

CARE SUBMISSION TO THE SECONDARY LEGISLATION SCRUTINY COMMITTEE SLAVERY AND TRAFFICKING REGULATIONS 2022

1. Draft Slavery and Human Trafficking (Definition of Victim) Regulations 2022 have been laid before Parliament under section 69(2) of the Nationality and Borders Act 2022 for approval by resolution of each House of Parliament.¹
2. CARE previously provided evidence to the House of Commons Public Bill Committee during consideration of the Nationality and Borders Bill.² This submission sets out the views of CARE on the 2022 Regulations within the terms of reference of the Committee.

Issue (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House

3. The Slavery and Trafficking Regulations are intended to ensure that for the purpose of Part 5 of the Nationality and Borders Act 2022 (NBA), victims of slavery and human trafficking are defined in legislation.
4. Aspects of the response to modern slavery are delegated to Scotland and Northern Ireland – specifically the criminal justice response (offences etc) and the provision of assistance and support. However, the initial identification and confirmation of who is and is not a victim of modern slavery are managed at the UK level by the Home Office through the National Referral Mechanism (NRM). This determination has been key to whether a person will receive support services and, in the case of children, an independent child trafficking guardian.
5. Once it comes into effect, Part 5 of the NBA will give UK victims entitlements to a so-called recovery period during which time they cannot be deported and the potential to be given leave to remain. Whilst all of the UK jurisdictions have had modern slavery legislation since 2015, this is the first time that legislation has defined a victim for the purpose of immigration matters. This definition will also impact the provision of support services for victims in England and Wales.
6. It is vitally important that definitions of what constitutes a victim of slavery or human trafficking meet the UK's international obligations and are consistent across all relevant legislation in their outcomes to ensure victims do not slip through the net by qualifying as a victim under one definition and not another. For instance,
 - 6.1. The Modern Slavery Act 2015 (MSA) defines a victim as someone who has been the victim of a slavery/trafficking offence in section 56.³
 - 6.2. There are relevant definitions in sections 1-3 of the MSA, some of which are reflected in these Regulations.⁴
 - 6.3. The Legal Aid, Sentencing and Punishment of Offenders Act Sch 1, para 32(6)-(8) defines a victim for the purposes of receiving legal aid as a person who is determined to be a victim by the “competent authority” under the National Referral Mechanism.⁵

¹ [The Slavery and Human Trafficking \(Definition of Victim\) Regulations 2022 \(legislation.gov.uk\)](#)

² [CARE Submission to the Public Bill Committee](#)

³ [Modern Slavery Act 2015 \(legislation.gov.uk\)](#)

⁴ [Modern Slavery Act 2015 \(legislation.gov.uk\)](#)

⁵ <https://www.legislation.gov.uk/ukpga/2012/10/schedule/1>

- 6.4. The Modern Slavery Statutory Guidance⁶ issued under section 49 of the MSA⁷ gives guidance about identifying victims and recognises that “*it can be challenging to identify a potential victim of modern slavery*”.⁸
- 6.5. The European Convention Against Trafficking (ECAT) sets out a further definition of a ‘victim of trafficking’ in Article 4 to include persons who have been subject to exploitation, including “at minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁹
- 6.6. Article 3 of the Palermo Protocol also stipulates that, “exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁰
7. Victims need to be properly identified to ensure they receive the support that they need to recover from their exploitation and to be treated fairly and consistently across the relevant legislation.

Issue (c) that it may imperfectly achieve its policy objectives

8. CARE is concerned that Regulation 2(2)(a) differs from the definition of ‘victim of slavery’ given in sections 1 and 56 of the Modern Slavery Act. There are two elements to the determination that a person is a victim of slavery – that the victim has been subject to the offence in section 1(1)(a) which is also referred to in section 56(1), and that “*regard may be had to all the circumstances.*” in two key aspects:
 - 8.1. Regulation 2(1) says a victim of slavery is a person who has been subject to slavery, servitude or forced or compulsory labour.
 - 8.2. The wording of Regulation 2(2)(a) which refers to having regard to a person’s personal circumstances differs in two ways from the wording used in section 1(4)(a) of the MSA:
 - 8.2.1. Firstly with respect to the person’s personal circumstances, the Regulations require the consideration be that these circumstances “*significantly impair the person’s ability to protect themselves from being subjected to slavery, servitude or forced or compulsory labour*”¹¹ while the language used in section 1(4)(a) of the MSA states regard may be had to circumstances “*which may make the person more vulnerable than other persons.*”¹² Comparatively, the language in Regulation 2 could be inferred as placing a duty on the person to protect themselves from vulnerability that could be a contributory factor to their exploitation. The onus should not at any point be on the victim. This wording is also contrary to the Modern Slavery Act Statutory Guidance paragraphs 2.82-2.98.¹³
 - 8.2.2. Secondly with respect to “any work or services provided by the person”. There is an additional qualifier in the MSA which states “including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).”¹⁴ These qualifiers of

