

20th April 2019

Dear Modern Slavery Unit, Home Office,

We enclose with this letter the feedback we have been able to collate to date in response to the draft Modern Slavery statutory guidance (section 49, MSA). This is the best we can do within the compressed timescales provided to us. For the avoidance of doubt the comments made by individuals and organisations from the sector should not be considered as an endorsement or support for guidance of the policies that they set out.

We would like to say at the outset that we do welcome the opportunity as a sector to comment on the long-awaited and much needed statutory guidance ("the guidance") on victim identification and care pursuant to the requirements in the world leading Modern Slavery Act 2015. The identification and care of victims underpins every aspect of the Government Strategy to tackle Modern Slavery. As such it is our strong view that it is essential for any guidance produced for this purpose to be fit for purpose and achieves its aims of ensuring that some of the most vulnerable people in our society are identified, protected and receive the short and long term support that they require.

However, we re-iterate the concerns which we have already raised about the approach that has been taken to engaging the sector in feeding back on this important guidance. See email of Kate Roberts dated 12 December 2018 and Anna Sereni for ATMG dated 21 December 2018). Others have also raised concerns. See ECPAT UK (letter enclosed, sent 12 April 2018) and by the [UN Special Rapporteurs dated 3 January 2019](#) (hyperlink).

The approach that has been taken thus far to engaging stakeholders directly contradicts and undermines the high aspirations of producing guidance which is world-class and a model for how to protect and support victims of modern slavery. To refresh your memory of the chronology

- On 14 December 2018, there was a meeting with (several) anti-trafficking NGO's made up of the Modern Slavery Strategy Implementation Group (MSSIG) Victim Support Task and Finish Group and others keen to feed into the statutory guidance. During the meeting the MSU was urged to reconsider the rapid publication of what was proposed to be interim guidance and was at that stage just 6 pages in length. A consultative and iterative process was recommended whereby civil society could engage and consult on drafts of the guidance over a period of several months to inform the framework, wording and content. The interim guidance was not published. No further steps were taken by the MSU to engage with the group of NGO's or the sector more broadly on the development of the guidance until 18 March 2019 when a letter from the Minister (Victoria Atkins MP) was emailed to the group, saying the guidance would be drafted by the end of April. It is noted that it was no longer proposed to be interim only guidance.
- On 26 March 2019, we were given a revised contents page for the draft guidance (without the substance of what the guidance says).
- On 27 March the Victim Support Task and Finish Group met. During this meeting Home Office Modern Slavery Unit officials attended and discussed feedback on the guidance. It was made clear during this meeting that the time frame was impossible to work with but

the Home Office response was that there was no scope for any extension. Due to legal and other Home Office deadlines it was made clear that the deadline for comments was 17 April.

- On 2 April 2019, we were provided with a draft of the guidance with a deadline for comments by 17 April 2019. This draft ran to 140 pages in length.

This is an aggregate timescale of 2 weeks to consider and feedback on draft guidance that is substantial in content and numbers 40,000+ words. This truncated timescale has been imposed in circumstances where there have already been significant concerns with the approach taken in respect of the earlier interim guidance. We refer you back to the email sent by Kate Roberts on behalf of a number of groups dated 12 December 2018 and the email from Anna Sereni on behalf of Anti-Trafficking Monitoring Group ('ATMG') dated 21 December 2018. We have made repeated requests that the MSU facilitate a process through which civil society is consulted and able to contribute meaningfully to this important document. We do not consider that the steps taken to date have facilitated a process which offered the opportunity for genuine engagement / consultation.

We note your response to the UN Special Rapporteurs that the Modern Slavery Act 2015 does not impose a duty to carry out a public consultation, however, it is clear from the Minister's response to the UN Special Rapporteurs dated 18 March 2019 that the Government recognises the importance of engaging with stakeholders such as the NGOs and support providers who provide the day to day support to victims of modern slavery. However, the suggestion that 'engaging' with us is different from 'consulting' us is a distinction without a difference. It is clear from the email exchanges and the meetings we have participated in that the Government rightly recognises the contributions that can be made by organisations who directly work with victims. If the Government is genuine in its intention to listen to and take account of the feedback based on the expertise of organisations who work with victims of modern slavery, that process of consulting the sector must be a fair process and must adhere in spirit if not in form to the well-established principles of a fair consultation process. Attaching the label of "engagement" does not alter the reality that the Government has chosen to consult. Having elected to do so, this needs to be conducted fairly.

The process to date has been inadequate and unfair and the draft produced thus far (which in any event is incomplete) is not fit for purpose. In particular:

1. **No white paper:** There is no White Paper accompanying the draft guidance clearly explaining the policy approach taken by the MSU and how this draft guidance, as it stands, achieves the legislative objectives of the Modern Slavery Act 2015, which are to improve identification and protection of victims of modern slavery. Even if not a White Paper, there is no accompanying explanation of significant aspects of the draft guidance which represent policy changes, many of which have not previously been announced. This raises significant concerns about the transparency of this process.
2. **Insufficient Time:** In order to try to facilitate some comments on the draft and still incomplete guidance it was agreed that NGO's able to participate within the truncated

timetable imposed would provide their comments on a google doc version of the guidance. The identity of many of those who have commented on the document are unknown. It is not clear who has been invited to engage with the document or the process for doing so. It is likely that there are significant gaps in expertise as a result. We are aware that due to the limited time available, those who have provided some comments have had to do so without being able to consult internally within their organisations or with colleagues, and have only been able to partially review the document. The comments they have provided are not to be taken to be all they wish to say on the subject-matter but what they are able to do in the time given.

