

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written submission from Steve Malloch

This submission is drafted from an international perspective and contains analysis of the current draft bill in relation to the relevant international conventions/directive. It should also be noted this analysis is based on the text of the bill and referenced laws as they are written, and not from the context of communities of practice in either law or social service provision within Scotland or the UK. This submission is presented in an individual capacity, and errors are the author's alone.

Summary

The draft legislation fails to correct existing problems with the framing of human trafficking in the UK, which is viewed predominantly as (im)migration plus crime, rather than being largely about employment conditions plus (migrant) labour rights.

- The proposed definition of trafficking is not consistent with CoE Convention, EU Trafficking Directive, and the UN (Palermo) Trafficking Protocol
- Some language in the bill could be interpreted as conflating trafficking with legitimate consenting adult sex work
- There are significant omissions under provision of support to trafficked persons with respect to EU Directive (privacy, victim/witness protection, right to remain, right to work, educational opportunities)
- The need for regular, *adequately* funded and independently conducted evaluations and human rights impact assessments should be included in the strategy guidelines, as should appropriately conceived and conducted research into the extent of trafficking.

The Scottish Bill would be greatly improved by addressing these issues; and existing laws which reference trafficking should be up-dated to reflect a corrected definition rather than replicating those errors in this law. Coherence with other UK legislation is a good idea, but this should be built around best practice and not the compounding of existing problems.

Over-riding principles of human rights

“Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.”

UN Trafficking (Palermo) Protocol

The Global Alliance Against Traffic in Women published their landmark research findings titled “Collateral Damage” in 2006¹. Research in multiple continents revealed a pattern of human rights infringements resulting directly from *anti-trafficking* laws, policies and practices. These violations range from restrictions on freedom of

¹ http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf

movement based on age and gender, harassment and violence at the hands of police, wrongful convictions for trafficking by people who were not guilty of trafficking offences or were in fact victims of trafficking themselves, and continued failures to recognize and support genuinely trafficked persons.

There is now much greater awareness of some of these issues worldwide and it is encouraging to see in this draft bill an emphasis on protection and support for people affected by trafficking that is based on their consent, is not conditional on their cooperation with prosecutions, and includes an awareness that non-prosecution/punishment should be the norm for people who may have committed crimes in the course of their trafficking.

Every clause of a new trafficking bill, however, must be scrutinized from the perspective of human rights. Every sentence needs to be questioned with: *what are the unintended and possibly harmful consequences of this law?* Human rights are indivisible, universal and inalienable. There should be no collateral human rights damage from a new trafficking law.

The creation of a single human trafficking offence (definition)

*“Article 3 of the [Palermo] Protocol represents the first clear, internationally agreed definition of trafficking in persons ... This forms the basis of the subject matter covered in the Protocol, the basis of international cooperation and other fundamental elements of the treaty. ... [A]ll States parties to the Protocol are obliged ... to criminalize trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, **the full range of conduct covered by the definition**... ... The basic obligation to establish criminal offences is directly linked to the definition of “trafficking in persons” and it is **this definition which is therefore central to any legislation** seeking to implement the Protocol.”*

UNODC Legislative Guidelines on implementation of UNCTOC and the Protocols.

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

1969 Vienna Convention on the Law of Treaties.

The newest conflation: confusing trafficking with traveling.

The first word of the trafficking definition in both the UN Trafficking Protocol and CoE Convention/EU Directive on Trafficking, is “Recruitment.” According to these definitions a person commits an offence, if they *recruit*, or move or harbour, another person through force or fraud for the purpose of exploitation.

The omission of the word ‘recruitment’ from Clause 1(a) of the draft definition of the trafficking offence in Scotland is significant.

The relegation of ‘recruitment’ to a subset of arranging or facilitating travel in Clause 1(a)(i) (line 10 - ‘recruiting the person with a view to transporting or transferring the person’) opens a potential loophole for all businesses who outsource labour. Even if they are aware that their sub-contracting agency cuts corners and breaks labour laws to get the cheapest labour to the right place at the right time, the business who

benefits would be entirely exempt from trafficking liability because they did not 'arrange or facilitate' travel.

