited in Part 2 of the Bill as they can be made on application by a number of bodies – including immigration officials - even where there has previously been no conviction. Risk orders have no relationship whatsoever to the criminal justice system, notwithstanding the fact they are supposedly a response to alleged criminality of the most serious order. In accordance with the compelling recommendations of the Draft Bill Committee, Liberty urges parliamentarians to push, at the very least, for the proposed risk order scheme to be scrapped. The Government must learn the lessons from the disastrous control order regime, replaced in 2011 by the equally ineffective and unfair TPIMs which are now, in the words of the Joint Committee on Human Rights "*withering on the vine*".²⁵ In much the same way as terror offences are patently unsuited to civil law responses, the idea that potential traffickers should be made subject to something akin to an anti-trafficking ASBO is an insult both to victims and our best criminal justice traditions. Leaving suspected perpetrators of serious organised crime at large in the community subject to travel bans and unspecified restrictions on their liberty will not disrupt trafficking networks. The removal of criminal due process protections means that, in addition to leaving dangerous people at large, civil orders also risk imposing life-destroying restrictions on the innocent.

33. The lack of willingness by police to pursue prosecutions in cases of slavery and servitude, demonstrated in the case of our client Patience Asuquo, led to Liberty's to push for a specific criminal offence of holding another in slavery or servitude. While the early signs are good, Liberty believes that much more needs to be done to ensure that such offences are taken seriously by police, prioritised and fully investigated. In providing for a parallel regime of civil sanctions the Government is creating another, far less effective, form of resolution in cases of suspected slavery which will inevitably push criminal investigations and prosecutions down the agenda. The argument that these orders will enhance the

²⁵ Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011, Tenth Report of Session 2013–14, para 80.

prospect of prosecution has been discredited in the case of TPIMs. In January this year the JCHR reported it had “*failed to find any evidence that TPIMs have led in practice to any more criminal prosecutions of terrorism suspects*”.²⁶ The Independent Reviewer of Terrorism Legislation has also firmly concluded that TPIMs have not been an effective mechanism for securing investigations.²⁷ The former Director of Public Prosecutions, Ken MacDonald QC, has previously concluded that precursor control orders would have actively inhibited criminal investigations and prevented trials and convictions if they had been applied in certain specific cases. We know from bitter experience that in practice civil orders divert attention from prosecution, hindering the imposition of more appropriate sanctions for those engaged in criminality while potentially punishing the innocent.

Strengthening support for victims

34. Liberty welcomes the Government’s decision to introduce new provision in the House of Commons demanding greater transparency in supply chains and encouraging vitals shifts in commercial practice. This is a promising indication that the Government is listening to arguments about the ways in which the reach of the Bill can be extended to increase protection. Liberty urges parliamentarians to seize the opportunity presented by the Bill to take a number of obvious steps which would dramatically improve the situation of victims of modern slavery in this country.

The National Referral Mechanism

35. Liberty has grave concerns about the state of the National Referral Mechanism (“the NRM”), which is the process used to identify victims of trafficking, and therefore a gateway to much support and assistance. The NRM operates on a three stage model. First responders, including local authorities, enforcement agencies and NGO service providers make an initial referral to a competent authority. There are currently two bodies with competent authority status, the UK Human Trafficking Centre (“the UKHTC”), part of the National Crime Agency, and UKVI, a Home Office agency with responsibility for considering immigration applications. The second stage of the process sees one of these bodies determine whether there are reasonable grounds to consider a person a victim of trafficking. If an individual is found to be

²⁶ Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011, Tenth Report of Session 2013–14, para 35.

²⁷ D Anderson, Terrorism Prevention and Investigation Measures in 2012, March 2013, para 11.5.

so, he or she is accommodated for a reflection and recovery period of 45 days. At end of this period, stage three, a conclusive decision is made about an individual's status.²⁸

36. Liberty believes that the Modern Slavery Bill offers an ideal opportunity to place an independent and effective NRM model on a statutory footing. We consider that legal clarity around processes and legally enforceable duties will bring significant gains in accountability. There are a number of obvious core reforms which must be incorporated into a statutory model to ensure basic standards of fairness. The Home Office Review of the mechanism, which reported back in November, identified problems with the role of UKVI as a conclusive grounds decision-maker, identifying, in particular, a lack of proper separation of asylum and trafficking decision-making and noting:

