

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written submission from the Equality and Human Rights Commission

Introduction

The Equality and Human Rights Commission (EHRC) is the National Equality Body (NEB)¹ for Scotland, England and Wales, working across the nine protected grounds set out in the Equality Act 2010: age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment. We are an “A-status” National Human Rights Institution (NHRI)², and share our human rights mandate in Scotland with our colleagues in the Scottish Human Rights Commission (SHRC).

The Commission welcomes the opportunity to comment on the policy aims of the Human Trafficking and Exploitation (Scotland) Bill. The bill comes three years after the Commission’s ground-breaking inquiry report into human trafficking in Scotland³, which underlined the need for dedicated legislation on human trafficking in Scotland that is consistent in definition, clear on what trafficked exploitation looks like and enables the effective prosecution and disruption of traffickers. It is encouraging to see this and other inquiry recommendations broadly reflected in the Bill.

Human trafficking is described in the Commission’s inquiry report as “the dark underbelly of globalisation”. It is a complex, multi-faceted problem, which respects no borders. It represents a profound violation of an individual’s human rights, personal autonomy and dignity. Any legal and policy framework designed to address human trafficking must have the needs of victims as its primary concern.

Our response will address a number of provisions in the Bill, including definitions and non-prosecution of trafficking victims, and will also look at the evolving legal framework across the UK. Finally, it will consider wider policy and strategic priorities, in particular the future operation of the National Referral Mechanism (NRM) in Scotland.

Definitions

The Bill presents an important opportunity to remove the current gaps in legislation so that, together with the Modern Slavery Bill and Northern Irish legislation, the UK has a comprehensive and consistent legislative framework to tackle human trafficking.

The Policy Memorandum sets out the international legal background to the Bill, noting that the UK is bound by the Council of Europe Convention on Action against Trafficking in Human Beings⁴ and the EU Directive on Human Trafficking⁵. As the

¹ www.equineteurope.org/-Equality-bodies-

² www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx

³ www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/human-rights-scotland/inquiry-human-trafficking-scotland

⁴ <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

memorandum notes, the Convention and Directive provide comprehensive definitions of human trafficking and exploitation: some of these, such as trafficking for the purpose of organ removal, are made explicit in the Bill (Section 3, (6)); other types of exploitation, such as illegal adoption, forced marriage or forced criminality, are not.

Section 1 of the Bill provides that arranging or facilitating the travel of a person with a view of that person being exploited is an offence. As currently drafted, travel is a prerequisite for the offence – neither the Directive nor the Convention require this – and we are concerned that these provisions may not capture traffickers who are not involved in the arrangement or facilitation of travel. This prerequisite means that it may not be possible to prosecute those involved in the trafficking chain when there is no movement of victims, or where movement cannot be evidenced. We note that the Policy Memorandum states that the elements of travel and exploitation are defined broadly. However, for the avoidance of doubt, we would welcome further detail from Ministers on how the Bill can be aligned as closely as possible with the Directive, to help ensure that all acts of trafficking amount to a criminal offence.

Section 1 (2) currently renders the consent of the victims irrelevant *only* in relation to any part of the arrangement or facilitation of travel. In order to meet the requirements of Article 2(4) of the Directive, it should make it explicit that it is also irrelevant in relation to exploitation that has been obtained by use of force, deception, fraud or abuse of position of vulnerability, regardless of the particular exploitative action being employed. On the current reading, if the victim did not object to their exploitation in these circumstances, their failure to object may continue to be relevant in determining that they have been trafficked, eroding the protection for victims seeking redress by opening debate about the nature and degree of the threats, force or coercion to which they were subjected. In the Commission's view, the consent of a victim is also irrelevant to whether they are a victim of a slavery offence.

The Commission understands that Ministers intend the provisions at Section 3 (7) to cover any of the manifestations of human trafficking and exploitation listed in the CoE Convention and EU Directive. However, as our 2011 inquiry sets out (pp.60-61) professional and public awareness of human trafficking and its' indicators remains low, as one legacy Scottish Police Force noted:

“A clearer definition of what activities or actions might fit within the definition of exploitation provided within legislation would be helpful for law enforcement agencies to improve their understanding of [what] might be considered trafficking”⁶

The Commission would welcome further detail from Ministers on how the definitions of trafficking and exploitation in the Bill reflect the comprehensive definitions provided in the EU Trafficking Directive and CoE Convention, and on how the Bill will assist criminal justice agencies in working to a clear and comprehensive statutory definition of human trafficking and exploitation.

⁶ Evidence from Lothian and Borders Police to the inquiry, Feb 2011 (p64).

Vulnerability

The Bill requires courts (Section 4, (3)) to have regard to “any personal circumstances” which may make a person more vulnerable than others, when determining if a person is being held in slavery or servitude, or required to perform forced or compulsory labour. The EHRC welcomes this open-ended approach to the kind of factors which could lead to a person being more vulnerable than others. However, we note that the provisions at Section 3 (8) (a) & (b) limits the vulnerability factors to be taken into account (in considering whether a person has used or has attempted to use another person to secure services or benefits) to mental/physical disability or illness, youth or family relationship.

