

Rainbow Migration's submission to the Windrush Lessons Learned Review progress update: call for evidence

22 November 2021

Rainbow Migration supports lesbian, gay, bisexual, trans, queer and intersex (LGBTQI+) people through the asylum and immigration system. Our vision is a world where there is equality, dignity, respect and safety for all people in the expression of their sexual or gender identity.

The Home Office's Comprehensive Improvement Plan (September 2020), published in response to the Windrush Lessons Learned Review, sets out the ambition of building a 'fairer, more compassionate Home Office' that puts people first and sees the 'face behind the case'. Do you think the Home Office has made progress towards this ambition?

It is difficult to agree that much progress has been made towards a fairer and more compassionate Home Office given the New Plan for Immigration consultation process and subsequent Nationality and Borders Bill. The New Plan for Immigration consultation ran from 24 March 2021 to 6 May 2021, despite concerns from stakeholders that this was too short a period for meaningful consultation, particularly given it included the Easter period and purdah for local elections. Those concerns were dismissed.

Stakeholders from the Asylum Strategic Engagement Group wrote to the Home Office on 8 April 2021, in addition to the short consultation period concerns were raised about the inaccessibility of the consultation to those people who are in or have been through the asylum process. This was due to issues around digital accessibility, given that the

webpage only indicated one way to submit a response, which was through the webpage. The consultation was also only available in English, and roundtable consultation meetings had been arranged with several organisations, but none with those people who had lived experience of the asylum system. The Windrush Lessons Learned report was explicitly referenced.

The Home Office responded on 19 April 2021 and stated that “we would be very keen to work with you, and the wider SEG partner organisations, to identify potential groups that Britain Thinks could reach out to and engage with to obtain the lived experience of those with experience of using the immigration system”. Attempts to include people with lived experience in this process were an afterthought, rather than being put first. In the end, those meetings took place after the consultation had closed, and so it is unclear to what extent the responses were taken into account when drafting the subsequent legislation, the Nationality and Border Bill. This is particularly the case given the length and complexity of the Bill, and the fact that its first reading on was on 6 July 2021, only two months after the consultation ended. This was too for the feedback to have been seriously considered and taken into account when drafting the legislation.

Based on your experience, how well is the Home Office doing in terms of each of the below:

- i. Righting the wrongs and learning from the past? By this, the Department means being open minded and willing to acknowledge, explore and put right mistakes, including using that learning to inform future work.

Rainbow Migration welcomed the Home Office consulting us on the LGB asylum interview training, which they did earlier this year. This was a positive move and the Home Office has showed clear willingness to improve their practice in this area.

- ii. Demonstrating ‘a more compassionate approach’? By this, the Department means putting people first and taking proper account of the complexity of citizens’ lives, in order to make the right decisions.

When we wrote to the Minister for Justice and Tackling Illegal Migration to raise our concerns about the proposal in the Nationality and Borders Bill to raise the standard of proof, our concerns were acknowledged but we were disappointed that the Minister’s response was that the Home Office would “review and update the training and guidance provided to decision-makers”. During Committee Stage of the Bill, when the standard of proof was discussed, the Minister stated that, “we will seek to update the training and guidance provided to decision makers. **That will concentrate on interviews, to ensure that they are sufficiently detailed to enable claimants to meet the standard**”. It is inherently difficult for anyone to prove their sexual orientation or gender identity, and more detailed questioning will not resolve this issue¹.

- iii. Demonstrating more ‘inclusive and rigorous policymaking’? By this, the Department means putting in place systems and support to enable staff at all levels to make, evaluate and improve evidence-based policy that is thorough, rigorous, and promotes equality.

The New Plan for Immigration and Nationality and Border Bill are examples of poor policymaking, that is neither rigorous nor evidence-based. Several of the footnotes to the consultation refer to unpublished management information.² Transparency is key if policymaking is to be rigorous, as it must be able to sustain examination of the underlying data on which decisions are being made. The government’s own Equality Impact Assessment for the Bill accepts that

¹ For more information, see UNHCR Guidelines on International Protection NI. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees <https://www.unhcr.org/509136ca9.pdf>

² <https://www.gov.uk/government/consultations/new-plan-for-immigration>

“evidence supporting the effectiveness of this approach [increased deterrence to encourage people to claim asylum elsewhere] is limited”.

