

A Briefing for Civil Society Organisations in Scotland Responding to the UK Govt's New Plan for Immigration Consultation

The New Plan for Immigration Consultation

On 24 March 2021, the UK Government published its New Plan for Immigration, which sets out various proposals for changes to nationality, immigration and asylum law. The consultation invites members of the public to participate by completing an online survey which consists of a combination of multiple-choice and free text boxes, covering a wide range of proposals.

The New Plan for Immigration policy document is available here:

<https://www.gov.uk/government/consultations/new-plan-for-immigration>

To sign up to respond to the public consultation, follow this link:

<https://newplanforimmigration.com/en/>

If you are not able to use the online system to respond, or you would like to respond in a different format, you can email your response to:

newplanforimmigration@britainthinks.com.

The deadline for responding is 11.59pm on 6 May 2021.

Purpose of This Briefing

This briefing is written for civil society organisations and other agencies in Scotland that are responding to the consultation and provides some guidance on how JustRight Scotland will be framing our own response, as well as some further explanation in relation to some specific questions in the consultation.

Our view is that many of the proposals in the consultation are **not based in evidence, contradictory, unworkable and unlawful**.

We have real concerns about the manner in which the consultation is being run and also the short timescale for responding.

Scotland's Legal Centre for Justice and Human Rights

JustRight Scotland is a Scottish Charitable Incorporated Organisation (SC047818) which provides legal services through its limited liability partnership, JustRight Scotland LLP which trades as JustRight Scotland (SO305962). This firm has been authorised to act as solicitors by the Law Society of Scotland (Registered No 53703).

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We are further concerned that the timing of the consultation – during election period for local and regional elections in England, Wales and Scotland – means that key local and regional government agencies will not be able to contribute to the evidence.

However, we also feel it is important that people and organisations in Scotland respond to the consultation – particularly:

- people who have come to Scotland to seek safety (asylum seekers, survivors of trafficking and domestic abuse and refugees);
- other British and non-British people who live in Scotland and will be affected by the proposals (on British nationality, deportation and statelessness); and
- frontline professionals, civil society organisations, and other agencies who work with and support these groups of people.

We also feel it is important that a wide range of organisations respond to the consultation – not just migration sector organisations, but people who work across the violence against women’s sector, children’s rights, disability, health and mental health, education, labour, anti-trafficking and exploitation, housing and homelessness, and LGBT+ organisations.

How the Consultation Works

The consultation invites members of the public to participate by completing an online survey which consists of multiple-choice and free text questions.

The consultation covers a wide range of proposals and is divided into the following chapters:

- Chapter 1: Overview of the Current System
- Chapter 2: Protecting those Fleeing Persecution, Oppression and Tyranny
- Chapter 3: Ending Anomalies and Delivering Fairness in British Nationality Law
- Chapter 4: Disrupting Criminal Networks and Reforming the Asylum System
- Chapter 5: Streamlining Asylum Claims and Appeals
- Chapter 6: Supporting Victims of Modern Slavery
- Chapter 7: Disrupting Criminal Networks Behind People Smuggling
- Chapter 8: Enforcing Removals including Foreign National Offenders (FNOs)
- Public Sector Equality Duty (and other general questions)

The multiple-choice questions are long and complex. In some cases, it is not possible to choose a single answer without providing a misleading response. **For those questions, we would recommend not responding at all.**

We know that organisations have limited time to respond to this consultation, and you may want to focus your response in only a few areas that directly impact your work.

Therefore, we have outlined below key points that you could consider making in the free text boxes, whilst choosing not to respond to all or most of the multiple-choice questions.

Impact in Scotland

Our key concern is that whilst some of the proposals relate to issues that are reserved to the UK Government (for example, proposals around the legal standard for assessing asylum claims, or reforms to British nationality law), **some of the proposals are not matters to be decided by the UK Home Office alone, because they are issues devolved to the competence of the Scottish Parliament** and/or their impact will fall into areas of devolved competence, such as the identification, support and safeguarding of vulnerable groups.