Despite the request for a consultative process which would facilitate the guidance produced to benefit from the knowledge and expertise available within civil society the government has failed to create a process in which these organisations can genuinely engage. It is unacceptable that organisations have not had sufficient time to consider the document in its entirety.

3. **Incomplete draft:** Large sections of the draft were entirely absent with just a note for the indicated section reading 'TBC.' It is difficult to meaningfully consult when many sections and invariably these draft sections will impact on the context of wider sections of the document which have been drafted. It is **essential** that the work of other stakeholders including public organisations/bodies drafting relevant sections to be inserted into the guidance (including but not limited those in section 5) is made available for review by the MSSIG group. The issues and policy relating to identifying and supporting victims are complex and require input of multiple governmental agencies and non-governmental stakeholders, to ensure synergy with wider guidance aimed at protecting vulnerable adults and children. The approach taken thus far is piecemeal, disjointed, and contrary to the spirit of collaboration across all bodies in the public and private sphere who are involved in the identification and protection of victims.
4. **Introduction of unannounced policies:** The guidance contained the introduction of new and previously unannounced policies. This notably includes, but is not limited to, the revocation of conclusive grounds decisions and a policy on improper claims and public order grounds. We are not in a position to fully respond to the proposals but are deeply concerned about the significant changes proposed. We highlight in brief outline these concerns as follows:
 - a. **Risk of unfair and arbitrary approach to the reconsideration process:** There is already no right of appeal in respect of a negative trafficking decision. The current policy requires victims who wish to seek a reconsideration to do so via a first responder or a support provider. We note that the draft new section on reconsiderations now mandate that the first responder or support provider making the request must be the one who was originally involved with the victim. This is something that has been slipped into the draft without it being identified

as a key proposed change. It is also now said that if a first responder or support provider decides not to make a request for reconsideration, they do not have to give reasons to the victim. This suggestion is contrary to base principles of fairness and the right of the subject of a decision to know what decision has been made and why. These are significant retrograde changes to what is already a process which is non-transparent, lacks accountability and creates arbitrary outcomes (depending on whether the victim has someone who can advocate on their behalf). We simply cannot engage fruitfully with consultation on this aspect of the guidance in this truncated time table and without any information as to the rationale behind such a change when the consequences are grave for affected victims.

- b. **Draconian measures regarding revocation of positive decisions:** the proposed approach for revoking a positive decision on trafficking or modern slavery is draconian and denies any opportunity to a victim to make representations. There is no right of appeal against revocation unlike in immigration decisions. This is a significant measure that again is not explained or properly thought through. The proposed measure removes what little transparency and accountability there is from the decision-making process for revocation. Given the suggested implications of revocation – including possible curtailment of leave to remain or negative immigration decisions as well as the withdrawal of bail and detention of victims, this is simply not a policy change which can be introduced without proper consultation particularly as this is proposed to be placed on a statutory basis and is intended to further the objectives of the Modern Slavery Act. We have significant difficulties seeing how such an approach is consistent at all with the objectives of the Modern Slavery Act and the Government's stated policy objectives of improving the lives of victims. We cannot and are unwilling to respond and engage with the consultation process on this aspect in this way and that the rationale behind the introduction of this draconian measure needs to be properly explained and more discussion needs to be had given the consequences for victims.
- c. **Meaning of public order:** There is a section on improper claims and public order grounds which is currently incomplete. It is said that there will be new guidance on the meaning of public order but this is 'TBC.' How this term is defined has significant and grave consequences of defining which class of victims may be excluded from or denied support. Plainly where the impact is grave, the applicable criteria needs to be made transparent so that it can be commented upon . Thorough consultation including a clear understanding of the impact for victims and wider strategy implications is needed. Similar reasons as to our concerns stated above apply similarly here.

5. **Lack of transparency:** Not only do we have no detailed explanation of the Government's rationale to all aspects of the draft guidance, it is not at all clear who has been invited to engage with the document or the process for doing so. There is also no facilitation of cross-disciplinary discussions which are essential if this guidance

is intended to apply to all public bodies and organisations involved in providing support to victims. While we have done our best to facilitate engagement we cannot be certain that there are not significant gaps in expertise.

