



Rights of Women's response to the consultation 'Employment-related settlement, tier 5 and overseas domestic workers'

About Rights of Women

Celebrating our 35th anniversary this year, we work to secure justice, equality and respect for all women. Our mission is to advise, educate and empower women by:

- Providing women with free, confidential legal advice by specialist women solicitors and barristers.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives. We received the Mayor of London's Award for Distinction for outstanding and innovative work in relation to domestic violence (November 2007) and the Lilith Project's Best Voluntary Sector Violence against Women Campaign (November 2005).

Rights of Women is an Industrial and Provident Society and an exempt charity. Our Rules set out our charitable purposes. Pursuant to the *Charity Act 2006* we are in the process of registering as a charity.

Summary

Rights of Women will only be answering the consultation questions that relate to migrant domestic workers. We believe that the consultation's proposals in relation to migrant domestic workers are misguided at best and disingenuous at worst. Overall, we are concerned that the proposals threaten to close a migration route that benefits the UK and global economies with consequences that will increase human trafficking and other forms of exploitation and abuse. Rights of Women maintains that the current domestic worker visa benefits the UK economically, offers important safeguards to domestic workers and does not contribute significantly to UK net migration. Rights of Women is particularly concerned that the violence and abuse experienced by domestic workers in the UK is not recognised in the consultation as forms of violence against women which the Government has committed to eliminating. We believe that this failure has resulted in poorly thought-out proposals which contradict the Government's own policies on eliminating violence against women and girls.

Rights of Women understands that Kalayaan¹ and a number of domestic workers have responded to this consultation. We believe that their responses should be given particularly careful consideration given their skills and experiences.

The Government's Commitment to Ending Violence Against Women and Girls

This section of our response applies to all of the questions asked in relation to migrant domestic workers.

The Home Secretary, Teresa May MP:

"The ambition of this government is to end violence against women and girls."²

In its *Call to End Violence Against Women and Girls* and its associated *Action Plan* the Government set out its absolute commitment to work towards the elimination of violence against women and girls. Central to the both documents is prevention, as the Home Secretary states in her forward to the *Call*:

"However, at the heart of our approach will be prevention. We will work across the whole of government on preventative measures to stop violence from happening in the first place."³

¹ Kalayaan is a not-for-profit organisation that provides advice and support to domestic workers. Further information about them can be found here www.kalayaan.org.uk.

² *Call to End Violence Against Women and Girls* page 3.

³ Ibid

Domestic work in the UK is primarily carried out by women; the majority of migrant domestic workers are women and 84% of Kalayaan’s service users are women. The consultation is rightly concerned about the abuse that many domestic workers experience in the UK. Kalayaan’s registration statistics from January 2008-December 2010 shows that domestic workers experience high levels of violence and abuse:

- 58% were psychologically abused;
- 16% were physically abused;
- 64% work seven days a week with no day off or significant rest period;
- 5% were sexually abused or harassed;
- 57% receive a wage of £50 a week or less;
- 50% worked 16 hours per day or more; and,
- 65% had their passports withheld by their employers.⁴

There is no legal definition of what conduct or forms of harm constitute violence against women within the law of England and Wales. However, the *UN Declaration on the Elimination of Violence against Women (1993)*⁵ defines violence against women in Article 1 as:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

Article 2 of the *Declaration* further states that violence against women encompasses, but is not limited to:

“...Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution...”

It is upon this that the Government’s definition of violence against women, as set out in the *Call*, is based. However, the consultation document fails to recognise the abuse that domestic workers in the UK experience as forms of violence against women which require positive State action and to which the Home Secretary has committed to taking a cross-Government and preventative approach. Given the gendered nature of domestic work and the high levels of abuse experienced by migrant domestic workers in both private and diplomatic households, it is of great concern to us that nowhere in the

⁴ *Ending the abuse, Policies that Work to Protect Migrant Domestic Workers*, Kalayaan (Briefing) (2011), page 2.

