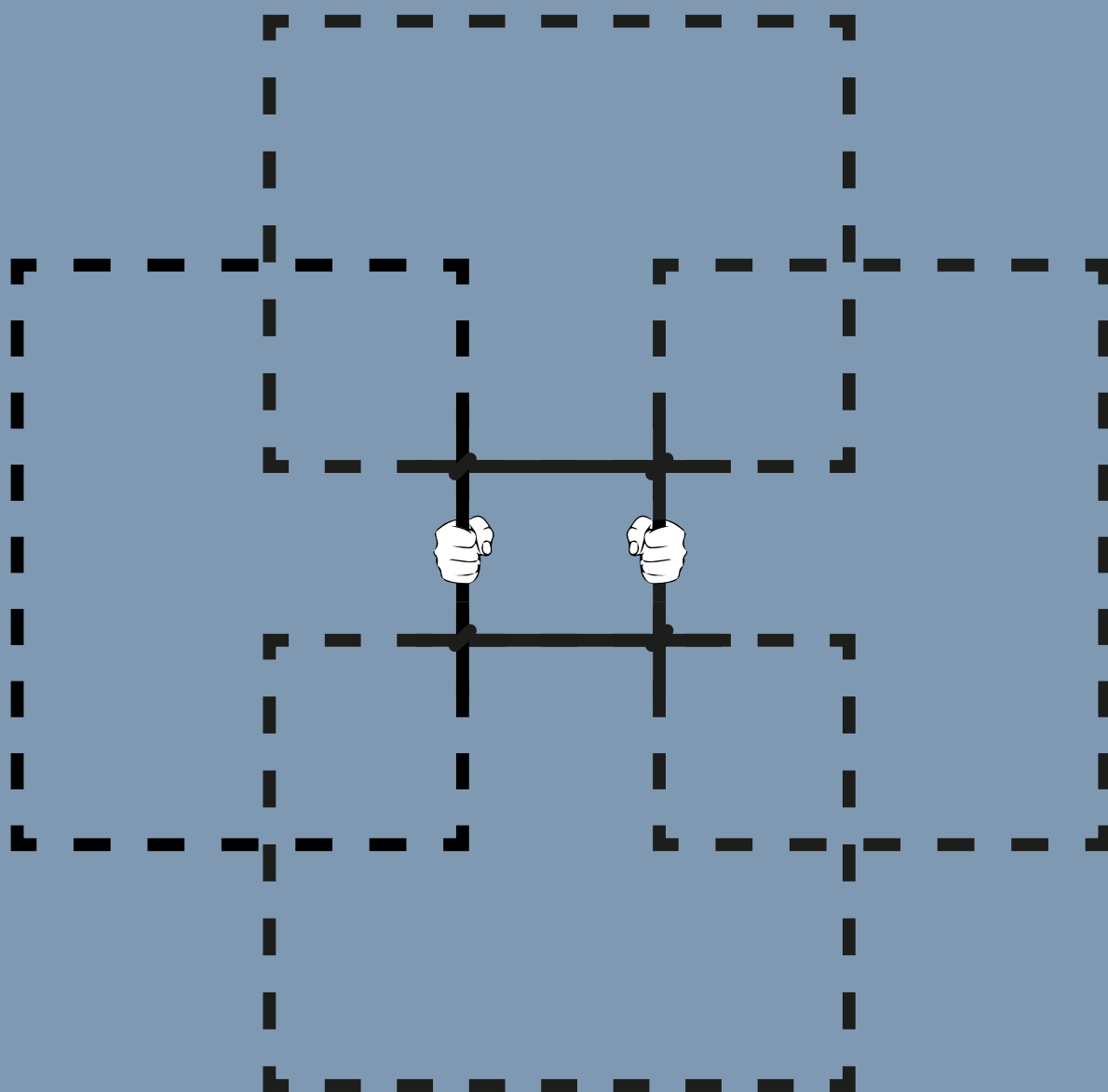


PUTTING ADULTS AT RISK

A GUIDE TO UNDERSTANDING THE HOME OFFICE'S "ADULTS AT RISK" POLICY AND ITS HISTORY



"I am concerned that the Home Office has become too concerned with policy and strategy and sometimes loses sight of the individual."
- then Home Secretary Amber Rudd speaking on Windrush

