# ILPA SUPPLEMENTARY BRIEFING: LORDS' REPORT FIRST DAY 9 MARCH 2016: OVERSEAS DOMESTIC WORKERS

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On 5 March ILPA issued its briefing on amendments tabled for the first day of Lords' Report on the Immigration Bill, including a briefing to Lord Hylton's amendment, supported by Lord Rosser on overseas domestic d workers. On 7 March 2016, the Government issued its response to the report of James Ewins QC on overseas domestic workers. This briefing comments on the Government's response. It concludes that the amendment is not adequate and that the need for Lord Hylton's amendment, supported by Lord Rosser, to give effect to Mr Ewins' recommendations, is as strong as ever.

## NEW CLAUSE after Clause 36

ILPA supports the **NEW CLAUSE Overseas Domestic Workers in the names of Lord Hylton and Lord Rosser**

### Purpose

To give effect to the recommendations of James Ewins QC as to the overseas domestic worker visa as set out below. In particular to ensure that all overseas domestic workers are able to change employer and to remain in the UK for up to 2 ½ years.

### Briefing

James Ewins (now QC)'s' Independent Review of the Overseas Domestic Worker Visa. This is available at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf

The Ministerial Statement containing the Government's response is at
http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-03-07/HLWS568/

During the debates on the Modern Slavery Bill, the Minister, Karen Bradley MP, declared

` *We have asked for this review to take place and we look forward to the recommendations. I cannot commit a future Government, but the intention is that whoever is in government—I very much hope it will be the Conservatives—will implement the review's recommendations*[1]*'.* Karen Bradley MP 17 March 2015 Modern Slavery Bill Debate (accessed 15 December 2015)

Now, despite a review that in its careful weighing of all the available evidence must surely have surpassed Government expectations, the Government has opted to pick and choose between Mr Ewins QC without regard for his careful arguments and explanations of how the amendments fit together support each other.

Mr Ewins chose to identify the minimum necessary to protect overseas domestic workers. The Government proposes to implement less than that minimum. Overseas domestic workers will not be protected.

The Government argues that it is free to disregard Mr Ewins' recommendations because he identifies gaps in the evidence available and has to base his recommendations on incompl3oete evidence: "Such evidence remains elusive due to the difficulty of obtaining reliable data" and "In the absence of reliable quantitative evidence of prevalence of abuse" But as Mr Ewins QC explained in meetings in parliament, he has done what any judge would do. He has not thrown up his hands because there are gaps in the evidence. Instead he has marshalled the evidence available and made the best possible recommendations based on that.

The Government says that it has come to its view "On the basis of advice from the Independent Anti-Slavery Commissioner". But it did not commission the Anti-Slavery Commissioner to undertake the review and the Anti-Slavery Commissioner has not put forward his views in a document of comparable weight or supported by the compelling arguments contained in the review. There is therefore no reason why the Government should chose to prefer his view. Moreover the Home Office identified in its Review of the National Referral Mechanism in November 2014[2] the need to improve data collection in this area. Its recommended that the collection and collation of data be improved[3] ... to facilitate the progression of cases, the management of the system and to contribute to intelligence where possible. Either it was not possible to have obtained better data, in which case the lack of data is not a reason to reject Mr Ewins' conclusions, or it was possible and the Home Office, which is the organization in a position to collect, failed to do so, in which case it should not be able to hide behind its own failings.

The Government proposes, instead of accepting Mr Ewins' recommendations, to take a two-pronged approach.

It will allow all domestic workers to change employer, not just, as per s 53 of the Modern Slavery Act 2015, those in whose cases there has been a "conclusive grounds" decision under the National Referral Mechanism that the person has been trafficked or enslaved, but only within the currency of the six month visa.

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[1] 17 March 2015, col 650 available at http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150317/debtext/150317-0001.htm#15031750000002

[2] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467434/Review_of_the_National_Referral_Mechanism_for_victims_of_human_trafficking.pdf

[3] Recommendation 9.4.1

Meanwhile those who do have a conclusive grounds decision will be permitted to extend their stay, to a maximum of two years, as opposed to 2 ½ years proposed by Mr Ewins.