⁶ [Modern Slavery: Statutory Guidance for England and Wales \(under s49 of the Modern Slavery Act 2015\) and Non-Statutory Guidance for Scotland and Northern Ireland, Version 2.9, May 2022](#)

⁷ <https://www.legislation.gov.uk/ukpga/2015/30/section/49>

⁸ Statutory Guidance, *Op Cit*, page 34

⁹ [Council of Europe Convention on Action against Trafficking in Human Beings CM 8414 \(publishing.service.gov.uk\)](#)

¹⁰ [Protocol to Prevent, Suppress and Punish Trafficking in Persons | OHCHR](#)

¹¹ [The Slavery and Human Trafficking \(Definition of Victim\) Regulations 2022 \(legislation.gov.uk\)](#)

¹² [Modern Slavery Act 2015 \(legislation.gov.uk\)](#)

¹³ Statutory Guidance, *Op Cit*

¹⁴ [Modern Slavery Act 2015 \(legislation.gov.uk\)](#)

exploitation are included in Regulation 3 but not in Regulation 2. Since the key principle is that slavery, servitude, forced or compulsory labour is exploitation, it is unclear why these words would have been omitted from the definition.

- 8.3. We recognise that ECAT is the basis for framework of the Regulations, but we are concerned that the definition of exploitation in Regulation 3 is too narrow since it does not account for how human traffickers and those wishing to exploit victims are opportunistic and entrepreneurial. Both Article 4 of ECAT¹⁵ and Article 3 of the Palermo Protocol¹⁶ are **clear that their definitions of exploitation are a “minimum” whereas Regulation 3 is prescriptive.** The international instruments leave room to adapt and include new forms of exploitation as they emerge and have proved prescient as new forms of exploitation have emerged over time, (for example in recent years criminal exploitation) as offenders have seen new opportunities to turn a profit.
- 8.4. CARE also suggests that there should be a definition of travel as per section 2(5) of the MSA to ensure consistency of understanding and to make clear that the travel does not have to be across borders, since there has been a significant increase in so-called county lines exploitation where young people are coerced into moving drugs within the UK.

Issue (e) that there appear to be inadequacies in the consultation process which relates to the instrument.

9. There has not been thorough consultation with the anti-trafficking sector regarding the definitions set out in these Slavery and Trafficking Regulations despite the existence of established stakeholder engagement groups. It is essential that the definitions are workable and consistent, and informed by those engaging directly with victims.

For more information contact CARE | 53 Romney Street | London | SW1P 3RF |

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¹⁵ Council of Europe Convention on Action against Trafficking in Human Beings CM 8414 (publishing.service.gov.uk)

¹⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime | OHCHR

6th June 2022

Via email to:

Chair of the Joint Committee on Statutory Instruments
Chair of the House of Lords' Secondary Legislation Scrutiny Committee

Dear Chairs,

The Slavery and Human Trafficking (Definition of Victim) Regulations 2022

I am writing to you about the draft regulations the government has laid before Parliament under section [69(2)] of the Nationality and Borders Act 2022 defining a victim of slavery and human trafficking, The Slavery and Human Trafficking (Definition of Victim) Regulations 2022.

Throughout the passage of the Nationality and Borders Act 2022, ECPAT UK has been part of a wide coalition of organisations working with child and adult victims of modern slavery and human trafficking. There has been no consultation about these regulations and we are concerned that the drafting is defective, rendering them incompatible with international law and significantly narrowing the definitions and therefore scope for identification of victims.