Executive Summary

The Adult at Risk policy was introduced to protect vulnerable people at risk of harm in detention. However, it is now very clear that the policy instead leads to more vulnerable people being detained for longer. This document seeks to explain the history behind the policy, to set out in simple terms how the policy is intended to work and, lastly, to highlight some of the main issues with the policy and explain why it fails to protect vulnerable people from inappropriate detention. We call on the Home Office to review the policy to ensure that it is truly protective, effective and inclusive

The detention of vulnerable people

Home Office policy stipulates that detention must be used *'sparingly'*, only *'for the shortest period necessary'* and subject to a *'presumption in favour of temporary admission or temporary release'*¹. In addition, policies such as the Enforcement Instructions and Guidance, with its list of vulnerable groups who should only be considered suitable for detention in 'very exceptional circumstances', have contained a very strong presumption against the detention of vulnerable people over and above the general presumption of liberty. Despite such policies, more than 27,000 people are subject to indefinite detention annually. Vulnerable people continue to be inappropriately detained contrary to government policy and in 6 cases² the national courts found that the conditions of detention amounted to 'inhuman and degrading treatment' in breach of Article 3 of the European Convention on Human Rights.

Mounting evidence of systemic failings

Over the last decade there has been mounting evidence of systemic failings in immigration detention from a wide range of sources including the courts, non governmental organisations (NGOs), independent inspectors, parliamentary inquiries and the media.

February 2015 the Tavistock Institute published a report which identified a number of concerns including the lack of mental health training for staff, ineffective communication between teams and a pervasive "culture of disbelief" within immigration removal centers (IRCs). In a response published on the same day, the then Home Secretary, Theresa May, announced that there would be an independent review led by the former Prisons and Probations Ombudsman Stephen Shaw into the welfare in detention of vulnerable persons.

Shortly after, in March 2015, the All Party Parliamentary Groups on Refugees and Migration, led by a cross-party committee of MPs and peers who heard evidence from over 200 individuals and organisations, jointly published an 'Inquiry into the Use of Immigration Detention in the United Kingdom'³. The inquiry concluded that indefinite detention is *'expensive, ineffective and unjust'* and that the *'enforcement-focused'* culture within the Home Office leads to too many instances of unnecessary detention in breach of official guidance. On the same day that the APPG report was launched Channel 4 broadcast an extremely damning undercover report showing the callous and racist attitudes of many guards charged with looking after vulnerable detainees at Yarl's Wood Immigration Removal Centre.

Stephen Shaw's "Review into the Welfare in detention of Vulnerable Persons" was published⁴ in January 2016 and concluded that too many people were detained for too long, that existing safeguards were inadequate and that the system was in urgent need of reform. The review found that *"a consistent finding from all the studies carried out across the globe and from different academic viewpoints that immigration detention has a negative impact upon detainees' mental health (...)*the impact on mental

¹ Enforcement Instruction and Guidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655233/chapter-55-detention-v2.OEXT.pdf

² R (S) v SSHD [2011] EWHC 2120 (Admin), R (BA) v SSHD [2011] EWHC 2748 (Admin), R (HA) v SSHD [2012] EWHC 979(Admin), R (D) v SSHD [2012] EWHC 2501 (Admin), R (MD) v SSHD [2014] EWHC 2249 (Admin); R (ARF) v SSHD [2017] EWHC 10 (QB); BA, D, MD and ARF were Medical Justice clients

³ The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

health increases the longer detention continues" and that survivors of previous trauma, particularly asylum seekers, victims of torture and children, were at increased risk of their mental health deteriorating in detention.

The Shaw review recommended changes to the existing protections for vulnerable people, including an expansion of the list of people who should normally be considered unsuitable for detention and that a catch-all should be added to reflect the dynamic nature of vulnerability. In addition the review recommended that the failing safeguards, especially the 'rule 35' mechanisms, be reviewed and reformed.

The Government's response to the Shaw Review

The Government's response to the Shaw review stated that it accepted the "broad thrust of his recommendations" and announced the introduction of detention review panels, a mental health action plan and a new Adult at Risk (AAR) policy which would *"adopt a wider definition of those at risk, including victims of sexual violence, individuals with mental health issues, pregnant women, those with learning difficulties, post-traumatic stress disorder and elderly people"*⁵ with the stated intention of ensuring that fewer vulnerable people will be detained and that, where detention becomes necessary, it will be for a shorter period than at present.

