



ILPA's response to the ICIBI's Call for Evidence: Second Annual Inspection of 'Adults at Risk' in immigration detention

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

We are aware that ILPA members are submitting individual responses to the ICIBI for this inspection, and we have therefore kept our response focussed on concerns around stakeholder engagement in policy making within Immigration Enforcement in the Home Office.

On 21 July 2020 the Secretary of State for the Home Department made a statement in the House of Commons which included the following:

Our approach, which Wendy Williams has welcomed, will ensure sweeping reforms to our culture, policies, systems and working practices, reaching across the entire Department. We are consulting external experts, community organisations and the very people the Home Office has failed in the past in an extensive programme of engagement to ensure that officials understand the change that is needed and that the organisation at every level learns the lessons of what went wrong. I have been clear to my officials that it is not a box-ticking exercise. A delivery plan has been drawn up to ensure meaningful and rapid action. We are

embracing the need to change our culture across the board, and in many cases we are going further than the recommendations that Wendy has made.

...

Thirdly, I am changing the Home Office's openness to scrutiny. Policy and decision making must be rigorously examined to ensure that any adverse impact on any corner of our society is identified and acted on quickly. To ensure that we better understand the groups and communities that our policies affect, we are overhauling the way in which we build up our evidence base and engage with stakeholders across the board. I expect my officials to engage with community organisations, civil society and the public, and I will be looking for evidence of that in every piece of advice that Ministers receive.¹

This statement was welcomed by stakeholders, however we have concerns about how this openness to scrutiny is being implemented in the context of policy making for the detention of vulnerable people. These concerns are set out in detail below.

[Changes \(positive and negative\) to Home Office policy and practice since the first 'Adults at Risk' inspection, including in response to the recommendations in the first report](#)

Enhanced Screening Tool

In the response to the ICIBI's Annual inspection of Adults at Risk in Immigration Detention (November 2018 to May 2019), the Home Office said the following:

5.4 The provision of real-time medical advice, in the way described, would require a fundamental change in approach by a number of stakeholders, including primary healthcare providers, and their respective systems, at significant cost. As the Inspectorate has noted in its report, the practicalities of such an arrangement would be challenging. We think that the issue can be proportionately addressed through work already under way to scope how we will enhance the screening of those encountered and subject to enforcement action, in part to better identify

¹ <https://hansard.parliament.uk/Commons/2020-07-21/debates/CF88BF2D-55E5-4672-8103-E28A1136C3F1/details>

issues of vulnerability – this is also an area that the Home Affairs Select Committee, in their recent report on Immigration Detention, commented upon.²

The recommendation by the Home Affairs Select Committee referred to was in their report on Immigration Detention published in March 2019:

79. The introduction of the Detention Gatekeeper function is a welcome step forward, but the current approach still fails to provide sufficient safeguards to prevent inappropriate detention or the detention of vulnerable adults. As the latest Shaw report noted, large numbers of vulnerable people are still being detained. This indicates that vulnerable people are being wrongly routed into detention due to the Gatekeepers' incorrect validations or misplaced challenges of Home Office caseworkers' decisions. *There needs to be a thorough, face-to-face pre-detention screening process to facilitate the disclosure of vulnerability. Where there is no deemed risk of absconding, this screening should be undertaken at the point of enforcement activity, for example, as part of the reporting process where UK Visas and Immigration officials or Enforcement officers should feedback any concerns they have about a person's suitability for detention. Even a short period of detention for someone who, for example, has been a victim of torture could be extremely traumatic. Therefore it is essential that a proper pre-screening assessment is done.*

In response to these recommendations, the Home Office designed the 'Enhanced Screening Tool' and this was emailed to a limited group of NGOs on 4 February 2020. Permission was subsequently granted by the Home Office for this to be distributed to the members of the NASF Equalities subgroup but not for it to be shared any further. The tool was intended to facilitate the disclosure of vulnerability, however it was referred to as a 'consolidation of existing processes' and stakeholders were told that 'there is no current intention to publicly consult or share an internal evaluation broadly'. However we were told that our views on the approach or type of questions would be welcome and we were given a deadline for responses of 13 February 2020.