⁵ A/RES/48/104

consultation document is reference made either to the *Government's Call to End Violence Against Women and Girls* (and its associated documents and commitments) or its domestic and international legal commitments to respond to violence against women. For example, the UK is a signatory of the *Convention on the Elimination of Discrimination Against women* (CEDAW). Article 6 of CEDAW requires States to take "all appropriate legislative and other measures" to deal with trafficking. General Recommendations are issued by the Committee that monitors compliance with CEDAW. *General Recommendation 12 (1989)* sets out the positive obligations on States to eliminate gender-based violence while *General Recommendation 19*⁶ goes further in describing the positive obligations on States to eliminate gender-based violence and makes clear that States may be responsible for private acts if they fail to act with due diligence to prevent the violation of rights or to investigate and punish acts of violence. The Committee that monitors States' compliance with CEDAW has found that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men". The European Court of Human Rights has found that a State's failure to protect women against violence is unlawful discrimination because it breaches their right to equal protection of the law⁷.

Rights of Women believes that this failure to recognise the abuse that domestic workers experience as violence against women has resulted in proposals being formulated which contradict the Government's own policies on violence against women and its domestic and international human rights obligations. The lack of recognition in the consultation of the gendered nature of domestic work and the violence experienced by domestic workers also undermines the value of the consultation exercise as many respondents will be unaware of how the proposals made in relation to the domestic workers fit in with other Government policies and commitments, such as the *Call to End Violence Against Women and Girls*.

Legal aid

Rights of Women would like to take the opportunity afforded by this consultation to emphasise the importance of legally aided advice and representation to migrant domestic workers. Migrant domestic workers disproportionately experience forms of violence against women while they are in the UK and are particularly vulnerable because of their immigration status. Like victims of domestic violence, their vulnerability makes them less able than other applicants to seek advice and represent themselves.

⁶ General Recommendation No. 19 (11th Session, 1992) on Violence against women.

⁷ *Opuz v Turkey* [2009] (Application no. 33401/02) para 191

26. Should the route for domestic workers in private households be closed?

Answer: No.

Rights of Women does not think that there is any evidential basis for ending the domestic worker visa. We understand from the consultation document that a central aim of the proposed changes is to significantly reduce net migration into the UK. Set against this aim the UKBA is able to point to a number of areas of migration which have seen increases in applicants over recent years. In contrast, the evidence suggests that in relation to migrant domestic workers, the number of applicants seeking visas through this route has remained at a consistent and comparatively low level. The consultation document recognises this when it refers to evidence suggesting that from 2003-2009 the number of visas issues ranged from between 12,500 and 10,100⁸. Similarly, closing the route for domestic workers will not have any significant effect on net migration as evidence from the UKBA, analysed by Kalayaan, shows that 94% of the domestic workers coming to the UK return to their country of origin with their employer and do not seek to remain in the UK⁹.

Rights of Women also believes that this proposal contradicts other aims in the consultation, namely to encourage investors and those of exceptional talent to come to the UK. We believe that individuals in these categories are likely to wish to come to the UK with their households and that this will include domestic workers who may have established roles caring for children and housekeeping. Such relationships are beneficial to employers and their families, who are able to arrange their households in the way that benefits them the most. These arrangements are also vitally important to domestic workers who not only benefit personally from these arrangements, but who are often able to support other family members and their wider communities through their remittances. Rights of Women endorses the response to this consultation question submitted by the Immigration Lawyers Practitioners Association (ILPA) on the value of remittances in reducing global poverty and securing the Government's international development policy¹⁰.

Rights of Women appreciates that unemployment in the UK is a significant social problem which results in hardship for individuals and families and costs for the State.

⁸ Source: Control of Immigration Statistics, United Kingdom, 2009 <http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf> and subsets of this data as quoted at page 30 of *Employment-related settlement, tier 5 and overseas domestic workers, a consultation*.