We encourage people and organisations in Scotland to comment on the following, where relevant to their experience and/or their direct work with individuals:

➤ **Supporting survivors of trafficking (Questions 31-37)**

In Scotland, this work is governed by the Human Trafficking and Exploitation (Scotland) Act 2015 and changes to our legal framework for survivor support must be consistent with the principles and protections set out in the Act and our other commitments under international law, including the Council of Europe Convention on Action Against Trafficking in Human Beings.

The identification and protection of victims of human trafficking in the UK is not an immigration process. Yet the decision by the Home Office to present these proposals as part of a New Plan for Immigration – as well as the substance of some of the proposals – appear to conflate the two issues.

A National Referral Mechanism (NRM) for the identification of victims of trafficking is a co-operative, national framework through which governments fulfil their obligations to protect and promote the human rights of victims of trafficking, co-ordinating their efforts in a strategic partnership with civil society organisations and the private sector¹. Early identification is fundamental to an NRM. We have obligations arising under our international commitments to take proactive measures to prevent trafficking and protect victims. Any proposals for reform must be in line with these international commitments and consistent with the principles of an NRM.

Furthermore, and with particular regard to Scotland, identification, protection and prevention are also questions that relate to the safeguarding of vulnerable people, child protection and other local authority safeguarding structures,

¹ OSCE Permanent Council (2003), Decision No. 557 on [OSCE Action Plan to Combat Trafficking in Human Beings](#), 24 July 2003.

criminal justice, specialist adult support as well as health and legal support for survivors. Every single one of these matters is a devolved issue.

The Human Trafficking and Exploitation (Scotland) Act 2015, and its Regulations, recognises these links and competencies by setting out the criminal offence of human trafficking as well as the prosecution of victims of human trafficking. It also establishes measures for the protection of adult and child victims (around guardianship, age assessment and a clear statutory obligation to provide support and assistance to adults with defined parameters around when this support will be provided and for how long). This devolved competence is demonstrated by Scotland having a minimum recovery and reflection period of 90 days as opposed to the 45 days in England and Wales.

We note that the key proposals on trafficking set out in the New Plan for Immigration (training, parameters of support, health, child protection, criminal justice) largely relate to matters firmly within the devolved competence of the Scottish Parliament, for the above reasons.

➤ **Increasing enforcement powers and severity of offences linked to entering the UK illegally (Questions 33-35)**

The Plan also sets out proposals that directly impact survivors of trafficking and people fleeing persecution, although they are not framed in that way. For example, introducing tougher criminal offences for people entering the UK illegally is inconsistent with the finding that a significant majority of people who are legally recognised as survivors of trafficking and as refugees entered the UK illegally because of the lack of safe, legal routes.

We are concerned that these proposals will not stop smuggling and trafficking of people but rather will increase the risk of vulnerable groups falling into exploitation and human trafficking.

➤ **Removing support from asylum seeking families who are currently supported by local authorities (Questions 38 & 41)**

In Scotland, social work support to destitute families is provided under Section 22 of the Children (Scotland) Act 1995. The Plan includes a proposal to seek the agreement of local authorities to systematically exclude some children and families from the operation of Scots child welfare law.

It is important to underline that current support for asylum seeking families is provided following an assessment that those families have a clear and identifiable right to remain in the UK – even if a further application to the Home Officer (often requiring payment of a fee) requires to be made in order to secure that right.

There is no evidence that this legal standard is not working from the perspective of ensuring child welfare and the human rights of the children and families involved – although it does create increasing pressure on local authority financial resources as Home Office policies push more and more people into destitution.