ILPA and nine other NGOs wrote to the Home Office on 12 February 2020, expressing concern over the short deadline and the limited scope of the feedback sought, as well as the restriction on the distribution of the draft. We asked for permission to distribute to other stakeholders to ensure the

² <https://www.gov.uk/government/publications/response-to-the-annual-inspection-of-adults-at-risk-in-immigration-detention/the-home-office-response-to-the-independent-chief-inspector-of-borders-and-immigrations-report-annual-inspection-of-adults-at-risk-in-immigration-de>

consultation was as complete as possible, and we asked for an extension of time to respond until 28 February 2020. We said that the initial response to the draft had been one of concern and so it was important that we were able to respond in full. We said that we did not believe that the draft tool addressed the HAC's recommendation, and that it went beyond identifying vulnerability. Concerns were raised about the potential for answers to be given in the absence of legal advice which could then be relied on by the Home Office to the detriment of the person being questioned. We asked for information about how the form would be used in practice and at what point a person would be able to access legal advice.

On 13 February 2020 the Home Office confirmed that we could have an extension of time until 28 February 2020 and said that they would respond in full to the rest of the points in our letter separately. We did not receive a further response from the Home Office before the NGOs submitted our full response on 26 February 2020. In that response we said that we did not believe that the tool complied with the HAC's recommendation. We urged the Home Office to convene a specialist group, to include clinical experts, to consider the UNHCR and International Detention Coalition's 'Vulnerability Screening Tool' and how this may usefully form the basis for a dedicated vulnerability screening tool that would meet the HAC's recommendation.

On 6 March 2020 we received a response from the Home Office to our letters of 12 February 2020 and 26 February 2020. The letter stated that 'as this is a consolidation of tools rather than a new approach, we are not consulting, and we do not plan for a full consultation to take place'. The existing processes were not adequate, hence the HAC's recommendation, so it is difficult to see how consolidating those processes would amount to an adequate response.

The letter went on to say that 'We are keen to work with our external partners and value the range of expertise and insight that this approach brings however we are conscious that if following an approach of openness is likely to heighten levels of concern and anxiety around improvement we are endeavouring to bring across the Home Office, then we will look again at the benefits of this approach'. It is difficult to read this as anything other than a veiled threat to stop consulting with stakeholders if we continued to raise concerns. We were subsequently informed that this was unfortunate phrasing and that was not the intention, however similar actions in Immigration Enforcement policy since then has only heightened our concerns.

The proposed introduction of standards for medical evidence

On 3 January 2020 members of the NASF Decision Making subgroup were sent a draft version of new guidance to caseworkers on considering medical evidence in asylum claims, along with a consultation log. This new guidance is the result of merging of two existing documents, 'Medical evidence (non-medical foundation cases)'³ and 'Medico-Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Report Service'.⁴ Stakeholders were told that key aspects of the content had not changed significantly, beyond the removal of named organisations. We did not agree, and a substantive joint response from Freedom from Torture, Helen Bamber Foundation, Medical Justice and ILPA was provided on 16 March 2020, after the initial deadline for response was extended. The letter accompanying the response detailed the very serious concerns that we held about the proposals, in particular the removal of safeguards including the presumption of a delay in decision making in order to allow for the production of medical evidence, and the guidance on the expertise and authority of reputable providers. Several recommendations were made.

On 4 June 2020 the Home Office sent draft governing standards for external medical reports, ahead of a meeting on 8 June 2020. Stakeholders were asked not to send the draft to anyone else without asking the Home Office first. At the meeting, the Home Office alleged that large scale fraud involving legal representatives and medical professionals was taking place in Immigration Removal Centres, and that this was why it was necessary to introduce these standards. We asked for evidence of the problem, redacted if necessary, so that we could ascertain the extent of the problem and whether the proposed response was proportionate.

No such evidence was forthcoming, and another meeting was held on 23 June 2020 to discuss the standards, at which even more alarming allegations were made by the Home Office, namely that they had encountered people working illegally after being released from detention, and that they were doing so to pay off the debt incurred to their legal adviser in obtaining their release from detention. Attendees asked to what extent the relevant regulators had been involved, as this seemed like the more logical step, as opposed to changing the policy in the proposed way, which could have a negative effect on unrepresented detainees. We were not given a clear answer.

