



**Freedom from Torture**  
Medical Foundation for the Care of Victims of Torture

## Submission of Freedom from Torture to the Joint Committee for Human Rights inquiry into immigration detention

*August 2018*

1. Freedom from Torture is a UK-based human rights organisation and one of the largest torture rehabilitation centres in the world. Each year we provide clinical services to more than 1,000 survivors of torture in the UK, the majority of whom are asylum seekers or refugees.
2. This submission will focus on torture survivors and primarily address the first two areas of the inquiry's terms of reference.<sup>1</sup> Our submission is broken down into the following issues:

Key Issue	Recommendation
Current legal and policy framework of immigration detention is flawed, leading to poor decisions to detain and continue detention	<ol style="list-style-type: none"><li>1. Torture survivors should not be detained under any circumstances &amp; should be prioritised in alternatives to detention.</li><li>2. Decisions to detain should be made independently. Representations should be permitted by the individual and their lawyer.</li><li>3. In detention reviews, vulnerability should outweigh immigration factors, unless there are exceptional circumstances.</li></ol>
Adults at Risk Policy fails to protect vulnerable people and raises the evidentiary burden to a degree that it restricts access to those in need	<ol style="list-style-type: none"><li>1. Remove the evidence levels from the Adults at Risk policy</li><li>2. Replace the broad range of immigration factors with the previous threshold of 'exceptional circumstances' to justify continued detention</li></ol>
Rule 35 safeguard measure does not work, leaving torture survivors suffering harm to their health in detention	<ol style="list-style-type: none"><li>1. Remove the requirement to comment on the likely impact of ongoing detention</li><li>2. Properly resource the process</li><li>3. Independent monitoring</li></ol>
'Torture' definition undermines aim of primary legislation to protect vulnerable people	<ol style="list-style-type: none"><li>1. Statutory Instruments 2018/410 and 2018/411 should be annulled immediately with administrative guidance subsequently amended.</li><li>2. The UNHCR detention guidelines definition should be used.</li></ol>

<sup>1</sup> I. Whether current legal and policy frameworks are sufficient in preventing people from being detained wrongfully and whether current practices in the detention system protect human rights; II. Whether the initial decision to detain an individual should be made independently, such as by requiring prior judicial approval.

### Issue: Legal and policy framework for immigration detention is flawed, leading to poor decisions to detain and continue detention

3. It is accepted that torture survivors and those subjected to ill-treatment are particularly vulnerable to harm in detention because independent clinical evidence shows it is profoundly damaging.<sup>2</sup> It causes or worsens anxiety, depression, post-traumatic stress, suicidal thoughts and self-harm.<sup>3</sup> The current safeguards fail to provide adequate protection.
4. Between January and September 2017, Freedom from Torture's medico-legal report service received 101 referrals for suspected torture survivors in immigration detention. This indicates that vulnerable people are incorrectly routed into detention by the Gatekeeper team.
5. If people are routed into detention, their suitability is reviewed. However, these decisions are often poorly reasoned, lack reference to vulnerability and contain unrealistic assessments that removals will be imminent.<sup>4</sup>
6. **Recommendation: Torture survivors should not be detained under any circumstances. They should be prioritised in alternatives to detention.**
7. **Recommendation: Decisions to detain should be made independently. The individual and their lawyer should be able to make direct representations at this stage to the Gatekeeper Team.**
8. **Recommendation: In detention reviews, vulnerability should outweigh immigration factors, unless there are exceptional circumstances, which must be clearly specified.**<sup>5</sup>

### Issue: Adults at Risk policy fails to protect vulnerable people and increases the evidentiary threshold

9. The Adults at Risk policy, designed to protect vulnerable people has had the opposite effect. The policy represents a significant backwards-step, because it raises the threshold for a decision not to detain.
10. It does this in two ways:

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<sup>2</sup> A literature review in 2015 by Professor Mary Bosworth concluded that 'literature from across all the different bodies of work and jurisdictions consistently finds evidence of a negative impact of detention on the mental health of detainees' - Bosworth M (2016) Appendix 5: The Mental Health Literature Survey Sub-Review. In Shaw (2016), Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office. Further literature illustrating this point includes: [https://www.freedomfromtorture.org/news-blogs/26\\_07\\_2018/whats\\_the\\_difference\\_between\\_torture\\_and\\_uk\\_immigration\\_detention](https://www.freedomfromtorture.org/news-blogs/26_07_2018/whats_the_difference_between_torture_and_uk_immigration_detention) and [https://www.freedomfromtorture.org/news-blogs/23\\_06\\_2008/the\\_true\\_legacy\\_of\\_torture\\_stories\\_of\\_three\\_survivors](https://www.freedomfromtorture.org/news-blogs/23_06_2008/the_true_legacy_of_torture_stories_of_three_survivors)

<sup>3</sup> Furthermore, it is the position of the Royal College of Psychiatrists that detention centres are likely to precipitate a significant deterioration of mental health in the majority of cases, greatly increasing both the suffering of the individual and the risk of suicide and self-harm. See: Royal College of Psychiatrists (2015), *Position statement on detention of people with mental disorders in immigration removal centres*.