The regulations pertain to the interpretation of Part 5 of the Nationality and Borders Act and will have far reaching consequences for victims of all forms of modern slavery as they significantly narrow the scope of identification. The definitions contained in the draft appear to set out the criteria by which individuals identified as potential victims and referred into the National Referral Mechanism (NRM) will have their cases considered to determine if they are accepted as potential and conclusively determined as victims entitling them to support and protections in line with the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT).

Since the inception of the National Referral Mechanism in 2009, the definition utilised is that detailed in Article 4 of ECAT consisting of elements of action, means and purpose. This mirrors the international definition of human trafficking as set out in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol). Subsequently and in response to the Modern Slavery Act 2015 the NRM was extended to cover all forms of modern slavery. Millions of stakeholders have already been trained on existing definitions including first responders for the NRM system.

We highlight our particular concerns about the drafting of the regulations below.

The draft regulations set a definition of exploitation that is far too narrow. The definition of exploitation as set out in Article 4 of ECAT and Article 3 of the Palermo Protocol sets out at a “minimum” forms of exploitation but is not in itself a limited definition of exploitation. This takes into account the entrepreneurial nature of exploitation and that different types of exploitation emerge over time.

The draft regulations make no distinction between adult victims and child victims of slavery.

In determining a victim of slavery in draft Regulation 2(a) regard must be paid to a person’s circumstances when determining if that person is a victim of slavery. It merely sets out ‘age’ as being of these circumstances to pay due regard to. We consider that this drafting is significantly defective as age is not solely ‘a factor’ having regard to the wider set of international legal obligations, including but not limited to, International Labour Organisation’s Worst Forms of Child Labour Convention, 1999 (No. 182) and the Optional Protocols to the Convention on the Rights of the Child (UNCRC). These include the identification of child victims of all forms of exploitation and includes practices similar to slavery such as debt bondage, illegal adoption, child soldiers and the exploitation of children for illicit activities, in particular for the production and trafficking of drugs.

Consideration of criminal exploitation is of particular significance in the UK context given child potential victims were most often referred for criminal exploitation in 2021 (49%; 2,689) , with ‘county lines’ cases averaging over 500 referrals a quarter. This lack of inclusion of criminal exploitation into either the victims of slavery or victim of human trafficking regulations is particularly problematic given there is currently no statutory definition of criminal exploitation, often leading safeguarding partners unsure as to what constitutes this form of abuse when encountering cases which can lead to a lack of safeguarding responses. The full range and specificity of child exploitation must be reflected in any statutory definition of a victim of slavery and human trafficking. Such issues also arise for adult victims where there are no specific definitions around criminal exploitation.

In addition, the definitions of exploitation do not feature “practices similar to slavery” as detailed within ECAT and its Explanatory Report (Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 includes debt bondage, forced marriage, and adoptions for the purposes of exploitation). It should also be noted that the EU Directive (Directive 2011/36/EU) also expressly references forced begging and exploitation of criminal activities within its definition.

The drafting of the definition of a victim of human trafficking at draft Regulation 3 (1) sets a completely inappropriate standard for victim identification over emphasising ‘arranging or facilitating travel’. The international standard sets out that ‘travel’ or movement is only one aspect of the ‘action’ element of the definition, the others being recruitment, harbouring, receipt, and transfer of persons. The overemphasis of the word travel is already a source of confusion in the criminal law definition which should be addressed in these draft regulations.

Draft Regulation 3 is completely defective in respect of the ‘means’ element of human trafficking. It defines consent with regard to adult victims as being linked to the ‘travel’ rather than the international standard which sets out the ‘means’ element of the definition as related to the exploitation or purpose. Furthermore draft Regulation 3(6)(d) introduces a standard of including children in deliberation of the ‘means’ test – this is very troubling as this ‘means’ element within ECAT does not apply to children as legally children can never consent to their own exploitation. It is completely inappropriate for children recruited to provide services and benefits of any kind if those constitute any form of exploitation if only accepted when being subjected to force, threats or deception designed to induce consent. In addition, the definitions in draft Regulation 3 are even narrower than the criminal law definition of exploitation as set

out in Section 3 of the Modern Slavery Act 2015 which at paragraph 6 includes securing services etc. from children and vulnerable persons which does not require a means element to be proven.