The creation of a second offence of 'holding in slavery' or 'requiring forced labour', although welcome, does not adequately replace the omission of the word 'recruitment' in Clause 1(a). Businesses who outsource labour do not 'require' or 'hold' the workers in exploitative conditions – the outsourcing agency manages their terms and so bears all the risks of trafficking prosecutions.

This submission proposes the word 'recruits' be added to Clause 1(a), and words such as 'directly or indirectly employs under conditions similar to ... [slavery/forced labour]' should be added to Clause 4(1). The element of travel, although common, is not critical to the definition: it is enough to recruit through force or fraud for the purpose of exploitation, irrespective of where the employer or employee is located.

While it is true the international trafficking definition was not intended to be copied and pasted but adapted for domestic legislation, the radical restructuring and re-phrasing of the definition not only changes the meaning, but gives the UK a definition that is significantly different from other countries. This exacerbates the problem of different countries compiling inconsistent data, which is one of the problems the international definitions were intended to solve. We can never know the global extent of trafficking if we are all counting different things.

Clearly it is existing UK and Scottish legislation that has driven the choice of language in this case. However, a new and comprehensive anti-trafficking bill such as this, which seeks to fully implement Palermo and CoE Convention/EU Directive, should take the opportunity to correct the mistakes of the past, not replicate and consolidate them.

A fully human rights and person-centred approach might also consider a definition of trafficking that enshrines people's rights as well as specifying the behavior of offenders. For example: "a person who is recruited or moved, through force or fraud, for the purpose of exploitation, shall be considered a 'trafficked-person' and entitled to the full protections and rights of trafficking victims specified in this bill." Such a clause would cover situations where a person's migration journey involves multiple agents, and goes through different stages, without another individual necessarily being guilty of all three elements of action, means and purpose. If rights are only according to 'victims of an offence', then without a perpetrator, there is no victim.

ILO estimates² suggest the large majority of trafficking is for labour exploitation, and a large amount of global migrant labour operates in this distributed recruitment way (more like 'dis-organised' crime than 'organised'.) Recruitment organizations both small and large often charge significant fees leading to large debts and sometimes debt bondage, or make exorbitant deductions for provision of sub standard accommodation; and beneficiaries of outsourced labour may fail to allow staff their due time off, holidays, or provide sufficient health and safety conditions. Taken together these conditions can meet the definition of trafficking, even if it is not clear if there is a single perpetrator of the trafficking offence. While Scotland's number of

² <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>

trafficking cases is, on the basis of available evidence, low by global standards, it would be most unfortunate to omit responsibility for out-sourced labour from our trafficking definition.³

The oldest conflation: confusing trafficking with consenting adult sex work

Background:

Both the Palermo Protocol and the CoE Convention/EU Directive state clearly that "*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.*"

The phrase 'at a minimum' implies the list is open ended and other exploitative situations may also be considered for inclusion; such as begging, sexual abuse of children, or, in some circumstances, forced marriage.

It is very clear in the definition that it is the 'exploitation' of the prostitution of others that forms part of the trafficking offence.

Despite such clear language a number of countries around the world, either in policy or practice, continue to confuse and conflate criminal abusive practices in the sex sector with the consenting choices of adults who decide to engage in sex work. This framing of exploitation in relation to trafficking is deeply problematic from a human rights perspective and often leads to the over-policing of the sex sector – where violent brothel raids, invasions of privacy, confiscations of property, and even coercion and sexual abuse at the hands of law enforcement are rife. This approach also fails to recognize the agency, autonomy, and self-determination of sex workers, most of whom are women, who are often viewed by law enforcement and anti-trafficking organisations through a 'you must be a coerced victim' lens. This can lead to false identifications of women as trafficked when they are not, with negative consequences such as being deported back home before they have earned the money they intended to save, often with a 'trafficked' label over them – a label that can lead to gossip, harassment and even discrimination and abuse in their home communities, especially if details are leaked to media.⁴ Focussing disproportionate attention on the sex sector also distracts money and human resources away from sectors that do need closer attention: in Scotland this includes agriculture, food processing and hospitality.⁵