⁹ Calculation done by Kalayaan based on UKBA management information figures for visa renewals in 2009 www.kalayaan.org.uk.

¹⁰ The consultation response, dated 5th September 2011, can be downloaded from here <http://www.ilpa.org.uk/resources.php/13678/ilpa-response-to-uk-border-agency-consultation-on-employment-related-settlement-tier-5-and-overseas->.

However, we do not think it tenable to suggest that domestic worker positions would be filled by British work-seekers if these families were prevented from bringing their domestic worker to the UK with them. These positions are residential and employers seek employees who speak the same language and have the same cultural background as them. Those currently employing domestic workers who live with them may be attached to their employee as they have already employed and lived with that person for at least 12 months (as is required by the Immigration Rules in the case of migrant domestic workers in private households, see further below). These issues are particularly important if the domestic worker's role includes caring for children or other family members. Given this fact we are concerned that the consultation document does not refer to the UKBA's statutory duty under section 55 of the Borders, Citizenship and Immigration Act 2009 as these proposals affect the ability of the children of migrants to continue their relationship with, and receive continuity of care from, an established live-in employee. Domestic workers in this context provide care in long-term relationships to migrant children and facilitate the entry into the UK labour market of the very migrants (workers, investors and those with exceptional talent) that the Government wishes to attract. Rights of Women can envisage such migrants, who usually have a choice of jurisdictions in which to work or invest, seeking to relocate their households in different jurisdictions if they were unable to arrange their domestic circumstances as they would like.

Rights of Women appreciates and shares the concerns outlined in the consultation about cases of abuse which involve migrant domestic workers. We reiterate the point made above that this abuse should be understood and responded to as a form of violence against women. However, Rights of Women disagrees with the suggestion that the existence of abuse makes or contributes to a case for abolishing the private household domestic worker route. Instead we take the view that documented abuses of this system point to a need to retain the route with its current safeguards either in place or strengthened. The current domestic worker visa offers protection to domestic workers who are in the UK. The consultation document suggests that the UK's system is more generous than provision made for migrant domestic workers in other European jurisdictions. Rights of Women believes that this is evidence that the current UK position represents 'best practice' in terms of State's abilities to respond to violence against women, trafficking and forced labour and as such should be championed rather than abolished.

By contrast, if this route were abolished the evidence suggests that more domestic workers would be brought to the UK unlawfully. It is already the case that women are being trafficked into the UK for domestic servitude. See, for example, the recent case of

OOO & Others v Metropolitan Police¹¹ which concerned four young Nigerian women who were trafficked into the UK and were forced to work in households across London. All four women experienced considerable abuse, including physical violence. If there is no legitimate route for families to bring migrant domestic workers into the UK the number of those who are trafficked or brought into the UK unlawfully is likely to increase. Indeed, it was because domestic workers were brought to the UK unlawfully and exploited that the domestic worker visa was first introduced in 1998. Women in this situation who flee an abusive or exploitative employer will be particularly vulnerable because of their immigration status and may face barriers accessing services or themselves be treated as someone who has breached immigration law. An increase in trafficking will result in increased costs for the taxpayer as those who have been trafficked will have no choice but to consent to be referred into the National Referral mechanism for victims of trafficking. This may result in more trafficked women being granted residence permits or other forms of leave to remain in the UK (see also our answer to question 28 on this point). Overall, facilitating the entrance and working of migrant domestic workers in the UK benefits the UK and global economies, while abolishing the route serves only to increase violence against women, trafficking and other human rights abuses as well as costs to the taxpayer. If the abuse of migrant domestic workers is of concern to the UKBA then we recommend that greater efforts are made to investigate and prosecute those responsible for that abuse. This could include:

- providing domestic workers with information on their rights in the UK when their visa is issued to them;
- using the information provided to the UKBA by domestic workers who change employers to take action against abusive employers;
- enforcing the legal requirement that those who employ domestic workers pay tax and national insurance contributions;
- improve the response of the National Referral Mechanism to victims of trafficking for domestic servitude;
- ensure that sufficient, safe, accommodation is available to victims of trafficking and forced labour.