NGO concerns, litigation and lack of consultation

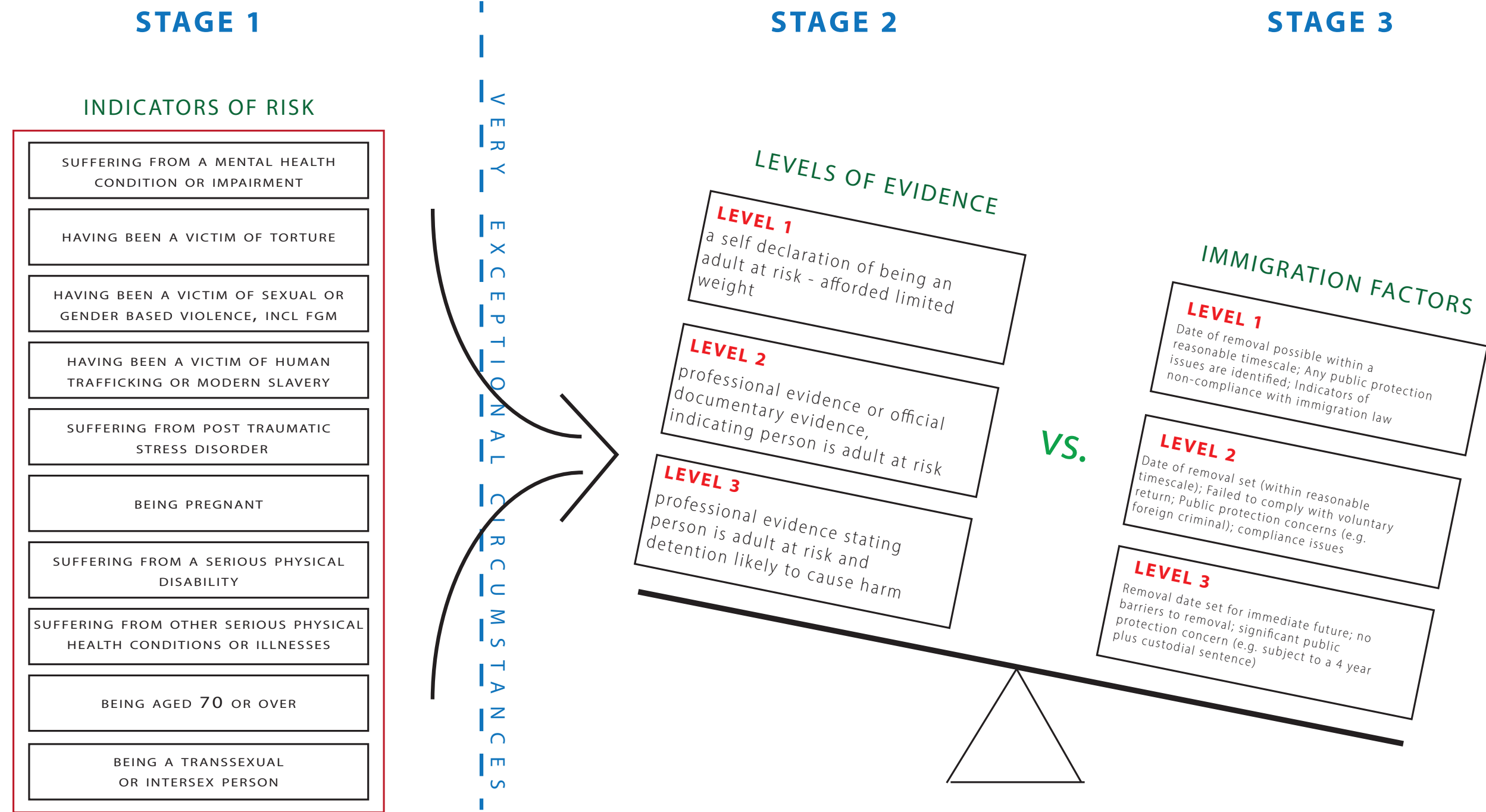
From the very first draft of the AAR policy, NGOs and other concerned stakeholders warned the Home Office that the policy would lead to more, not less, vulnerable people being detained, and for longer. NGOs warned that the policy lacks adequate mechanisms for identifying vulnerable people, fails to provide adequate safeguards for those in detention, increases the evidential burden on individuals to prove they are vulnerable and makes it more difficult for individuals to be released from detention by balancing vulnerability against a wide range of immigration factors. These warnings were ignored.