We are aware that there is ongoing litigation in respect of several aspects of the draft guidance including: the 45 day time limit for post NRM support, the fairness of the reconsideration process, the correct standard of proof in conclusive grounds decision making and the meaning of public order under Article 13 of ECAT. In respect of the 45 day time limit for post NRM support, the Court has already granted permission for the challenge to proceed to a substantive hearing in late June / early July 2019. In respect of the reconsideration process, we understand there is litigation being heard on 14 May 2019. These issues are likely to be imminently determined by the Courts. The concerns raised in those ongoing proceedings ought to be taken fully into account by the MSU as it is clearly in the interest of the victims to have guidance that ensures a robust, transparent, fair and protective system for their recovery. We are concerned that the draft guidance appears to ignore entirely the concerns about aspects of existing policy (which have been transposed into the draft) and bypass scrutiny by the courts.

There remain a large number of concerns regarding the operation of the process for identifying, supporting and protecting victims of trafficking and modern slavery and the draft guidance does little to address these concerns. For example:

- 1. Support Section (Currently Chapter 10) not fit for purpose:** An essential part of the guidance relates to the support for victims. Whilst it is important to comment on this the draft guidance is extremely short and does not reflect the victim journey pre NRM, during and post NRM including the responsibilities of all agencies. In particular, the guidance has to take into account wider domestic legislation and guidance aimed at protecting and supporting vulnerable adults and children. Rather than engaging at this stage with insufficient detail, our response is that this guidance is not fit for purpose. There needs to be more comprehensive guidance on the whole of the victim journey, for both adults and children, to be dealt with separately. Engagement with the current draft cannot be sensibly productive.
- 2. Support After the NRM (Currently Chapter 11):** As indicated above, there is ongoing litigation relating to post-NRM support. Additionally, we are concerned about being asked to comment with partial information particularly as post-NRM support also involves other statutory agencies. The guidance does not reflect in full how the different agencies' obligations fit together and is not fit for purpose. Engaging at this stage may be detrimental to the litigation and this is an area that requires further fuller particularising and proper engagement with all the agencies affected.

It is clear even in the short timeframe of this limited consultation that Adult's and Child Guidance should be separated. In particular, we wish to attach a letter from ECPAT sent 12 April 2019 clearly requesting further time to consult on these important issues.

Finally, we are concerned about the inconsistency of terminology used in the draft.

1. Much of the draft that we have seen appears to be taken from other documents including the Competent Authority and Frontline Staff policies. It is self-evident that the draft guidance seeks to consolidate these policies but has done so in a rushed manner. As such there is an inconsistency in terminology and definitions. For example there is a definition of 'potential victim' at the beginning which refers to those with a positive Reasonable Grounds decision but in the substantive section on identification of victims, potential victim seems to indicate someone who presents with indicators such that an NRM referral is required. The use of 'potential victim' in that section is incongruent with what appears to be the uniform definition for the guidance. There is also the confusing interchangeable use of victim of slavery, human trafficking and modern slavery, when the latter seems to encompass both.
2. The glossary definitions of 'must', 'should', 'may', 'could' and 'can' are important words and have legal significance as to the nature and extent of duties and powers to be exercised by public authorities and those subject to this guidance when it is finalised. There is no explanation in the draft guidance as to why a specific one of these words is used, the legal basis for choosing, for example, 'may' instead of 'should', when the legal consequences for victim protection can be significant.

We have grave concerns that without additional time and facilitated engagement in the draft this guidance will not be fit for purpose. We understand that other groups have been given more time to feed back. We therefore cannot understand why we are being expected to work under a compressed timetable when there are so many organisations involved in feeding back. This in itself shows that this is a disjointed, non-transparent and poorly thought out process not reflective of the government commitments to work together with all stakeholders to combat modern slavery. We would respectfully request more time to gather feedback although this is without prejudice to our strong view that any short extension will not remedy the defects in the process we have identified above. We therefore again urge that the MSU undertake a proper public consultative process that is transparent and fair based on a completed draft of the guidance.

Yours sincerely,

Marissa Begonia, Voice of Domestic Workers

Minh Dang, Survivor Alliance

Laura Duran, ECPAT

Nancy Esiovwa, Survivor Alliance

Red Godfrey-Sagoo, Sophie Hayes Foundation

Yvonne Hall, Palm Cove Society

Philip Ishola, Love 146

Victoria Marks, ATLEU

Wanjiku Mbugua, BAWSO

Jasmine O' Connor, Anti- Slavery International

Kate Roberts, Human Trafficking Foundation

Phillipa Roberts, Hope for Justice

Anna Sereni, Anti- Trafficking Monitoring Group

Andrew Wallis, Unseen

Rachel Witkin, Helen Bamber Foundation

Additional signatories added to copy of the letter sent 25th April 2019:

Abigail Ampofo- Hestia

Debbie Ariyo- AFRUCA

Phil Knight- Just Enough Group

Rachel Mullan- Feroze- Ashiana Sheffield

Paul Gerrard- The Co-op

Louise Gleich- CARE

Dr Rosie Riley- VITA Training

Garry Smith- The Medaille Trust

Copy sent to:

- MSSIG Victim Support task and finish group members and others who have expressed an interest to comment on the guidance
- The Independent Anti- Slavery Commissioner
- The Home Affairs Select Committee
- Special Rapporteur on the situation of human rights defenders, Special Rapporteur on contemporary forms of slavery, Special Rapporteur on trafficking in persons.