<sup>4</sup> As highlighted by Shaw, during detention reviews 'immigration factors such as travel documentation, the availability of escorts, and ongoing legal barriers, were given a higher weighting than vulnerability indicators'. Para 4.70, Stephen Shaw (2018), *Welfare in detention of vulnerable persons review: progress report*

<sup>5</sup> For example, case owners should cite clear evidence of risk of harm to others and not just rely on adverse immigration history, which can be an indicator of impact of torture on their mental health. For example, avoidance, missing appointments to sign due to a chaotic lifestyle, homelessness, poor memory, or fear of authorities.

- The framework provides for three levels of ‘evidence-based risk’. This is supposed to correspond with increasing levels of vulnerability but in reality, the three levels correspond with increasing levels of evidentiary burden.<sup>6</sup>
  - A wide range of ‘immigration factors’ have been introduced against which levels of vulnerability are weighed to inform a decision not to detain; whereas the previous policy had a presumption to release except in very exceptional circumstances.
11. A lack of evidence, (which is hard to come by while in detention), restricts access to the protection that the policy is meant to afford. Under the previous policy,<sup>7</sup> torture survivors needed to show independent evidence of their history of torture to be considered unsuitable for detention except in ‘exceptional circumstances’.
  12. The new policy introduces an additional requirement to present specific evidence that detention is likely to cause harm in order to reach Level 3 and for release to be seriously considered. This evidence is extremely hard to come by *before* harm has occurred. It should be presumed within the policy that if someone is found to be a member of a vulnerable group, they are at risk of harm from continued detention, so must be released.<sup>8</sup>
  13. Perversely the policy demands that preventable (and predictable) harm of torture survivors take place, whilst the Home Office does not have a process in place for measuring any such deterioration. Rule 35 doctors often make no comment about the detainee’s mental health or say that it is being managed by the mental health team, but these teams are poorly resourced and people wait weeks for an assessment. Furthermore doctors do not review the responses to Rule 35 reports as required. As a result, Shaw noted in his recent report that only 11 people were designated at Level 3 as of 4 February 2018, despite 1,189 recorded as being “at risk”.
  14. The Adults at Risk policy has also weakened the protection offered by introducing a much wider range of ‘immigration factors’ for consideration before a decision not to detain can be justified. This list very significantly lowers the threshold below ‘exceptional circumstances’<sup>9</sup> even for Level 3 evidence.<sup>10</sup>
  15. Even if more people are being identified as “at risk”, they are left in detention.<sup>11</sup> As noted by Shaw, the policy is not ‘delivering the expected outcomes’.<sup>12</sup>

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<sup>6</sup> Level 1: self declaration. Level 2: professional evidence (e.g. from a social worker, medical practitioner or NGO), including Rule 35 reports. Level 3: professional evidence stating that the individual is at risk and that a period of detention would be likely to cause harm.

<sup>7</sup> Section 55.10 of the Enforcement Instructions and Guidance (EIG)

<sup>8</sup> A literature review in 2015 by Professor Mary Bosworth concluded that ‘literature from across all the different bodies of work and jurisdictions consistently finds evidence of a negative impact of detention on the mental health of detainees’. Bosworth M (2016) Appendix 5: The Mental Health Literature Survey Sub-Review. In Shaw (2016), Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office.

<sup>9</sup> Section 55.10 of the Enforcement Instructions and Guidance

<sup>10</sup> Section 55.10 of the Enforcement Instructions and Guidance relied upon considering the risk of re-offending, inflicting harm or absconding, as well as imminent removal. The factors laid out in the AAR guidance place a much greater emphasis on non-compliance including unreasonably a failure to comply with voluntary return.

<sup>11</sup> A review of 19 of our cases referred to our medico-legal cases shows that under the policy, caseworkers are placing far too much weight on immigration factors than previously applied under EIG 55.10. In all 19 cases, continued detention was justified on the basis that removal was possible within a reasonable timeframe. However, on average, 10-14 weeks was given as the predicated wait for removal, which is not reasonable.

<sup>12</sup> Para. 4.20, Shaw (2018). Shaw further noted in the same report at Para 4.21 that ‘the current AAR policy itself is focused more on the levels of evidence provided in relation to a medical condition than it is to an assessment of the risks of detention and how they may change over time’.

16. **Recommendation:** Remove the evidence levels from the Adults at Risk policy. A self-declaration of vulnerability can carry less weight than documented vulnerability, but should always trigger further investigation.
17. **Recommendation:** Implement Shaw's recommendation number 11 that detention of anyone at Level 3 should be subject to showing 'exceptional circumstances'. Freedom from Torture further recommends that Level 2 should also be restored to 'exceptional circumstances'.
18. **Recommendation:** replace the broad range of immigration factors with the previous threshold of 'very exceptional circumstances' to justify the continued detention as those identified as vulnerable and at risk.