³ <https://www.gov.uk/government/publications/medical-evidence-non-medical-foundation-cases-instruction>

⁴ <https://www.gov.uk/government/publications/dealing-with-asylum-claims-involving-torture-or-serious-harm-allegations-process>

Following that meeting, ILPA, Helen Bamber Foundation, Medical Justice and Freedom from Torture wrote to Tyson Hepple, Director General of Immigration Enforcement on 3 July 2020, raising our concerns about the debt bondage taking place in Immigration Removal Centres. We asked for further details of the problem as well as what steps had been taken to safeguard detainees and to prevent the legal representatives/medical professionals from operating as alleged. No response has been received to that letter.

A further meeting was held on 10 August 2020. Just prior to that meeting, on 5 August 2020 the Home Office emailed a document entitled 'Policy development issues' which contained three sections, Adults at Risk policy reforms, Introduction of standards to govern the production and consideration of external medical reports, and proposed changes to Modern Slavery guidance for detained PVOMs. At the meeting, those in attendance raised concerns about the limited consultation that was taking place, and this was followed up with a letter dated 12 August 2020 which stated in terms that the signatories did not consider that the consultation was adequate. In the absence of having been provided with information and evidence we had asked for previously, FOI requests were made. We received a holding response from Tyson Hepple's Private Secretary on 14 August 2020, stating that we would receive a response to our letters of 3 July 2020 and 12 August 2020 early the following week. No response has been received.

[Changes to policy on the detention of victims of trafficking](#)

In addition to the standards for medical reports as discussed above, the 'Policy development issues' document sent on 5 August 2020 included proposed changes to Modern Slavery guidance for detained potential victims of trafficking. This was partially in response to a legal challenge that had been brought and settled by the Home Office who agreed to review the policy in light of the pleadings in that case, and further submissions made by several NGOs.⁵ The further submissions had been made on 18 May 2020 and included evidence from the Taskforce for Victims of Human Trafficking in Immigration Detention, After Exploitation, and the Human Trafficking Foundation. None of these NGOs were included in the distribution list for the 'Policy development issues' document, nor were they invited to the meeting on 10 August 2020. Again, this failure to engage with relevant stakeholders on such an important issue, in circumstances where the Home Office has already conceded that their previous policy was unlawful, is of great concern.

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[https://www.duncanlewis.co.uk/news/Home_Office_to_review_policy_on_detention_of_trafficking_and_slavery_survivors_as_a_result_of_legal_challenge_brought_by_a_survivor_of_trafficking_\(18_May_2020\).html](https://www.duncanlewis.co.uk/news/Home_Office_to_review_policy_on_detention_of_trafficking_and_slavery_survivors_as_a_result_of_legal_challenge_brought_by_a_survivor_of_trafficking_(18_May_2020).html)

Prison Parity

The ICIBI's Annual inspection of 'Adults at Risk in Immigration Detention' (2018–19) recommended that the Home Office:

4.8 Produce a comparative analysis of the treatment and conditions (covering Rules, policies, guidance, and practice) of detainees and of Foreign National Offenders detained in prison under immigration powers, and ensure that there is a clear and evidenced justification for any differences, particularly where one group is demonstrably disadvantaged compared to the other.⁶

The HAC recommended in their report on Immigration Detention that:

People held under immigration powers in prisons subject to deportation procedures, i.e. foreign national offenders who are serving custodial sentences in prisons and who are liable to deportation at the end of their sentences, do not have access to the DDA scheme in prison. This means that they have no guaranteed access to a legal adviser and have to find and contact a lawyer themselves. Foreign national offenders should be afforded the same legal safeguarding provisions as immigration detainees held in IRCs so that, on completion of their custodial sentence, they can be deported or have their immigration status resolved rather than entering immigration detention. This should include access in prison to the DDA scheme.⁷

A meeting between Immigration Enforcement and some NGOs was convened to discuss the prison parity project in September 2020. The NGOs that had been invited sought to have ILPA and the Equality and Human Rights Commission included in that meeting, however the Home Office refused.

Conclusion

The above examples are not exhaustive of the issues that have been experienced in relation to the ability of stakeholders to engage with Immigration Enforcement policy within the Home Office. The situation appears to be deteriorating, notwithstanding the SSHD's statement to the House of

⁶ <https://www.gov.uk/government/publications/annual-inspection-of-adults-at-risk-in-immigration-detention-2018-19>

⁷ https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/91306.htm#_idTextAnchor039
paragraph 97

Commons. If lessons have been learned, we are yet to see it in this department, and we would strongly encourage a more open and transparent way of working to be adopted quickly if the harms of detention policies are to be minimised.