Following the implementation of the policy in September 2016, Medical Justice and 7 detainees lodged judicial review proceedings arguing that the policy failed to adequately protect victims of torture. The AAR policy introduced a narrower definition of torture which restricted torture to acts perpetrated by, or with the acquiescence of, state actors. This led to many victims of non-state actors not being recognised as victims of torture, such as the 7 claimants who included victims of sexual and physical abuse, trafficking, sexual exploitation, homophobic attacks, a child abused by loan sharks, and a young man kidnapped and abused by the Taliban. Interim relief was granted in November 2016 and the High Court found the definition to be unlawful, following a full hearing in March 2017, because it excluded from its ambit victims of torture covered by the definition in the previous policy whom the evidence showed were particularly vulnerable to harm in detention, was contrary to the purpose of section 59 of the Immigration Act 2016, and lacked a rational or objective evidence base.

The High Court judgment also noted that Medical Justice had made much the same points during the consultation on the policy as during the legal proceedings. Had the Home Office listened to these concerns earlier the negative impact on vulnerable detainees and expensive litigation could have been avoided. The judge ordered the Home Office to review and reissue the AAR policy within a reasonable time frame.

The Home Office have now introduced a new definition of torture into the AAR policy and Detention Centre Rules which no longer excludes victims of non-state violence but which is fundamentally flawed in other ways and will result in more vulnerable people being excluded from the AAR policy and detained. Again, NGOs have been very clear in their concerns and, again, the Home Office have chosen to ignore these warnings. The new definition came into effect on the 2nd of July 2018. Medical Justice has lodged a judicial review challenging it.

⁵ <https://publications.parliament.uk/pa/cm201516/cmhansrd/cm160114/wmstext/160114m0001.htm>



Adults at Risk policy explained

The policy is intended to involve three stages of assessment: Firstly, the policy sets out a number of ‘indicators of risk’ which serve to identify those with a particular vulnerability to harm in detention. These include, amongst others: persons suffering from a mental health condition or impairment; victims of torture, victims of sexual or gender based violence, victims of human trafficking or modern slavery and those suffering from post traumatic stress disorder. These ‘indicators’ broadly mirror the categories of the previous policy with some additional categories recommended by the Shaw review alongside a catch-all category to cover any unforeseen vulnerabilities.

However, where the AAR policy diverges from the previous policy is that it specified that once someone was identified as belonging to one of these categories they should only be detained under ‘very exceptional circumstances’. As such the category approach under the previous policy was protective, with the requirement for very exceptional circumstances imposing a high threshold for continued detention to be justified. Under the Adults at Risk policy an ‘indicator of risk’ is not in itself enough for someone to be considered normally unsuited for detention. Instead, once someone has been identified as having an indicator of risk, Home Office officials secondly determine the ‘levels of evidence’ supporting the indicator. The policy introduces three levels of evidence: Level 1 – self declaration, Level 2- professional evidence that the person is at risk, Level 3: professional evidence that a period of detention would be likely to cause harm.

Thirdly, the perceived risk is then balanced against a wide range of ‘immigration factors’, including length of time in detention, public protection issues and compliance issues. Depending on the assessment of the level of evidence, the corresponding immigration factors needed to justify continued detention increase accordingly. The Home Office has stated that the threshold of immigration factors needed to justify continued detention for someone with level 3 evidence of risk is broadly equivalent to the ‘very exceptional circumstances’ requirement under the previous policy.

Issues with the Adults at Risk policy

The findings of the initial Shaw review were very clear – too many vulnerable people are detained for too long and existing safeguards fail to adequately protect vulnerable people from a detention environment which in and of itself undermines welfare and contributes to vulnerability. The Government was consistently clear in its response that the AAR policy would be more protective than the previous policy but it is now clear that it is not

We are particularly concerned that:

The policy fails to identify vulnerable persons and therefore fails to protect vulnerable persons from inappropriate detention.