The Government purports to justify the "change employer within six months for all" limb of its approach saying

> "*The Government does however acknowledge the case which has been put forward for providing O*[verseas] *D*[omestic] *W*[orkers] *with an immediate escape route from abuse*."

But it has not done so. The right to change employer within six months is not really a right to change employer at all. The chances of getting work if you can only stay in the UK for a maximum of six months are slim indeed. And without work, how will a worker live without falling back into exploitation and abuse, when she or he has no recourse to public funds?

The worker is invited to take his/her chance on getting a positive "conclusive grounds" decision; to come forward to the authorities, to risk removal within six months, all on a chance of a decision that s/he has been trafficked or enslaved. There is a real risk that workers will not take that chance.

As to those given the extension of time, it is likely that many of those who qualify for this would in any event have qualified for leave as a trafficked or enslaved person. It is unclear what they gain.

In contrast to Mr Ewins QC's carefully reasoned report, the Government response is confused and confusing. The Government reject's Mr Ewin's recommendation that the right of domestic workers to change their employers should be made an effective right by extending it to all workers, not just the trafficked, and allowing them to extend their stay for up to two years in addition to the initial six months. The Minister stated

> *The Government's concern is that if O[*verseas*] D[*omestic*]W[*orkers*]s were able to change employers and significantly prolong their stay, irrespective of whether they have reported this abuse and whether there is evidence that such abuse has taken place, they may be less likely to report abuse.*

This fails accurately to reflect Mr Ewins' recommendations. He recommended that provision be made for the worker to be obliged to report that they have changed employer to the Secretary of State, who can then chose to investigate further.

This also addresses the concern as to the use of the ability to change employer by those endeavouring to exploit, rather than to protect the worker. It is strengthened by Mr Ewins' recommendation as to mandatory information sessions. The worker knows, from the off, that they have a right to change employer, not, or not merely, to have their exploiter changed for them.

All changes of employer could be investigated, or this could be done on an intelligence led basis. Whether investigated or not, information on changes could be collated, permitting of the identification of patterns of abuse.

It could be correlated with other information on which data is to be collected. Mr Ewins QC recommended that

> *5. The Home Office should develop and implement clear policy and practice which will ensure the effective feed-back of information and intelligence drawn from the entry/exit data and change of employer/renewal applications to the application process itself.*

And set out

> *15. … with the introduction of entry/exit data from UKVI, it should be possible to collate such data with information drawn from overseas domestic workers visa applications, as well as applications to change employer and renew the visa as well as data from overseas domestic workers who enter the NRM. This review strongly urges the Government to collate and analyse such data to provide a clearer quantitative understanding of how the visa operates. 16. Further, implementation of this review's recommendations will provide data, information and intelligence which will enable the police, Immigration Enforcement or the proposed Director of Labour Market Enforcement, to take intelligence-led steps to investigate and pursue those who abuse overseas domestic workers with criminal, civil or immigration sanctions. Tasking such entities to take active steps to initiate enquiries into such abuse will require other measures beyond the scope of this report. However, it is the clear finding of this review that none of the basic protections of overseas domestic workers' fundamental rights should be conditional upon the worker initiating any such enquiry themselves, especially where the Home Office will have sufficient*

An obvious reason to investigate further would be if the employer immediately sought to bring in another domestic worker. The notion that, in the words of the Ministerial statement

> *This may perpetuate a revolving door of abuse in which perpetrators remain unidentified and free to bring other domestic workers to the United Kingdom with impunity.*

It also ignores that a worker is more likely to report the abuse if they have left the control of the employer and have relative security. The Minister states

> "*We believe that empowering victims of modern crimes like* [sic.] *modern slavery is fundamental to bringing them into the light and ending the cycle of exploitation."*

Yet this is precisely what the Government has rejected in rejected in rejecting Mr Ewin's recommendations.

The Minister states

> "*…as with any other victims of slavery our aim must be to be create an environment in which O*[verseas] *D*[omestic] *W*[orker]*s who are victims of abuse are encouraged to report the abuse and to access support.*"

This was Mr Ewins aim in making his recommendations. He concluded that

> *10. On the balance of the evidence currently available, this review finds that the existence of a tie to a specific employer and the absence of a universal right to change employer and apply for extensions of the visa are incompatible with the reasonable protection of overseas domestic workers while in the UK (see paragraphs 65 - 87).*

He advocated that the right to change employers be given to all workers because it is "impractical and invidious" to discriminate between different levels of abuse.