In relation to LGBTQI+ people, Rainbow Migration has explained the detrimental impact and potential indirect discrimination that many of the proposals would have on our service users in particular at several stages, both during the consultation and since.³ The government’s Equality and Impact Assessment for the Bill agrees that there is a risk of indirect discrimination, yet proposes to address this only after operationalising the Bill.

The Equality Impact Assessment for the Bill acknowledges at paragraph 18 that: *“There is a risk that our policies could indirectly disadvantage protected groups. However, our analysis is that with appropriate mitigation and justification, such impacts would not amount to unlawful indirect discrimination within the meaning of the 2010 Act.”*⁴ Those with the protected characteristics of gender reassignment and sexual orientation are specifically listed as “Vulnerable people” at paragraph 19, where it is acknowledged that: *“Members of this cohort might find it more difficult than others: to disclose what has happened to them; to participate in proceedings; and to understand the consequences of non-compliance with legal requirements. There may also be trauma-related considerations, in terms of how any vulnerable groups adduce evidence.*

³ As also set out in our briefing for Committee stage of the Nationality and Borders Bill <https://www.rainbowmigration.org.uk/sites/default/files/2021-10/NBB%20Committee%20Stage%20Briefing.pdf>, as well as for [Second Reading](https://www.rainbowmigration.org.uk/sites/default/files/2021-08/Briefing%20for%20second%20reading%20FINAL.pdf) <https://www.rainbowmigration.org.uk/sites/default/files/2021-08/Briefing%20for%20second%20reading%20FINAL.pdf> and our response to the New Plan for Immigration consultation https://www.rainbowmigration.org.uk/sites/default/files/2021-06/New%20plan%20for%20immigration%20Response%20to%20stakeholder%20questionnaire_0.pdf

⁴ https://publications.parliament.uk/pa/bills/cbill/58-02/0141/Nationality_and_Borders_Bill_-_EIA.pdf

*We will continue to consider ways in which to mitigate adverse impacts on vulnerable people. For example, we will mitigate the risk of adverse impacts on unaccompanied asylum-seeking children by exempting them from the inadmissibility process. **We will provide guidance to operational teams on interviewing and supporting vulnerable people and when determining the type of accommodation that would be appropriate for their needs. We will also provide increased access to legal aid.***"

There is no acknowledgement of the harm that will be caused to those who are put through the system while this learning takes place, nor is it clear why Rainbow Migration's evidence as to the difficulties that the Bill will cause for LGBTQI+ people is insufficient to allow mitigation to be planned for and explained now. Training already exists⁵ as does guidance⁶, yet this has not been enough to resolve issues such as using delay in claiming asylum as a reason for disbelieving someone's sexual orientation or gender identity. We therefore do not believe that the safeguards trailed in the Equality Impact Assessment will suffice.

With the exception of statistics on the number of asylum claims made on the basis of sexual orientation and decisions on those claims, the Home Office does not monitor data on LGBTQI+ people in the asylum system, for example statistics on LGBTQI+ people housed in asylum accommodation or put into detention. It is therefore difficult to see if and how the government is making and evaluating evidence-based policy that promotes equality.⁷

In relation to immigration detention, the Home Office and immigration detention centres do not routinely monitor the number of LGBTQI+ people that are

⁵ <https://questions-statements.parliament.uk/written-questions/detail/2020-02-24/19905>

⁶ <https://www.gov.uk/government/publications/sexual-identity-issues-in-the-asylum-claim>

⁷ In a debate in the House of Lords, the government could not confirm that that LGBTQI+ individuals did not experience direct or indirect discrimination in the asylum system <https://hansard.parliament.uk/Lords/2019-06-10/debates/D5B513A2-EAC1-4815-9D93-E64758CAA1A6/AsylumSeekers>

detained, at what stage in the asylum process they are detained, nor how long they are detained for. The Independent Chief Inspector of Borders and Immigration noted the following in the report on the Adults at Risk annual inspection:

5.98 The Home Office also told inspectors that it did not collect data about “the number of LGBTQI persons detained...”

5.99 Without this data it is hard to see how the Home Office is able to assess the quality of its decisions to detain or the impacts of detention on specific groups, which stakeholders have argued are particularly vulnerable.⁸

LGBTQI+

8.213 The Home Office was unable to tell inspectors how many LGBTQI+ persons had been held in immigration detention in 2016–17, 2017–18 and 2018–19, as this information was not centrally recorded on Home Office systems. The Home Office explained that: “The disclosure and therefore identification of an LGB individual detained under immigration powers, about their sexuality, is entirely at the discretion of the individual. Whilst the DSO 02/2016 [‘Lesbian, gay and bisexual detainees’] requires Home Office Immigration Enforcement staff to record this disclosure on the Casework Information Database (CID) as appropriate, when they are told, there is not expectation that this information will be disclosed in every case. Consequently, even a manual trawl of cases of individuals detained within the requested timeframe, will not necessarily be representative of the true number of LGB individuals detained during this period.”