Great caution also needs to be exercised in relation to 'end demand' discourses in relation to trafficking in the sex sector. While Palermo and CoE/EU language does

³ Explanatory notes to this bill reference 55 victims of trafficking in Scotland in 2013 with an assessment the real number could be two or three times that high. Countries at the other end of the spectrum have estimates that put trafficking figures in the tens (or even hundreds) of thousands, though all figures should be treated with caution given the difficulties of quantitative trafficking studies. For example: United Nations Inter-Agency Project on Human Trafficking, 2010 http://www.no-trafficking.org/reports_docs/2009-2010_UNIAP_sentinel_surveillance_Poipet.pdf

⁴ See "Collateral Damage" as well as other more recent publications by other organizations.

⁵ Geddes, Alistair, Gary Craig, Sam Scott, L. Ackers, L. Robinson, and D. Scullion. "Forced Labour in the UK." *York: Joseph Rowntree Foundation*, 2013. http://cdn.basw.co.uk/upload/basw_120247-5.pdf.

refer to analysis, discouragement and reduction of “the demand that fosters all forms of exploitation related to trafficking in human beings”⁶ – the meaning in this regard is clearly ‘all forms’ of exploitation, including the wider economic framework where demand for cheap goods and services, and therefore cheap labour, contribute to exploitation.

Demand is indeed an important area for discussion, along with Supply, Quantity and Price, the stable-mates of Demand in free market economic theory and with which Demand dynamically (or ‘elastically’) interacts. The influence of global capitalism, restrictive immigration policies, limitations of migrant workers rights, and economic inequality both within and between States are also important subjects for analysis in this regard.

The tendency to interpret ‘end demand’ as meaning ‘end demand for prostitution’ is often connected with proposals to criminalise the clients of sex workers. Sex worker rights groups, as well as anti-trafficking organisations such as the Global Alliance Against Traffic in Women strongly oppose criminal penalties as they have not been demonstrated to reduce either trafficking or sex work, nor have they stopped violent or abusive clients. Such approaches instead threaten sex workers incomes and working conditions (by reduced number of clients and increased competition), increase their vulnerability (through less time to assess potential clients), increases stigma, and gives power over sex workers to police.⁷

Draft Scottish Bill – conflation:

The draft Scottish bill states a person commits an offence if they arrange or facilitate travel for the purpose of exploitation, and a person is exploited if “*Another person exercises control, direction or influence over prostitution by the person in a way which shows that the other person is aiding, abetting or compelling the prostitution.*”

As outlined above, the internationally agreed definition of trafficking is unequivocally clear: it is the “exploitation of the prostitution of others” that forms part of the trafficking offence. This is deliberate language, distinctly different from previous international agreements and conventions.⁸ The definition does not say ‘profiting from’, or ‘aiding or abetting’ or even ‘facilitating travel for’ the prostitution of others. While such actions may break certain domestic laws, they were never intended to form part of the modern definition of trafficking.⁹

⁶ link and check quotation

⁷ “Moving Beyond ‘Supply And Demand’ Catchphrases: Assessing the uses and limitations of demand-based approaches in anti-trafficking” (GAATW, 2011)

http://www.gaatw.org/publications/MovingBeyond_SupplyandDemand_GAATW2011.pdf

⁸ The UN Trafficking (Palermo) protocol is the internationally agreed definition of trafficking, and largely replaces the 1904 agreement and 1949 convention. (Under the Vienna convention, there is the argument of a new preemptory norm due to the greater number of signatories of Palermo, and once all parties to 1949 convention sign the 2000 protocol the former will cease.)