Evidence published in September 2020 by the NRPF Network indicated that 77% of families supported by local authorities are eventually granted leave to remain in the UK; however the cost to local authorities is significant, with a quarter of such families requiring more than three years of support and a rise in referrals for local authority support due to the impact of “hostile environment” policies.²

This evidence suggests that the key issue for children, families and local authorities is inefficient and (where there are successful appeals) challengeable Home Office decision-making – an issue that cannot be addressed by reforming how local authorities provide support.

It is therefore unclear what this further proposal could seek to achieve, and we are concerned that its impact – in an area clearly devolved to the Scottish Parliament – is potentially unlawful.

➤ **Disproportionate impact of reforms on women victims of gender-based violence**

The Plan sets out a range of reforms that we are concerned will have a negative impact for all people in the UK fleeing persecution. For example, there are proposals to create a two-tier system that will make some asylum claims inadmissible (Questions 19-23), to reintroduce plans for a “detained fast-track” appeals system (Questions 23, 26, 27) and for strictly enforcing a minimum notice period of 72 hours before a person can lawfully be removed (Questions 40-41).

These reforms reduce procedural safeguards and substantive rights for all people seeking protection. For example, the “detained fast-track” appeals system previously operated by the Home Office was suspended in 2015 following a finding by the Court of Appeal that it was unlawful because: “*the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases.*”³

² NRPF Network, “Councils achieve cost savings despite rising referrals and challenges obtaining immigration outcomes,” September 2020, <https://www.nrpfnetwork.org.uk/news/nrpf-connect-data-report-2019-20>.

³ *Lord Chancellor v Detention Action* [2015] WLR 5341

However, we are aware from evidence and research that the UK asylum system's rules and procedures have a disproportionately negative impact on women seeking asylum.⁴

It is therefore important to highlight the impact that these reforms will have on women, including female survivors of gender-based violence, who are very likely to have suffered sexual abuse in their countries of origin or other violence inflicted on them because they are women. This could include trafficking for forced prostitution, forced marriage or rape during war.

The identification and protection of female survivors of gender-based violence living in Scotland is – similar to the analysis for trafficking above – a matter wholly devolved to the Scottish Parliament. The mechanisms of protection in Scotland include our criminal justice system and the local safeguarding and child protection frameworks operated by our local authorities. It is important to recognise that in some cases the violent crime may be an ongoing matter in Scotland – for example, forced prostitution, forced marriage, rape and domestic abuse.

We are concerned that these proposals increase vulnerability and risks to women survivors of gender-based violence, both abroad and here in Scotland. We are also concerned that these reforms will have the effect of increasing the complexity of casework and the cost of providing practical support to these women – and will, in a substantial number of cases, shift the burden of meeting our international commitments to protect and support victims of gender-based violence from the Home Office to our local authorities and third sector organisations – at significant cost and without clear justification or evidence for any requirement for change.

➤ **Age assessment of children seeking asylum whose age is disputed (Questions 24-25)**

In Scotland, age assessments are conducted by local authority social workers to assess eligibility for support under the Children (Scotland) Act 1995. They are closely linked to obligations around the presumption of age of victims of human trafficking, set out in the Human Trafficking and Exploitation (Scotland) Act 2015. They are conducted in line with practice guidance issued by the Scottish Government in March 2018.⁵

The proposals recommend: requiring social worker age assessments to be made against Home Office criteria; forcing social workers to either complete age assessments or refer cases to a Home Office panel for age assessments

⁴ See Women for Refugee Women, "Consultation on the New Plan for Immigration: A Guide," April 2021, <https://www.refugeewomen.co.uk/campaign/new-plan-for-immigration/>.

⁵ Scottish Government, "Age Assessment: Practice Guidance," March 2018, <https://www.gov.scot/publications/age-assessment-practice-guidance-scotland-good-practice-guidance-support-social/>.

to be carried out; using this Home Office panel as a review mechanism for social work assessments; and using unspecified “up to date scientific technology” in age assessments.

Again, we do not believe the Home Office can lawfully set standards for, or compel, Scottish local authorities to either complete age assessments against their professional opinions or refer age assessment cases to a Home Office panel.