⁸ <https://www.gov.uk/government/publications/annual-inspection-of-adults-at-risk-in-immigration-detention-2018-19>

The lack of monitoring is also concerning when considering the assertions made by the government in the Equality Impact Assessment for the Nationality and Borders Bill in relation to mitigation of discriminatory impact.

Given the lack of an evidence base for the Nationality and Borders Bill, it is probable that the Home Office has regressed in terms of policymaking based on evidence.

- iv. Demonstrating greater ‘openness to scrutiny’? By this, the Department means becoming more outward facing and listening to, and acting on, views of and challenges from both staff and external stakeholders.

Rainbow Migration welcomes the Home Office’s setting up of a stakeholder group to discuss and try to resolve the issues around access to legal advice for people seeking asylum. This is an issue that affects the Home Office as well as those people who are within the asylum system, and it is positive that the Home Office recognises that and is seeking to work constructively with stakeholders and the Ministry of Justice to try to find solutions.

As detailed above, we do not believe that the views of external stakeholders have been taken into consideration during the New Plan for Immigration consultation process, nor in the drafting of the Nationality and Borders Bill. We found it striking that the Home Office officials withdrew from giving evidence to the Nationality and Borders Bill Committee in the House of Commons, without explanation.⁹

⁹ [https://hansard.parliament.uk/commons/2021-09-21/debates/e38b689e-afd4-446a-b6d3-72a9eeb419d8/NationalityAndBordersBill\(FirstSitting\)](https://hansard.parliament.uk/commons/2021-09-21/debates/e38b689e-afd4-446a-b6d3-72a9eeb419d8/NationalityAndBordersBill(FirstSitting))

The drafting of the Bill containing several placeholder clauses, with subsequent late amendments tabled by the government giving little time for scrutiny, is another example of how scrutiny is avoided rather than sought.

The Home Office regularly rolls out pilots in the asylum system out without prior notice or consultation with stakeholders, such as asylum interviews taking place in hotels and Napier barracks, and outsourcing asylum interviews to an external third party. Stakeholders raised serious concerns once the details of these pilots were known, and they were subsequently abandoned. However, proper engagement with stakeholders from the outset could have meant that problems were identified at an earlier stage. In general, there is little transparency as to the outcomes of pilots.

In relation to interviewing, however, around the time of the outsourced asylum interviewing pilot the Home Office also engaged with stakeholders in relation to alternative solutions to help reduce the backlog of cases. As a result of this, the Home Office have sought to increase the number of decisions that are made on the papers, without the need for an asylum interview. We have since seen this happen with one of our service users and it is a move that we welcome, as long as it is limited to grants only, as is currently the case. It is a good example of the Home Office listening to and acting on the suggestions of stakeholders.

[The Windrush Lessons Learned Review](#) said that wider cultural and systemic change was needed to ensure that nothing like the Windrush scandal ever happens again. To what extent do you think the Home Office's culture has changed?

We believe that there is willingness by many within the Home Office to improve, however their ability to enact positive change seems to be constrained by those more senior to them. We are particularly concerned about the culture of the Home Office

within Immigration Enforcement, where both policy, operations and stakeholder engagement need urgent improvement.¹⁰

Thinking about the areas in this call for evidence, is there anything else you want to say that hasn't already been covered?

The length of time between the Independent Chief Inspector of Borders and Immigration sending reports to the Home Secretary and their being published is cause for concern, and calls into question the effectiveness of the role, particularly when contrasted to Her Majesty's Inspectorate of Prisons. It will be important for their ability to engage effectively with people in the immigration and asylum system that the Migrant Commissioner, when appointed, is not subject to similar constraints.

For further information, contact:

Leila Zadeh, Executive Director

leila@rainbowmigration.org.uk

Sonia Lenegan, Legal and Policy Director

sonia@rainbowmigration.org.uk

¹⁰ See e.g. at 10.20 to 10.22

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027583/E02683602_ICIBI_Adults_at_Risk_Detention_Accessible.pdf