It is the Commission's view that the factors which should be taken into account should not be limited to personal characteristics, but should cover wider circumstances. Currently, those victims who are vulnerable to trafficking as a result of their ethnicity, cultural backgrounds, socio-economic or migrant status may not be captured. The EHRC would welcome further clarification from ministers as to why some factors have been listed which may contribute to increased vulnerability in this area, but not others.

Non-Prosecution of Victims of Human Trafficking

The Commission welcomes the provisions to place the Lord Advocate's guidelines on prosecuting someone who is, or appears to be, a victim of human trafficking on a statutory footing. However, it is worth noting that despite existing guidance from the prosecution agencies in Scotland, England and Wales, there remains evidence that individuals continue to be prosecuted for offences committed as victims of human trafficking⁷.

The Bill stipulates that the guidance must include factors to be taken into account in determining whether someone has been compelled to commit a criminal act, and whether that compulsion is directly attributable to the person being, or appearing to be, a victim of human trafficking. Again, it is important to emphasise that compulsion, coercion and control may take subtle, subjective and culturally specific forms, and wider training and awareness-raising for police and prosecutors will assist in ensuring that Section 7 of the Bill achieves its desired policy objective.

The Commission would welcome comments from Ministers on how a victim's protection in Scotland is secured adequately through the Bill, and in particular how it can be ensured that such protections are in line with those guaranteed through Part 5 of the Modern Slavery Bill for victims in England and Wales to ensure seamless protection for victims throughout the UK.

The Wider UK Legal and Policy Framework

The Bill forms part of a UK-wide reform of the statutory framework for identifying and tackling human trafficking and supporting witnesses, with the Modern Slavery Bill currently being considered at Westminster⁸ and the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill which has just received

⁷ See, for example, the Report of the Modern Slavery Bill Evidence Review, p.28, www.frankfield.com/upload/docs/Modern%20Slavery%20Bill%20Evidence%20Review.pdf

⁸ <http://services.parliament.uk/bills/2014-15/modernslavery.html>

Royal Assent in Northern Ireland⁹. Having a coherent and workable statutory framework across the UK is important, and the Commission welcomes steps to ensure that, where appropriate (for example in extending the remit of the Independent Anti-Slavery Commissioner, or the UK Government’s amendments on transparency in commercial organisations’ supply chains) provisions in the Modern Slavery Bill will be extended to cover Scotland.

However, there are other crucial non-statutory elements to identifying and tackling human trafficking, and to identifying and supporting victims. One of the most important of these is the National Referral Mechanism (NRM) which, since 2009, has been the process for the identification, referral, assessment and support of human trafficking victims in the UK.

The EHRC’s 2011 inquiry identified a number of significant concerns with the NRM, including over-centralisation of decision-making, institutional conflicts of interest (e.g. the same body determining a person’s immigration status and their status as a victim of human trafficking), and no right of appeal of decisions¹⁰. We therefore welcomed the 2014 Home Office review of the NRM, which reported in November last year¹¹. The review makes a number of welcome recommendations on, for example, developing a comprehensive awareness strategy to improve identification rates across the UK, and more tailored and person-centred support and assistance for victims.

While the ERHC agrees with many of the review’s findings and recommendations, we feel that more consideration is needed of the distinctive legal, policy and institutional environment in Scotland, to ensure consistency of not simply approach but also outcome. We note that the review itself, in considering children and the NRM, only makes recommendations for England and Wales, as it recognises the different “child protection systems, structures processes and timelines in Scotland” (10.5.1). The Commission would argue that other areas are equally distinctive in Scotland, such as our legal and policy framework for adults at risk of harm¹², or our long-established gendered analysis of violence against women¹³.

We also note that the NRM review recommends the introduction of trained and accredited “Slavery Safeguarding Leads” in the UK’s competent authorities (UK Visas and Immigration and the UK Human Trafficking Centre). “Safeguarding” is a precisely defined legal term and established policy approach to child and adult protection in England and Wales, with no direct read-across to Scotland.

For both these reasons, we would welcome further consideration from Ministers of how any future piloting of proposed changes to the NRM will help ensure consistency of both approach but also outcome in Scotland, and ensure the correct fit with wider devolved policy, law and institutions.

⁹ www.niassembly.gov.uk/assembly-business/legislation/current-non-executive-bill-proposals/human-trafficking-and-exploitation-further-provisions-and-support-for-victims-bill/

¹⁰ see pp. 82 ff.

¹¹ <http://webarchive.nationalarchives.gov.uk/20141202113128/https://nrm.homeoffice.gov.uk/documents/2014/11/nrm-final-report.pdf>

¹² www.scotland.gov.uk/Topics/Health/Support-Social-Care/Adult-Support-Protection

¹³ www.scotland.gov.uk/Topics/People/Equality/violence-women

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February 2015