### Issue: Rule 35 safeguard measure does not work, leaving torture survivors languishing in detention

19. Rule 35 is a safeguard originally intended to protect torture survivors from being detained. However, it has never worked effectively.<sup>13</sup>
20. The Adults at Risk policy has artificially lowered the value of Rule 35 reports because they are typically categorised as Level 2 evidence. This now means that the reports are accorded lower weight than under the previous Enforcement Instructions and Guidance policy (Section 55.10) when assessed against the immigration factors. The effect has been a watering down of the value of the reports and giving more weight to "immigration factors".
21. A report will only reach the threshold of Level 3 evidence if the doctor comments on whether the individual is likely to suffer harm in detention. However, this dangerously and incorrectly raises the evidentiary requirement.
22. Firstly, this aspect of the policy is not made explicit in the form to doctors. Secondly, there should be a presumption that if a doctor has completed the report stating, as per the template that, "I have concerns that the detainee may have been a victim of torture", then such a person *would* suffer harm in detention.
23. As a result of the higher evidentiary threshold, the release rate following a Rule 35 report has fallen sharply. In 2016 (before the policy was introduced), 800 detainees were released following a Rule 35 report compared with only 317 in 2017.<sup>14</sup> Those identified as vulnerable are therefore typically not released and suffer further harm, potentially serious deterioration in their mental health and increased risk of self harming and suicide.<sup>15</sup>
24. **Recommendation:** Remove the requirement to comment on the likely impact of ongoing detention so that Rule 35(3) reports can be afforded the appropriate weight.
25. **Recommendation:** Properly resource the Rule 35 process to enable IRC doctors to complete reports swiftly and meet the low evidential threshold required and doctors must sign the response to their reports as required, indicating if they accept a decision to deny release or wish to escalate their concern.

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<sup>13</sup> Stephen Shaw (2016), '*Review into the Welfare in Detention of Vulnerable Persons*', Stephen Shaw (2018), '*Welfare in detention of vulnerable persons review: progress report*'; Medical Justice (2012), '*The Second Torture*'.

<sup>14</sup> Figure 2.14, Shaw (2018)

<sup>15</sup> To further exemplify, between September 2017 and April 2018, Freedom from Torture received 32 referrals from detention. A quarter of those people did not receive a rule 35 report. Of the 24 who did have a rule 35 report, detention was maintained in over half of the cases.

**26. Recommendation: Independent monitoring of Rule 35 process implemented immediately.**  
**Issue: ‘Torture’ definition undermines aim of primary legislation to protect vulnerable people**

27. As of 2 July 2018, the Home Office introduced a new definition of torture.<sup>16</sup> This new definition was introduced following a legal judgment which found the previous definition to be unlawful.
28. The new definition<sup>17</sup> is far too restrictive, raises the standard of proof, and undermines the main aim of primary legislation, which is to identify and protect those vulnerable to harm in immigration detention.
29. The definition is more restrictive than even the UN sees fit to operate. It seeks to distinguish between torture and ill-treatment, which is an important distinction in international law, but entirely unnecessary for identifying those vulnerable to harm in detention. The new definition requires an assessment of whether the perpetrator had “control” over the victim and whether the victim was “powerless”. Such distinctions are irrelevant for the purposes of assessing the vulnerability of an individual in detention.
30. Victims of ill-treatment, such as victims of inter-personal violence on grounds of race, ethnicity, sexuality, blood feuds or clan origins who are not in an obvious situation of powerlessness against the aggressor are likely to now be excluded under this definition.
31. From a clinical perspective, the new definition is highly problematic. It forces doctors to make assessments far beyond their expertise, requiring them to make legal judgments and gather facts relating to asylum claims, which is gravely inappropriate. Doctors also lack resources to complete the forms effectively, including a lack of time, training and background information from immigration documents. Furthermore, the complexity of the definition carries a real risk that it will also be misapplied by caseworkers.
- 32. Recommendation: Statutory Instruments 2018/410 and 2018/411 should be annulled immediately with administrative guidance subsequently amended.**
- 33. Recommendation: The Home Office should rely on a more inclusive indicator modelled on the UNCHR detention guidelines, namely “victims of torture or other serious, physical, psychological, sexual or gender based violence or ill-treatment”.**

Please do not hesitate to contact us should you require any further information,

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<sup>16</sup> The new definition can be found in Rule 35 (6) of the Detention Centre Rules and Statutory Instruments 410 and 411. SI 2018/411 introduces a new torture definition into the Detention Centre Rules. SI 2018/410 introduces the Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2018 enacting the draft updated guidance “Immigration Act 2016: Revised Guidance on adults at risk in immigration detention”. The Guidance incorporates the new torture definition at footnote 3, and introduces a new ‘catch-all’ provision at paragraph 12.

<sup>17</sup> Rule 35 (6) of the Detention Centre Rules states that:

*“ ‘torture’ means any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in which-*

*(a) The perpetrator has control (whether mental or physical) over the victim, and*  
*(b) As a result of that control, the victim is powerless to resist.”*