We ask that you scrutinise these draft regulations accordingly and seek to resolve the deficiencies via the affirmative procedure to which they are subject. The regulations in their current form are far too narrow and are incompatible with international law. This will leave victims who fall clearly within international definitions unable to be identified, safeguarded, and to receive the support that they so desperately require.

Please do contact me for any further information.

Yours faithfully,

A handwritten signature in dark ink, appearing to read 'Patricia Durr', with a long horizontal flourish extending to the right.

Patricia Durr, CEO, ECPAT UK (Every Child Protected Against Trafficking)
with the advice and support of Phillipa Roberts, Solicitor and Head of Policy and Research, Hope for Justice

Further information from the Home Office

The Draft Slavery and Human Trafficking (Definition of Victim) Regulations 2022 align with our international obligations. The regulations are consistent with the definition that is currently applied in the *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015)* and non-statutory guidance for Scotland and Northern Ireland, which were drafted in line with European Convention on Action Against Trafficking in Human Beings (ECAT).

The Nationality and Borders Act 2022 (the NAB Act), which is the primary basis for the draft definition, provides legislative clarity to victims of modern slavery and decision makers on victims' rights. The Modern Slavery measures in the NAB Act also rely on the use of "victim of slavery" and "victim of trafficking" and require a definition based in the identification and support of victims sphere (thus aligning with ECAT and current statutory guidance) rather than the definition of the terms contained within s56 of the Modern Slavery Act 2015 which are based on decisions made in the criminal justice sector.

Members of the Modern Slavery Strategy Implementation Group (MSSIG) agreed that ECAT and the Palermo Protocol accurately represented their understanding of a "victim" and highlighted specific indicators, and we have reflected this within the draft definition.

This provides consistency for operational partners working in the modern slavery sector, as well as consistency across the Modern Slavery Act 2015, Modern Slavery Statutory Guidance and ECAT.

We disagree that the regulations are too narrow. The activities mentioned in ECAT Article 4 would be covered by the Draft Regulations and we have intentionally avoided including reference to specific forms of exploitation in recognition of the evolving nature of trafficking and modern slavery so as not to exclude victims of what may currently be unknown forms of exploitation.

The draft regulations make specific reference to all elements of trafficking at Section 3(2), setting out that "P may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V". Here, recruiting, transporting or transferring, harbouring or receiving, and transferring or exchanging control of the Victim are given equal weight as actions for trafficking.

The ECAT Article 4(a) definition of "trafficking in human beings" requires recruitment, transportation etc., by the means specified in that Article, for the purpose of exploitation. In relation to children, Article 4(c) makes clear that the recruitment, transportation etc. of a child shall be considered trafficking, irrespective of the means used. Regulation 3(5)(b) of the draft regulations does the same.

Exploitation under Article 4 includes forced labour or services. The policy intention is that in order to come within the definition of "trafficking", the services could be also provided under threat or deception. That is reflected in regulation 3(6)(d).

The draft regulations do not state that children (a person under the age of 18) can consent to their own exploitation. However, it is the policy position that a child can consent to providing a service and for that not to be exploitation. Where there is any element of force, deception or threat to induce them to provide that service, it is exploitation. That is the effect of regulation

3(6)(d). When considering the individual circumstances of a case, a person's age (as well as other factors) will affect what amounts to force, threat or deception.

This position is already reflected in the statutory guidance issued under section 49 of the Modern Slavery Act 2015 at paragraph 2.37:

"In cases involving children, not all work done by a child should be considered as exploitation. Participation in work that does not affect the health and personal development of a child or interfere with their schooling, should generally be regarded as being something positive. This may include activities such as helping parents around the home, assisting in a family business or earning pocket money outside of school hours and during school holidays. Such activities can contribute to a child's development and to the welfare of their family, and can provide the child with skills and experience that helps to prepare them for their adult life."

9 June 2022

Further Information from the Home Office

Q1: Why did the Home Office decide not to conduct any formal public consultation?