As the Scottish Government practice guidance states, local authorities are conducting assessments to determine whether they have duties arising to children under Scots child welfare law, and often linked to their obligations to protect child victims of trafficking under Scottish human trafficking legislation. As regards the use of scientific technology, the British Society for Paediatric Endocrinology and Diabetes have stated that physical examination, bone age assessment and dental x-rays do not add anything to the existing process, having a margin of error between 2 and 4 years.⁶ More recently, the UN Committee on the Rights of the Child has found in a series of cases that Spain breached the rights of migrant children under the UN Convention on the Rights of the Child by relying on x-ray evidence in reaching a determination on age assessment.⁷

We would again emphasise that age assessment of children in Scotland is a matter firmly devolved to the Scottish Parliament, and that we have a process for age assessment of children in Scotland which is based on a holistic assessment by experienced social workers, with multi-agency input, and that there is no evidence or convincing argument that this approach is not working to identify and safeguard children in Scotland.

We would also express our concern at any proposal that would supplant this approach with “up to date scientific technology” without robust evidence for any advantage gained, and express our concern that previous use of “objective” medical evidence in age assessment has been heavily criticised and rejected as variously unreliable, indeterminate, or in some cases, unethical.

➤ **Access to justice and judicial review reform (Questions 27 & 30)**

The Scottish justice, courts and tribunals system lie within the devolved competence of the Scottish Parliament, and are entirely separate to the justice and courts system of England and Wales. Whilst the UK Government

⁶ Royal College of Paediatrics and Child Health, “Refugee and unaccompanied asylum seeking children and young people: guidance for paediatricians,” <https://www.rcpch.ac.uk/resources/refugee-unaccompanied-asylum-seeking-children-young-people-guidance-paediatricians#age-assessment>.

⁷ UN Office of the High Commissioner for Human Rights, “Spain’s age assessment procedures violate migrant children’s rights, UN committee finds,” 13 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26375&LangID=E>.

can make changes to how appeals are dealt with to and from the First-Tier and Upper-Tier Tribunals (Immigration and Asylum Chamber),⁸ any Judicial Reviews of Home Office decisions are to the Court of Session in Scotland – and the rules that govern those appeals are set out by the Court of Session Act 1988 and the Rules of the Court of Session 1994.

The Plan includes proposals to amend how immigration Judicial Reviews are dealt with by the Court of Session. It is unclear whether, and how, the Home Office or the UK Ministry of Justice could propose to limit or change the right of Judicial Review, or amend the procedural rules for Judicial Review, in a legal action arising in Scotland before the Scottish Courts.

➤ **You may also want to comment on the wider impact of proposals for people seeking protection in Scotland and for statutory and third sector services in Scotland.**

At the end of the consultation there are questions about the Public Sector Equality Duty (PSED) and the equalities impact of the proposals (**Questions 42-44**).

We would point out that the Home Office has a poor track record of assessing the equalities impact of its own policies, most recently having been found by the Equality and Human Rights Commission to be in breach of the PSED when developing and implementing “hostile environment” policies, particularly in relation to the Windrush generation.⁹

Whilst the duty to comply with the PSED clearly lies with the Home Office in developing its New Immigration Plan, we would encourage you to comment on areas within your work where you are concerned about impact for yourself, and for the people and organisations you work with.

Some examples of relevant evidence might include:

- An increase the number of people in Scotland who cannot achieve legal protection status but who cannot safely return home, because of reforms that make it more difficult to claim asylum, or restrict routes to safety in the UK, will:
 - increase the number of people vulnerable to labour exploitation and trafficking
 - increase the number of people vulnerable to physical harm – including gender-based violence within intimate relationships

⁸ For example, appeals from the Upper Tribunal to the Court of Session are governed by Section 13 of the Tribunals, Courts and Enforcement Act 2007

⁹ Equality and Human Rights Commission, “Home Office failed to comply with equality law when implementing ‘hostile environment’ measures,” 25 November 2021, <https://www.equalityhumanrights.com/en/our-work/news/home-office-failed-comply-equality-law-when-implementing-%E2%80%98hostile-environment%E2%80%99>.