Julia Harris of Harris Recruitment who gave evidence to the Public Bill Committee[4] told ILPA[5]

> *" A six month visa restricting to domestic work in private household is no help to a vulnerable worker looking for a good employer as in reality who would employ someone for less than or up to six months for childcare or care work? It would be too unsettling for a family or for an elderly person.*
>
> *The domestic workers is much more likely to go into insecure work and is extremely vulnerable to being persuaded to stay on after their visa expires and go underground and be further exploited. I know of several recent instances when the employers of these "illegal" domestic workers have been raided and the domestic worker deported and the family prosecuted.*
>
> *How does keeping people without rights facilitate their going to the police? Overseas domestic workers are not going to the police now. How will this be different? …*
>
> *They would be taking a leap of faith that the authorities would identify them as a victim of crime. It's a lot to ask of someone fearful of the authorities and controlled by their employer. Putting it simply these workers are scared…scared and terrified, especially of going to the Police, as it is their word over that of their employer and they have so much to lose.*
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> *Most domestic workers carry a heavy burden of responsibility, as they know that they can't just walk out of a job, it is not that easy, as they would be unlikely to find another one, as they are usually the person who their entire family relies on to support them and send money home.*
>
> *… Workers would still be taking a risk to go to authorities. Surely it is far better to have protections in law which are not dependent upon their level of exploitation? We really need to protect against any level of exploitation.*
>
> *What about prevention? Pre the 2012 changes, under the old rules, domestic workers had rights and that went some way towards preventing abuse, rather than having a system in place, like the current one, which has been found to facilitate trafficking and then try to help patching things up.*
>
> *…. In reality, from a commercial point of view who would employ someone for six months or less in a care, childcare or housekeeping position, it is just not long enough, especially as the new employer would be highly unlikely to be able to get a reference from the previous employer?*
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> *If only able to work for legally for six months, the domestic worker would be highly unlikely to be able to get jobs through reputable domestic agencies such as mine, so would not be able to have*

[4] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-modern-slavery-bill-committee/draft-modern-slavery-bill/oral/5713.html

[5] Email of 7 March 2016

*someone on their side, explaining their story and providing a credible reason why a reference from their last employer just isn't possible.*

*As they can't get support from domestic agencies they don't have access to that level of protection to ensure they are not abused or exploited, as no employer would be willing to pay an agency fee for someone who has not only run away from their previous employer, but would only be able to stay and work legally in the UK for less than 6 months, without any chance of being able to renew their visa, it is simply a non-starter.*

*The system that has now been included in the Modern Slavery Act…is forcing the domestic worker into insecure casual employment, often in the black market, where the employee would have no rights, no contract of employment, no national minimum wage and the employer would probably be paying them cash in hand and certainly wouldn't be paying tax & NI for their work."*

The Government accepts Mr Ewin's recommendations for information advice and support meetings, which is also covered in Lord Hylton's amendment. We are concerned however that it will be difficult to convey the complexity of what the Government proposes in such as session, particularly to a worker who has found him/herself in a situation of abuse and is both frightened and confused. There is a risk of information overload.

In addition the Government has said that it will require employers of overseas domestic workers to be licenced to sponsor the work. The Minister states that an employer who fails to comply with obligations to allow the worker to attend information meetings, to comply with employment law and to cooperate with any UK Visas and Immigration's compliance checks could lose the right to sponsor workers in future. This seems a weak punishment for an employer failing to respect employment law. Will the employer face not only removal from the register of sponsors, but also cancellation of their own leave to be in the UK?

The Government intends that its changes apply also to those working for diplomats. It says

> "*UK Visas and Immigration may seek from that mission a waiver of the diplomat's immunity if it wishes to undertake checks on, for example, the diplomat's compliance with employment law*"

We should be interested in the Government's view of whether the Vienna Convention on Diplomatic Relations of 1961 would permit it to require such a waiver in advance, before the diplomat were permitted to bring the worker in at all.