- During the Commons Committee Stage of the Nationality and Borders Bill, on behalf of the Government, the former Lord Commissioner for the Treasury, Craig Whittaker stated that "we are creating a power to make regulations to define the meaning of "victim" in accordance with our Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) obligations." We have since met that commitment by defining the meaning of a victim of slavery and human trafficking in alignment with the definition set out in ECAT.
- During the formal public NPI consultation,¹ which ran from 24th March to 6th May 2021, most stakeholder and public respondents thought the proposals will be effective in building a resilient system, which identifies victims of modern slavery as quickly as possible. These regulations support that objective. This public consultation also provided an opportunity for modern slavery stakeholders to comment on the modern slavery policies that these regulations underpin.
- Separately, the policy has received sustained Parliamentary scrutiny very recently through debates for the Nationality and Borders Bill (now Act). We therefore considered that it was unnecessary to undertake a formal public consultation given the opportunities to comment on the modern slavery policies to which these definitions relate, and the opportunity given to key Modern Slavery stakeholders to comment directly on the drafting of the definitions. We have continued to engage with sector experts and operational partners during the drafting of the regulations.
- We also note that there is no duty in section 69 of the Nationality and Borders Act 2022 to consult on regulations made under that section, in contrast to the regulation-making powers provided for in Schedule 5 to the Act, both of which relate to modern slavery regulations.
- The Delegated Powers and Regulatory Reform Committee expressed one concern that the powers conferred by what was then clause 68(1) give Ministers an unlimited discretion to define the terms rather than setting out on the face of the Bill that they should reflect the provisions of Article 4 of ECAT and Article 4 of the ECHR, as intended. We have ensured that the definitions do reflect these international provisions in drafting. The Committee did not raise any other concerns that the Regulations would not receive sufficient scrutiny.

¹ The New Plan for Immigration Consultation included a section on supporting victims of modern slavery while ensuring the system is not open to misuse. Stakeholders and members of the public were invited to participate via an online questionnaire; there were also eight targeted engagement sessions with invited stakeholders, covering the detail of the policies; six focus group sessions with members of the public from across the UK; and interviews and small group discussions with those who have experience of the UK asylum and modern slavery systems. Full details: [New Plan for Immigration - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/new-plan-for-immigration)

Q2: Which organisations are members of the Victim Support Modern Slavery Strategy Implementation Group.

The Modern Slavery Strategy Implementation Group brings together key voices in the sector. The Home Office is unable to share details of specific attendees to the Victim Definition workshop.

Q3: Were the Victim Support Modern Slavery Strategy Implementation Group given the proposed wording of the legislation to comment on or were the discussions more around the principles, as paragraph 10.1 of the EM seems to indicate.

The engagement workshop on 26th January 2022 was intended for key stakeholders to share their views on what the drafting of the new definition of a victim of slavery or human trafficking should encompass, considering which existing definitions provide the most accurate depiction of a victim, and whether there were certain identification indicators or forms of exploitation we should include. We could not share the proposed wording at the time since we did not have Ministerial agreement.

Attendees expressed broad consensus for the need to align with the definition as set out in ECAT, to not amend the existing definitions too much given the impact on First Responders, and to keep the definition open to allow for new forms of exploitation to be captured as they emerge. We have ensured this advice is reflected in the draft regulations; which align with ECAT, existing definitions set out in statutory guidance, and allow for identification of victims of currently unknown forms of human trafficking or slavery. We therefore deemed it unnecessary to hold a follow up workshop given the broad consensus regarding the approach to drafting the definitions, and given that there was no request from stakeholders for further discussions.

Q4: Was there any material on the proposals published during the drafting process with which bodies not involved in the Victim Support Group could engage?

No. Following our engagement with stakeholders and operational partners, and as we set out in Parliament during the passage of the Nationality and Borders Act 2022, we set about drafting in accordance with our international obligations, including ECAT. We believe this group is representative of the sector and it would therefore be unnecessary to publish the proposals wider, particularly given that the public had an opportunity to comment more broadly on Modern Slavery Measures in the New Plan for Immigration Public Consultation.

Q5: Did you receive correspondence from either CARE or ECPAT UK during the policy formulation process and if so what was the response given?

On January 26 2022, an ECPAT representative attended our workshop on the Victim Definition SI. We incorporated points raised by the attendees into the drafting of the policy, including ensuring we align with ECAT and allow for potential forms of exploitation which do emerge in the future. We did not receive further correspondence from Care or ECPAT. Following the publication of the draft regulations, during engagement on a separate matter, ECPAT expressed that they had concerns with the draft definition. We welcome further engagement with stakeholders, as appropriate, going forward on the development and delivery of Modern Slavery policy.”

17 June 2022