The Government should also ensure that those who are at risk of, or are experiencing abuse are able to access specialist services and legal advice and representation.

¹¹ OOO & Others v Metropolitan Police [2011] EWHC 1246 (QB)

27. If we were to continue to allow domestic workers in private households to enter the UK, should their leave be capped (at a maximum of 6 months, or 12 months if accompanying a skilled worker)?

Answer: No.

Rights of Women believes that migrant domestic workers should be given the same period of leave as their employer, if their employer's stay in the UK is time limited. This is necessary to prevent workers being 'pushed' into overstaying their visa, as if their employer is remaining longer than 6 months in the UK then it is likely that their domestic workers would be encouraged or even pressurised into doing so as well. A system that makes it likely that, or results in, workers being 'pushed' into overstaying their visas would be open to exploitation and abuse. The ability to remain in the UK lawfully for the same period of time as their employer and change employers if necessary is a vital safeguard against unscrupulous employers who otherwise would be able to use the immigration system, and threats to report someone to the police or immigration authorities, as an additional tool of coercion or control. Rights of Women believes that the current system, that issues visas which can only be renewed if the domestic worker is in work, offers the UK economy sufficient protection as if there is no demand for the labour of the domestic worker, it will not be possible for them to renew their visa and they will have to return to their country of origin. Rights of Women also advocates the granting of short periods of discretionary leave to remain in the UK to domestic workers who overstay their visa because of the actions of their employers or because they have experienced violence and abuse. We would like to draw a parallel between this group of women and women who are victims of domestic violence and who make applications for indefinite leave to remain under the domestic violence rule¹². The latter group of women are able to make applications for ILR as overstayers and the relevant UKBA policy recognises that in this situation women may become overstayers through no fault of their own but as a consequence of the violence that they have experienced¹³.

Rights of Women is concerned that these proposals do not seem to be 'joined-up' with other proposals in this consultation which seek to limit the amount of time workers can remain in the UK and reduce the number of workers who are permitted to settle here. These changes, if implemented, will result in increasing numbers of migrants coming to the UK to work for short periods of time before returning to their country of origin. Given this, it does not seem either rational or reasonable to expect these families to disrupt a long-term relationship with a migrant domestic worker who lives in their household and

¹² Paragraph 289 of the Immigration Rules

¹³ *Guidance – Victims of domestic violence – version 2.0* (Valid from 28 July 2011)

www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/family/section4.pdf?view=Binary

provides care to children or other family members. We repeat (see our answer to question 26) that these consultation questions concern domestic workers who have been employed in their employees household, have lived there for 12 months before coming to the UK and are coming to the UK with that employer to continue that work¹⁴. Rights of Women believes that many legitimate employers may simply decide not to work or invest in the UK if they cannot maintain long standing domestic arrangements which are to their benefit.

Finally, Rights of Women is also concerned that this question fails to give consideration to migrant domestic workers as workers with rights in the UK. Domestic workers employed in the UK have important rights which they should be permitted to exercise. Domestic workers are also taxpayers, they pay income tax, national insurance and VAT. We submit that a mindset which views domestic workers only as the chattels of their employers, rather than rights bearers who contribute to the UK economy, only serves to further entrench attitudes towards them that facilitate or enable abuse and exploitation. Any law and policy changes on this issue must ensure that domestic workers have effective access to their legal rights and remedies.

28. Given the existence of the National Referral Mechanism for identifying victims of trafficking, should the unrestricted right of overseas domestic workers in private households to change employer be removed?

Answer: No.