The policy does not contain provisions for active screening for vulnerability. The Gatekeeper Team relies solely on internal information on which to base their decision to detain and we often see that even where there is evidence of vulnerability sitting on Home Office files, such as in cases of well documented mental health issues or those who have previously been released from detention due to vulnerabilities, this appears not to be taken into consideration in the decision to detain.

The policy has not improved identification of those at risk of harm in detention. The primary mechanism, rule 35 (3) reports, only apply to victims of torture. Additional indicators of risk were added but there is no effective reporting mechanism for these new indicators, e.g. survivors of gender based violence, unless it is deemed torture, or for transsexual detainees, those with Post Traumatic Stress Disorder etc.

The narrow definition of torture applied in the policy means survivors of severe ill-treatment and trauma could fall outside of the policy. The definition initially applied in the policy was found to be unlawful as it excluded victims of non-state violence and we fear that the Home Office's new definition of torture is again unnecessarily narrow and exclude some victims of torture.

Under the previous policy vulnerable people merely had to demonstrate that they belonged to a category known to be at increased risk in detention to be considered unsuitable for detention, barring very exceptional circumstances. The AAR policy introduces two new stages to the review of suitability for detention;

The policy increases the evidential burden on individuals in the move away from protective categories and the introduction of the levels of evidence. It is important to note that the levels of evidence are not a measure of the level of risk to an individual but of the evidence in support of this vulnerability. Thus, very vulnerable people may be classed as level 1 or 2 due to lack of evidence. This is particularly important as the most vulnerable are often those least likely to have ready evidence of their vulnerability. As a result we see many vulnerable people, e.g. victims of trafficking or sexual violence, languishing in detention despite the acknowledged risk of harm to these groups.

The policy increases the threshold for release from detention. To qualify for the highest level of evidence, roughly equivalent to 'very exceptional circumstances' under the previous policy, a person must present evidence not only of their vulnerability but of the fact that they are likely to suffer harm in detention. Such evidence is very hard to come by prior to detention, and once in detention the evidence is only likely to be generated as a result of the person deteriorating, at which point the harm has already occurred. Such a 'wait and see' approach knowingly places vulnerable people in a harmful environment.

We analysed 100 rule 35 reports and responses of people referred to Medical Justice between March and October 2017. 97% of cases were accepted as Adults at Risk. In 95% of cases the decision was taken to maintain detention. Only 2% of cases were assessed as level 3 despite the fact that reports

often referred to symptoms (such as nightmares, flashbacks, low mood, poor appetite, disrupted sleep patterns, anxiety, self-harming, PTSD) and in 14% of cases where detention was continued, the doctor in the IRC specifically stated that the detainees health was deteriorating in detention. The most common 'immigration factors' justifying continued detention of adults at risk included overstaying, absconding, illegal working, late asylum claims and past offending (but not considered risk to the public) – most of which appear to fall short of constituting 'very exceptional circumstances' under the previous policy. Of those who had their detention maintained the average period of time deemed reasonable by the Home Office for detention to continue was 10 weeks (the longest 6 months, shortest 1 week). This is a very long time for vulnerable people acknowledged to be at increased risks of harm in detention to be exposed to risk of harm, particularly in the face of the known inadequacies in healthcare in IRCs. Medical Justice's referrals are not representative of all detainees but we tend to see some of the most vulnerable detainees. However, Home Office statistics on releases following a 'rule 35' reports shows that in the last quarter before the introduction of the AAR policy the release rate following a 'rule 35' report was 39%. By the first quarter of 2018 this had dropped to 12.5%. Even where the policy identifies vulnerable people they are not being released from detention and their detention continues indefinitely.

"N was trafficked in a number of countries over a period of more than 10 years, since he was a minor. This included being kept locked up, beaten and cut with knives, and forced to work long hours for no pay. He was eventually brought to the UK and kept in a house where cannabis was being grown. He was arrested from the house and received a short prison sentence for production of cannabis. A decision was taken to deport him and he was detained under immigration powers at the end of his sentence. He claimed asylum, was referred to the National Referral Mechanism and was recognised as a victim of human slavery. Despite this, he continued to be detained. In detention he received rule 35(3) report and was accepted as an adult at risk. However, his detention was maintained because he was considered to pose a risk of harm to the public because of his conviction (despite the fact that his criminal activity was a direct result of his exploitation by traffickers) and because it was considered that his removal could be enforced within a reasonable time scale (said to be 16 weeks!). He was visited in detention by an independent Clinical Psychologist who diagnosed PTSD and depression, and concluded that his mental health was being 'significantly negatively impacted by his detention'."