- have wider impacts in terms of public health, public welfare and public safety if people are afraid to access universal services due to a fear of removal or deportation
- An increase in the number of people in Scotland who have legal protection status or the right to such status, but who are excluded from social assistance including social work support, will also increase vulnerability to exploitation and physical harm, and prevent people from seeking protection or exercising their rights when they need to.
- We would recommend giving examples from your own work of the impact of such an increase, or of how challenging it is to support people seeking protection, victims of domestic abuse, children and survivors of trafficking, even within the current framework. It would be helpful to focus in your submission on the inequalities that arise in your work, due to the current Home Office policies, including the “hostile environment.”
- We often support families with mixed immigration status. For example, families seeking asylum are often separated when they flee their home countries, and arrive in the UK at different times, by different means. It is often the case that some members of the family are refugees or British, and other members do not have any status and the Home Office is seeking to remove them. Policies that keep families apart, or that divide families by seeking to reduce the right to family life under Article 8 ECHR have harmful impacts on families and children living in Scotland.
- Our legal framework for accessing justice (Judicial Review) and for supporting and protecting children, survivors of domestic violence and trafficking (social work and local authority duties) should not be altered by immigration legislation in order to achieve UK Home Office policy goals without robust evidence-based analysis and due consideration to the wider impact for all people in Scotland of those changes.

For example, if a dual system of access to justice (migrant v. non-migrant) is proposed, we require to examine the impact in a clear and transparent manner. If we are proposing to restrict access to Judicial Review for certain types of cases, we need to consider whether that is fair and consistent with our approach in other cases, and whether this immigration-led reform would have the longer-term impact of restricting access to Judicial Review in other types cases.

- We recommend listing as many (or all) of the protected characteristic categories in your answer, appropriate to your work, in response to the equalities question, and adding a description of any other groups you work with who are disadvantaged, discriminated against or excluded by

operation of Home Office policies, including the “hostile environment” in your answer.

- We would conclude by reiterating that the Government’s proposals are **not based in evidence, contradictory, unworkable and potentially unlawful**.

Changes to immigration legislation and how we protect people seeking safety in the UK affect us all. We support even brief responses to this consultation from a wide range of Scottish organisations to ensure that the UK Government receives evidence which sets out the impact of these proposals for every community in Scotland.

Section-by-Section Analysis of the Consultation

As set out above, we think most non-migration sector organisations will choose not to respond to the full consultation.

However, if you are interested in answering some, or all of the questions, a few organisations have produced detailed guides setting out recommended answers to each question, or to certain questions.

We recommend:

Amnesty International UK (all questions):

<https://www.amnesty.org.uk/guide-governments-immigration-and-asylum-consultation>

Asylum Matters (for refugee led organisations, community groups and frontline organisations):

<https://asylummatters.org/2021/04/23/the-new-plan-for-immigration-what-it-means-and-how-to-respond/>

ECPAT UK (focusing on child trafficking):

<https://www.ecpat.org.uk/news/new-plan-for-immigration-impact-child-victims-trafficking>

Women for Refugee Women (focusing on women seeking asylum):

<https://www.refugeewomen.co.uk/campaign/new-plan-for-immigration/>

What Next?

This consultation is the first step in a longer process of reforming immigration law.

We expect the UK Government to announce the Sovereign Borders Bill 2021 in spring 2021 and for a further opportunity to respond by way of public consultation to more specific provisions through summer 2021.

We will continue to work with our statutory and third sector partners across Scotland and the UK to ensure that the evidence and experience of people in Scotland who are seeking safety here, and the professionals who work with them, are included in the Government's evidence at each stage of this process.