Rights of Women observes that this question is legally incorrect and presents a misleading impression as to the current position regarding domestic workers who seek to change employers. Such mistakes may serve to skew consultation responses to this question and therefore undermines the consultation exercise as a whole. Under the Immigration Rules the ability of domestic workers in private households to change employers is restricted as they must remain in full-time domestic work and notify the UKBA of this change. Domestic workers are not permitted to take any other form of employment either full or part-time. The National Referral Mechanism cannot be posited as an equivalent protection to that offered to a domestic worker by being able to change employers.

Rights of Women welcomes the implementation of the National Referral Mechanism (the NRM) for victims of trafficking as important part of the UK's obligations to identify and protect victims of trafficking under the Council of Europe's Convention on Action

¹⁴ See paragraph 159A of the Immigration Rules
www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5/

against Trafficking 2005 (the Trafficking Convention). Article 4 of the Trafficking Convention defines trafficking as:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

It is unfortunately the case that domestic workers, like other vulnerable employees, may be subject to a number of forms of abuse, discrimination and exploitation including: sexual harassment, failures to pay wages, failures to observe working hours or breaks or being forced to provide their labour. The NRM, whilst a valuable protection for those who have already been trafficked into the UK, does not provide a remedy to those who may not have been trafficked but instead seek to escape forced labour or uphold their employment rights. Indeed, the introduction of a new criminal offence of subjecting someone to slavery, servitude, forced or compulsory labour in section 71 of the Coroners and Justice Act 2009 was precisely because the Government recognised that the legal response to trafficking did not cover all manifestations of slavery or servitude. The fact that this offence carries the same penalties as trafficking offences indicates how seriously the Government takes this problem. Those who are experiencing abuse or exploitation in their employment situation can use their ability to change their employer to negotiate fairer working conditions. Where this is not possible, and a domestic worker has to pursue legal remedies against her employer, the ability to change employer is vital as bringing an employment tribunal claim would be impossible for a domestic worker who remained in the household of the respondent or who was unable to remain in the UK lawfully. Home Office data for the period January 2003-August 2004 shows that 41% of domestic workers who changed employer notified the Home Office that abuse and / or exploitation was their reason for doing this¹⁵. The ability of a domestic worker to accept another position is therefore an important safeguard against these forms of abuse for which there is no substitute.

Even in cases where the domestic worker has been trafficked into the UK, it may be that she would rather seek protection by obtaining new employment rather than accessing support through the NRM. A victim of trafficking must consent to be referred into the

¹⁵ *Ending the abuse, Policies that Work to Protect Migrant Domestic Workers*, Kalayaan (Briefing) (2011), page 3.

NRM. As such the NRM is one of a number of remedies available to those who have been trafficked (alongside reporting offences to the police, making a claim for asylum or returning to that person's country of origin). There are also considerable economic benefits in allowing migrant domestic workers who have experienced trafficking and/or other forms of abuse to change employers. These workers continue to work and pay taxes, continue to have no recourse to public funds, continue to be able to send remittances to their families abroad and do not have to rely on State services. Research done by Kalayaan shows that without the right to change employer a further 78 individuals could have required assistance under the NRM at an estimated cost of over £850,000 over 25 months¹⁶. It is for all of these reasons that the Committee that monitors States compliance with CEDAW recommends that States give independent residence permits to domestic workers, rather than tying workers to any employer:

“When residency permits of women migrant workers are premised on the sponsorship of an employer or spouse, States parties should enact provisions relating to independent residency status. Regulations should be made to allow for the legal stay of a woman who flees her abusive employer or spouse or is fired for complaining about abuse (article 2 (f))”¹⁷

The UK, as a State party to CEDAW and its Optional Protocol, it committed to implementing the recommendations of this committee.

29. Should leave for private servants in diplomatic households be capped at 12 months?

Answer: No.

Rights of Women believes that domestic workers should be permitted to remain in the UK for the same period of time as the diplomat that they work for the reasons outlined above in our answer to question 27. Diplomats may be posted to the UK for a number of years and capping leave in this category is likely to result in domestic workers being persuaded or pressured into overstaying their leave.