There is a systemic lack of follow up of vulnerable detainees who end up in detention

There is a failure to follow up vulnerable detainees once they have been identified as adults at risk and the decision taken to place them in detention – this is particularly worrying as they are recognised to be at increased risk and the policy requires evidence of harm in order for release to be seriously considered. The lack of follow up means that where harm does result, this is often initially missed. HM Inspector of Prisons found that: *"At both Brook House and Morton Hall, we obtained lists of detainees identified by the Home Office as being at risk of harm under the [Adults at Risk] policy, but neither the Home Office teams at the centres or custodial managers had these lists. They could not, therefore, systematically identify and support all at risk adults, nor monitor the impact of detention on them over time."* (Annual Report 2016-17)

The AAR policy leads to more vulnerable people being detained for longer and does not provide the safeguards needed to avoid future Article 3 breaches. The Home Office repeatedly ignored the warnings of NGOs and continue to put vulnerable people in detention despite the recognised increased risk of harm and despite the clear recommendations of the first Shaw review. We hope the publication of the second Shaw review will provide an opportunity for the Home Office to address the short comings of the AAR policy so that it may be truly protective for vulnerable people.

Medical Justice repeatedly set out its concerns about the AAR policy in detail to the Home Office following the publication of the first draft of the policy. These concerns were ignored. Medical Justice successfully challenged aspects of the policy in court but serious shortcomings remain. We hope that the second Shaw review provides an opportunity for the Home Office to review the operation of the Adults at Risk policy as a whole, engage meaningfully in consultation with stakeholders and reissue a revised AAR policy that is truly **protective, effective and inclusive**. However, we are concerned that the Home Office issued the amendments to the AAR policy after the deadline for the Shaw review closed, this meant they could not be properly considered in the review, yet will rely on these changes as part of their response to the review.

We believe that immigration detention, and the conditions of immigration detention, are so detrimental to the health and wellbeing of detainees that the only solution is to bring an end to immigration detention. Until this can be achieved, **we recommend**:

- Reinstating a category-based approach to identifying vulnerability where demonstrating that one belongs to a category at increased risk of harm in detention triggers protection from this risk – including an effective catch-all and effective screening for vulnerability.
- Replace the ‘torture’ and ‘victims of sexual or gender based violence’ categories with a more inclusive category modelled on the UNCHR detention guidelines, namely ‘victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment’.
- Abandon AAR evidence levels and ensure that all those identified as particularly vulnerable to harm in detention can be detained only if there are ‘very exceptional circumstances’. The policy should retain the commitment to self-declaration of vulnerability but this should trigger a duty of inquiry on the Home Office into the vulnerability.
- Update the rule 35 process to ensure that it can effectively identify all vulnerable groups, lower the threshold for reporting health issues and improve the reporting of suicide and self-harm risk. Such assessments must happen within 24 hours and doctors must be properly trained. The policy and its protections should be extended to all immigration detainees, including those held in prisons to whom the policy does not currently apply.
- Ensure that there are robust independent monitoring mechanisms in place to ensure that the operation of policies achieve their stated aim and to avoid unintended consequences. To move towards a culture of transparency and openness around Home Office processes where independent oversight is welcomed, and external input recognised as a valuable opportunity to improve processes and safeguard the wellbeing of vulnerable people in immigration detention. This must include a commitment to future reviews of the impact of detention policy.

Medical Justice is the only organisation in the UK to send independent volunteer clinicians in to all the Immigration Removal Centres across the UK. The doctors document detainees’ scars of torture and challenge instances of medical mistreatment. We receive over 1000 referrals from detainees each year and have gathered a sizeable, unique and growing medical evidence base. We help detainees to access competent lawyers who properly harness the strength of the medical evidence we generate. Evidence from our casework is the platform for our research into systemic failures in healthcare provision, the harm caused to detainees by these shortcomings, as well as the toxic effect of immigration detention itself on the health of detainees. We and others use our research to secure lasting change to the detention regime through policy work, strategic litigation and by raising awareness of the conditions inside places of immigration detention.