"it is difficult to maintain confidence in making two different decisions when using the same information and staff....If we wish to create an effective and efficient system in which all stakeholders work together collectively and transparently we need to address both the perceived lack of credibility and the reality of the way in which cases are managed."²⁹

37. Serious problems with the UKVI's operations as a competent authority were also identified by the Draft Bill Committee. In particular, the Committee remarked on the high case backlog; reports that the UKVI is infected by culture of disbelief; evidence that it erroneously requires independent verification where none is necessary; indications that it conflates trafficking and asylum decisions; and a serious lack of understanding of victim support services.³⁰ Statistics also reveal that the grant rate of the UKVI stands at just 20% as compared to an 80% grant rate from the UKHTC.³¹ It is essential that competent authority status is removed from the UKVI and placed in the hands of one independent body. At a minimum, a statutory mechanism must remove competent authority status from the UKVI, an agency with a clear conflict of interest, given its primary responsibility for assessing immigration applications. More broadly, Liberty believes that responsibility for governance of

²⁸ If the individual is found to be a victim of trafficking, he or she may be granted discretionary leave to remain in the UK for one year, with the possibility of extension, to allow them to co-operate fully in any police investigation and subsequent prosecution. The period of discretionary leave can be extended if required. Those victims not involved in the criminal justice process, may still be granted discretionary leave to remain in the UK on a case by case basis, or may be assisted with voluntary return.

²⁹ Home Office Review of the National Referral Mechanism for victims of human trafficking, November 2014, paragraph 7.2.18.

³⁰ Joint Committee on the Draft Modern Slavery Bill; Report Session 2013–14, Para 84.

³¹ Joint Committee on the Draft Modern Slavery Bill, para 85.

the NRM should be removed from the Home Office and placed with a body independent of both the Home Office and the Police.

38. It is further clear from much of the detailed evidence given by service providers to the Draft Bill Committee that the NRM does not currently operate a coherent system of reconsideration or review where an individual seeks to challenge a decision.³² At a minimum, a new statutory mechanism should provide for a coherent system of reconsideration and appeal. Liberty further sees the value in extending the period of reflection currently offered to victims from 45 days to a longer period in line with practice in other jurisdictions and commensurate with the trauma suffered by victims and the trials of recovery and reintegration.

Legal assistance

39. Victims of modern slavery are one of a number of very vulnerable groups affected by recent cuts to the civil legal aid system. In the first round of cuts to civil legal aid, introduced in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force in April 2013, huge swathes of services were cut, including much of the provision in immigration matters. A limited exception to the cuts was provided for victims of trafficking in relation to immigration and employment matters and claims for damages from a perpetrator. Significantly, however, legal aid provision is only available in cases where a conclusive determination has been reached by a competent authority that an individual is a victim of trafficking or a reasonable grounds determination has been made and a conclusive determination is pending.³³ Not only are delays a well reported feature of the NRM, particularly in relation to the role of the UKVI, issues with the quality of decision making at that agency throw the need for an effective avenue of challenge into sharp focus. At present there is no coherent system for reconsideration or appeal. The only effective form of redress available to individuals, therefore, is a challenge by way of judicial review. The prospect of a residence test, recently ruled unlawful by the High Court, but subject to Government appeal, risks removing provision from those who cannot establish 12 months lawful residence in the UK. Even those individuals present in the UK for 12 months may have significant difficulty evidencing the fact, given the shadowy and exploitative means by which they have been brought to the country..

³² Joint Committee on the Draft Modern Slavery Bill, see e.g. para 81.

³³ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, paragraph 32(1).

40. For those subject to slavery and servitude who do not qualify as victims of trafficking, the situation is significantly worse. Even limited provision for legal aid in immigration and employment matters will not be available to them. Victims of slavery will have no redress in their immigration or employment claims as well as an array of other civil matters. If ultimately reinstated, the residence test may well prevent access for those few matters which remain in scope.

41. Liberty firmly supports the Draft Bill Committee's calls for the Legal Aid, Sentencing and Punishment of Offenders Act to ensure our justice system works for all victims of modern slavery by extending provision to them for immigration claims and all over civil matters arising out of their ill-treatment. Provision should be available for potential victims from the first point of contact with a lawyer.

