

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written Submission from the Edinburgh Bar Association

1. The Edinburgh Bar Association (EBA) is grateful to the Justice Committee of the Scottish Parliament for the opportunity to provide this written submission in relation to the Human Trafficking and Exploitation (Scotland) Bill. The EBA acknowledges that the trafficking of human beings for exploitation is a serious and complex issue and, as such, presents significant challenges to those responsible for the investigation and prosecution of relevant offences. Notwithstanding the challenges facing the Criminal Justice System, the EBA supports and welcomes the introduction of legislation to consolidate, strengthen and clarify the law in this area. The EU Directive on Human Trafficking¹ has been adopted by the UK Government and the EBA considers it appropriate to legislate in this area, both to comply with our obligations under international law and, importantly, to ensure that our Criminal Justice System is effective and fair.

Part One – Offences

2. The EBA welcomes, in principle, the introduction of a single offence to be known as the offence of human trafficking. We note that the offence is drawn sufficiently broadly to criminalise those whose roles may be ancillary to some extent – i.e. the ‘facilitators’ – but whose participation is nonetheless an essential element in the process of trafficking of human beings.

3. The EBA would also submit that some consideration is given to the *mens rea* element of the offence provided for in section 1(3). This definition gave rise to some concerns in respect of the “knows or ought to know” aspect provided for in section 1(3)(b). We consider that knowledge and/ or intention are essential to the commission of this offence. The state of knowledge or mind of the accused, in the absence of an admission, is something which will be inferred from the facts and circumstances and, indeed his or her actions. This objective assessment of a person’s knowledge or otherwise may be sufficient to achieve the aims of the Scottish Government. The EBA would highlight the approach taken in relation to the offence of reset, where guilty knowledge can be established if it is found that the accused was wilfully blind to the circumstances².

4. The EBA has some concerns over the drafting of section 1(2) and considers that it may perhaps be preferable to express this in a similar manner to the comparative provisions of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims Act (Northern Ireland) 2015, namely section 2(5) “The consent of B to any act which forms part of an offence under this section is

¹Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA,

²i.e. *Herron v Latta* (1968) 32 J.C.L. 51

irrelevant". Framing the provision in this way makes clear that the trafficked person cannot consent to anything which is criminal in this context.

5. In line with the above, the EBA notes the terms of Article 2.4 of the EU Directive on Human Trafficking and considers that the provisions of Part One of the Bill should also make explicit provision that the consent of a victim of human trafficking to the exploitation, whether intended or actual, should also be irrelevant where certain circumstances exist. We consider that those circumstances should broadly reflect the terms of Article 2.1 of the EU Directive, namely that the consent is brought about by the threat or use of force, by coercion, abduction, fraud or deception, the abuse of power or of a position of trust, or by the exchange of payments or benefits to achieve consent. Furthermore, in line with Article 2.5 of the EU Directive, we consider that this area of the Bill should recognise the particular vulnerability of children to exploitation and therefore, make clear that the consent of a child is irrelevant even where the use of threats etc does not exist.

6. The EBA have some concerns over the clarity of section 3(3) of the Bill. In this regard, we are concerned that the drafting of this section may be unduly wide and/ or may lead to confusion in future prosecutions. We have some concerns about the practical operation of this section were it to remain in its' present form and hope that some consideration is given to amending this section. These concerns relate not only to section 3(3) in itself but also to the interaction of that subsection with section 1(3)(b) – where a person knows or ought to know the other person would be exploited. The EBA acknowledges the particular difficulties posed by sex trafficking and the need to ensure protection for the victims of such offences. In this important area, we feel it is important that the law is clear and unambiguous.

7. In relation to section 3(7), while the provision is drafted broadly, we consider that it may be useful to state that benefits include the proceeds of forced begging or criminal activities. It may be that forcing an individual to beg or engage in criminal activity would fall within section 4 of the Bill. We highlight this matter for the consideration of the Justice Committee.

8. We note that the Bill proposes certain aggravations in terms of section 5 and section 6. We note that the proposed aggravations generally reflect the approach to aggravations in other legislation, such as section 96 of the Crime and Disorder Act 1998. As a matter of public policy, we consider it appropriate that such aggravations should be provided for and, indeed, are consistent with the aims of the Human Trafficking and Exploitation (Scotland) Bill. We are, however, concerned with the nature and extent of the definitions provided for the "a public official" and "an international organisation".

Part Two – Protection of Victims

9. The EBA notes the terms of Article 8 of the EU Directive and also the position outlined in paragraphs 48 to 56 of the Policy Memorandum. While we recognise that the EU Directive does not provide victims of human trafficking with immunity from prosecution, we are concerned that the Bill does not provide a statutory defence to victims, where the alleged offence was committed as a direct consequence of being the victim of human trafficking and/ or exploitation. The EBA welcomes the duty

placed on the Lord Advocate to make and publish guidelines on the prosecution of victims of offences detailed in section 7 of the Bill. We are, however, concerned that this may still result in the prosecution of some victims of human trafficking.

10. While discretion remains entirely in the hands of the prosecutor, we would expect that most victims whose circumstances satisfy 7(2) of the Bill will not be prosecuted. However, it may be that a victim contends that the offence has arisen because of their status and as a result of being subject to compulsion yet the prosecutor is not satisfied of that position. In those circumstances, we consider that a statutory defence would provide an important safeguard to the victims of trafficking. The Lord Advocate may have other public policy considerations arising, particularly where the alleged offending is of a very serious nature. It is important that the Criminal Justice System does not further victimise the victims of human trafficking. A statutory defence would be a desirable, and arguably essential, means of ensuring that victims of human trafficking can properly protect their rights, especially in situations where a defence of necessity might be particularly difficult to establish.

Part Three – Confiscation of Property

11. The EBA notes the legitimate aims which are being pursued by the Scottish Government in Part Three of the Bill. We are, however, concerned about the potential impact on owners of property who were not in any way involved in the trafficking of human beings. We are concerned about the potential disproportionate impact on these individuals by the Bill as presently drafted. This is particularly so given the reference to “satisfactory security” in section 9(6). We consider that the aims sought by this Part of the Bill could be adequately met through less punitive measures of detention and forfeiture.

Part Four – Trafficking and Exploitation Prevention and Risk Orders

12. The EBA again notes the legitimate aims of this section of the Bill, which echoes legislation in other areas, namely sexual offences. We are, however, again concerned about the proportionality of the measures proposed and the test for such orders, particularly that set down for Risk Orders. The EBA is aware that the suppression of human trafficking is a key priority and that the investigation of this crime is complex and multi-national. Nevertheless, we would suggest that for a Risk Order to be imposed, the test ought to be one of “significant risk” that the adult may commit a relevant trafficking and exploitation offence. This order is sought where the person does not have a relevant conviction. The content of Risk Orders will clearly engage the individual’s rights under the ECHR and it is suggested that a “significant risk” test would more appropriately satisfy the proportionality requirement. This consideration also arises but to a lesser extent with Prevention Orders, given that they would follow a relevant conviction.

Part Six – Final Provisions

13. The EBA recognises that companies, partnerships and other commercial organisations may be involved in offences of human trafficking and exploitation. We consider, however, that the ‘mental element’ necessary to attract criminal responsibility, as provided for by section 35(1)(b) is too wide. This concern relates to

the part of this provision which would criminalise an offence which “was attributable to any neglect” on the part of a relevant person.

Concluding Remarks

14. The Edinburgh Bar Association hopes that this written submission is of assistance to the Justice Committee of the Scottish Parliament in considering the Human Trafficking and Exploitation (Scotland) Bill.

Edinburgh Bar Association
24 February 2014