Rights of Women believes that the right to change employer should be extended to domestic workers employed by diplomats (see our answer to question 28). We believe that this will deter exploitative employers and enable domestic workers to leave abusive

¹⁶ *Ending the abuse, Policies that Work to Protect Migrant Domestic Workers*, Kalayaan (Briefing) (2011), page 4.

¹⁷ Recommendation 26 (f). General recommendation No. 26 on women migrant workers CEDAW/C/2009/WP.1/R

http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf.

situations. Domestic workers in diplomatic households are particularly vulnerable to abuse because those who are employing them have diplomatic immunity and are therefore not deterred by criminal law sanctions that exist in relation to forced labour, trafficking or other forms of exploitation. Indeed Kalayaan estimates that 3.8% of diplomatic domestic workers are trafficked compared to 0.2% of domestic workers in private households¹⁸. This suggests that the current distinction between domestic workers in private and diplomatic households, in terms of the right to change employers, facilitates violence against women and indicates that the Government is failing in its domestic and international obligations to respond to violence against women with due diligence. The changes to the Immigration Rules that are anticipated by this consultation represent a good opportunity to remedy this.

30. Should an avenue to settlement be removed from overseas domestic workers (private servants in diplomatic households and domestic workers in private households)?

Answer: No.

Domestic workers contribute to the UK economy (including through the payment of tax) and have often made considerable personal sacrifices. The vast majority of domestic workers return to their country of origin with their employers, just 845 domestic workers were granted settlement in 2009 and 1060 in 2010¹⁹. Rights of Women believes that for those who meet the stringent settlement requirements (including that they are working as a domestic worker full-time, they have maintained and accommodated themselves without recourse to public funds and have met the English language and life in the UK requirements) settlement in the UK is a privilege that the domestic worker has earned. Granting settlement also aids integration in the UK as the domestic worker will be able to seek other employment and educational opportunities. The consultation document itself also recognises the value of settlement as a protection against domestic worker's "potential mistreatment and abuse."²⁰ Given the very small numbers of domestic workers who settle in the UK retaining this route will have no impact on the Government's commitment to reducing net migration.

¹⁸ Ibid

¹⁹ Home Office Control of Immigration: quarterly statistical summary Q4 2010, as quoted in the consultation document, paragraph 7.13.

²⁰ See paragraph 7.13 of the consultation.

31. Should the right for overseas domestic workers (private servants in diplomatic households and domestic workers in private households) to bring their dependents (spouses and children) be removed?

Answer: No.

As per the Immigration Rules, before a migrant domestic worker can be joined in the UK by their dependants they have to show that they can maintain these family members without additional recourse to public funds. Migrant domestic workers who are in the UK have lived in the household of their employers and have therefore committed themselves to providing care and support to families who are in the UK. Rights of Women believes that this sacrifice should be recognised by giving such workers a right to be joined in the UK by their own families, if they are able to support them. Rights of Women believes that this also offers migrant domestic workers with an additional source of support should their employment relationship be or become abusive.

32. If we were to continue to allow overseas domestic workers to bring their dependants, should those dependants' right to work be removed?

Answer: No.

Rights of Women believes that allowing the dependants of migrant domestic workers to work should be continued as the measure of economic independence it provides offers an additional safeguard against abuse, allows the family unity of migrant domestic worker to be maintained and contributes to the UK economy. The fact that the family member of a domestic worker has an additional source of income reduces the economic dependency of that worker on their employer and increases the likelihood that the domestic worker would be able to access advice and support if abuse does occur. While the number of dependants in this category is small, the value to the UK economy of these individuals economically and in terms of human capital should not be wasted by preventing them from being economically active and paying tax here.

Catherine Briddick
Senior Legal Officer

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Rights of Women
52-54 Featherstone Street
London, EC1Y 8RT

Tel: 020 7251 6575
Email: cate@row.org.uk
www.rightsofwomen.org.uk