Compensation

42. It is clear from evidence provided to the Committee that the Criminal Injuries Compensation Scheme 2012 is not serving victims of modern slavery. To access the scheme, an individual must be able to demonstrate a criminal injury attributable to their being a victim of '*a crime of violence*'.³⁴ Current offences of holding somebody in slavery and servitude and human trafficking are not explicitly included in the definition of violent crime under the scheme, meaning many victims are unable to benefit.³⁵ Liberty believes that the Bill provides an opportunity to amend the Criminal Injuries Compensation Scheme to ensure it makes explicit and adequate provision for victims of modern slavery.

Protecting overseas domestic workers

43. Liberty was deeply critical of changes to the Domestic Overseas Workers Visa introduced in April 2012 which see domestic workers tied to their employers potentially institutionalising abuse and forcing people into a position of victimhood and exploitation. The experience of over two years of the new, tied visa, which prohibits an individual from changing her employer, shows that exploitation of domestic workers has increased as the Government was warned it would. Evidence compiled by Kalayaan over the years since the tied visa came into force, shows that 16% of new entrants present on tied visas report physical abuse, compared with 8% of those subject to the pre-April 2012 Visa; 71% of those tied to an employer reported never being allowed to leave the house unsupervised,

³⁴ Criminal Injuries Compensation Scheme 2012, para 4.

³⁵ Criminal Injuries Compensation Scheme 2012, Annex B, 2(1).

compared to 43% of those subject to the original visa; 60% of tied migrants were paid less than £50 per week as compared with 36% under the original visa; and Kalayaan assessed 69% of those present on the tied visa to be victims of trafficking as opposed to 26% of those not tied.³⁶ These statistics are shocking, but not surprising.

44. Tied visas are a mechanism well known to regimes with shameful records on human rights and particularly the rights of women. A report produced this year by Amnesty International catalogues the widespread abuse of domestic workers in Qatar, ranging from physical assaults to absolute restrictions on their movements.³⁷ The Qatari 'no objection certificate' scheme, which prevents migrants from working for somebody else without the permission of their sponsor, is a factor widely acknowledged to sustain their abuse.³⁸ In introducing a tied visa, the UK is replicating this provision and allowing for the continued servitude of women brought to this country as slaves. One of the policy factors called in aid by the Government in defence of the tied visa is a commitment to grant visas only to workers who have been with their employers for 12 months.³⁹ It is hard to see how this policy can act as a safeguard in cases where women have been held in servitude by their employers in countries which institutionalise enslavement. There may be little we can do secure the safety of the vulnerable women routinely beaten and abused by their employers in Qatar, but we can say 'not on our soil'. Instead we are choosing to perpetuate their abuse. Liberty has been impressed by the Home Secretary's strong statements about her personal commitment to eliminating modern slavery and violence against women; she has described both as personal priorities.⁴⁰ We urge her to rethink the tied visa in light of these personal commitments and to use this Bill, with the ethical imperative it carries, as the vehicle for change.

45. The pre-April 2012 Overseas Domestic Worker Visa has been described by the Home Affairs Select Committee in 2011 as "*the single most important issue in preventing the forced labour and trafficking of such workers*",⁴¹ it is not hard to see why. A visa which allows vulnerable workers to change their employer not only facilitates prosecutions by

³⁶ *Still enslaved: The migrant domestic workers who are trapped by the immigration rules*, Kalayaan, April 2014.

³⁷ *'My Sleep is My Break': Exploitation of Migrant Domestic Workers in Qatar*, Amnesty International, 2014.

³⁸ *Ibid*, p.12.

³⁹ See, for example, Government Response to the Report from the Joint Committee on the Draft Modern Slavery Bill, Session 2013-14 HL Paper 166/ HC 1019 (June 2014); p.27.

⁴⁰ See the Home Secretary's Speech to the 36th Annual Women's Aid National Conference 2010 and '*Theresa May makes modern slavery her 'personal priority'*', the Guardian, 24th November 2013.

⁴¹ Home Affairs Select Committee. *The trade in Human Beings: Human Trafficking in the UK*. Sixth report of Session 2008-09. Volume I. House of Commons. p26.

allowing victims to come forward without the fear of deportation, it acts as a check on the behaviour of employers and allows individuals to remove themselves from employment relationships before they fall victim to exploitation. Ultimately the reintroduction of the original Overseas Domestic Workers Visa would save the public purse the cost of meeting the complex needs of victims of slavery and trafficking and allow individuals already present in this country to seek gainful, non-exploitative, employment and contribute to the British economy. If the Modern Slavery Bill is to deserve its title, it must reinstate the pre-April 2012 visa.

Rachel Robinson