The Government accepts the recommendation that where a mission sponsors a private servant of a diplomat under Tier 5 of the Points Based System one of its sponsorship obligations should be to ensure that the relevant diplomat receives written information about their obligations as an employer and confirms that they have read and understood it

The Government rejects Mr Ewins QC's recommendation that the employment relationship be with the mission rather than diplomat. It says that it is unpersuaded that this

> "…*would make a material difference to our ability to check compliance, as the mission itself would enjoy State immunity. It is also possible that requiring such staff to be employed by the*

*mission would cause the worker to be treated as service staff for the purposes of the Diplomatic Privileges Act 1964, making them exempt from UK immigration control, which would in turn reduce the checks that could be applied before the worker entered the UK."*

We are not in a position, in the short time available to produce this briefing, to comment on that analysis.

The Minister states that the Government is considering Mr Ewins other recommendations concerning, for example, access to legal assistance and the minimum wage. Mr Ewins QC's wrote

*"148. The Government must ensure that Legal Aid is provided in a timely manner for all overseas domestic workers who have received positive conclusive grounds decision from the NRM to make claims in the Employment tribunal or from the Criminal Injuries Compensation Scheme.*

*149. The Government should provide Legal Aid to fund 20 new cases per year of overseas domestic workers who are not victims of modern slavery to establish clear precedent as to an overseas domestic worker's rights to enforce her contract of employment.*

*150. The Government should support, with funding (possibly from an increased visa fee), a non-legal aid support service to facilitate and support overseas domestic workers' access to Employment Tribunals and the Criminal Injuries Compensation Scheme, possibly through specialist CAB advisors.*

*151. The Government should exempt overseas domestic workers from the two-year limit on enforcing payment of the national minimum wage."*

These were matters on which there was no lack of evidence. Mr Ewins QC records

*"137.…practitioners express concern, sometimes utter dismay, at the difficulty they experience in obtaining - and retaining - Legal Aid funding in practice. In view of the legal provisions cited above, practitioners should not have to resort to the onerous and time-intensive procedure of applying for exceptional funding for such cases. The Government must give clear guidance to the Legal Aid Agency to comply with its current obligations to grant legal aid to all victims of slavery or human trafficking - including overseas domestic workers - to pursue claims in the Employment Tribunal and from the Criminal Injuries Compensation Scheme, and ensure that this legal aid is routinely granted in practice.*

*138. Legal aid is only available for overseas domestic workers if the matter falls within the scope of Legal Aid, Sentencing and Punishment of Offenders Act 2012 or if Exceptional Case Funding criteria are met. If the proposed residence test - i.e. limiting legal aid to those who have been lawfully in the UK for 12 months - is implemented35, then this would affect overseas domestic workers (although not those who were found to be victims of trafficking and modern slavery). Currently, therefore, save in the limited circumstances of modern slavery and human trafficking set out above, overseas domestic workers are forced to seek redress in the Employment Tribunal as litigants in person. The Employment Tribunal is an alien environment for most UK citizens, let alone an overseas domestic worker whose English language skills are often limited. The fees and remission process alone is reported to be sufficiently complex to act as a barrier to some. And when faced with a legally represented employer, the barrier to access to justice*

*becomes practically insurmountable to an overseas domestic worker. This consequently gives employers a further both real and perceived layer of impunity. Although it is arguable that some reliance can be placed on the significant goodwill of and pro bono work from the Employment Law Bar, this leaves overseas domestic workers seeking to enforce the rights which they have as a matter of UK being made to feel like the objects of charity, rather than as valued individuals deserving of the protection of their fundamental rights while they live and work in the UK. This is particularly so where the Government knows that they are an inherently vulnerable group from before they arrive."*

That the Government is not in a position to accept these modest recommendations at this stage is further cause to prefer the amendment in the names of Lord Hylton and Lord Rosser.

If the Government was not prepared to accept the recommendations of the review, did it use public money to commission it simply to contain dissent during the passage of the Modern Slavery Act? If not, why is it not prepared to be guided by this careful piece of work? The response is a warning to all those who table amendments calling for a review.

ILPA considers that Mr Ewins' recommendations, which he identifies as the minimum necessary to protect overseas domestic workers, should be implemented without delay as an essential first step toward comprehensive protection.