⁹ Indeed, any reading of the history of anti trafficking legislation though the 20th century will quickly reveal that the conflation of trafficking and prostitution has been problematic from a human rights perspective for a long time. “According to the UN Special Rapporteur on violence against women, in her contribution to the negotiation of the Trafficking Protocol, this [1949] Convention was ineffective in protecting the rights of women who had been trafficked, was based on outdated ideas from the 19th century, and equated trafficking only with prostitution while failing to actually create a definition of trafficking.” Quoted in: http://www.afppd.org/files/1113/8206/9530/Policy_Brief.pdf

The draft Scottish definition as it stands, therefore, broadens the scope of the trafficking definition to a point where it could be dangerously interpreted to apply to friendly actions in support of consenting adult sex workers. For example, buying a ticket for a friend who wants to travel to engage in sex work, and even condom distribution or issuing safety advice by outreach workers, could be considered 'influence' and 'aiding or abetting' another's 'prostitution'.

The language of 'aiding and abetting' in common usage in the UK refers to being an accessory to a crime. However, sex work is legal under Scottish and English law (although many of the associated practices are criminalized.) The contrast in language between 'aiding, abetting' and 'compelling' is also striking. EU Directive language in relation to 'aiding and abetting' relates to the commission of a trafficking offence, not to selling of sexual services; so would be applicable in Clause 1 and Clause 4 of this bill if it were to be used and in the sense of 'aiding and abetting' someone who commits the offences of trafficking or slavery/forced labour.

Scotland and the UK are free to legislate domestically as they see fit in relation to the sex sector through criminalization, regulation/legalization, or de-criminalisation. There is no internationally agreed consensus on either the ethics or morality of sex work (and likely never will be), but full de-criminalisation is the recommendation both of most sex worker-led organisations around the world and of a growing number of human rights bodies, public health bodies and UN Agencies.¹⁰

While it is bad enough that current domestic UK legislation potentially criminalizes helpful and supportive actions by friends and family of sex workers such as drivers, security, receptionists, agents, cleaners and others, to escalate these actions into *aggravated* crimes with a *possible life sentence* not only defies logic, but is counter-productive to anti-trafficking efforts and a significant misinterpretation of the international trafficking laws.

Trafficking offences in all sectors are often referred to as hidden crimes since many trafficked people work away from the public eye (inside houses, or factories, or in remote fields). In the language of law enforcement it is a 'surveillance crime' - one that you tend not to find unless you go looking for it, and consequently the amount you do find is proportional to both the amount of time and money spent looking, and *where* you look. Accordingly, it makes strategic sense that finding these crimes needs to be intelligence driven. Stakeouts and covert surveillance are expensive, cannot be carried out with no probable cause, and risk major invasions of privacy. So to make good use of money, avoid wasting resources where they are not needed, respect people's privacy, and to focus resources on situations where crime is indeed taking place, good intelligence and research skills are needed.

The primary sources of information regarding trafficking in the sex sector are sex workers themselves (regarding their own situation or that of others) and those in

¹⁰ See this list of 107 sex worker rights projects (<http://www.swaay.org/groups.html>) and browse the website of each one to see their views on decriminalization.

See also: Human Rights Watch (2012 World Report), Amnesty International UK (2014, AGM), GAATW (see previous publication), Lancet medical journal (2014), World Health Organisation, UNAIDS, UNFPA (2012 public health guidelines on HIV), among others.

proximity to them including clients, agents, security, drivers and others. However, if each of these roles are effectively criminalised as 'aiding and abetting' another's 'prostitution', not only is there no positive incentive to report suspicions or concerns, there is an extremely strong negative incentive, since people would be potentially incriminating themselves if they did so.

As mentioned above, another disturbing aspect of the current draft legislation is the risk of interpretation of the law to mean that outreach workers and support service providers could be seen to be 'influencing' or 'aiding and abetting' sex workers through provision of condoms or even advice. This too is deeply problematic when considering the need for such services in efforts to combat HIV/AIDS. Peer educators, and sex worker led outreach organizations have been pioneers in the struggle against HIV, and to criminalise their actions is nothing short of reckless.¹¹ The Lancet medical journal published a series of articles in 2014 that "*investigate the complex issues faced by sex workers worldwide, and calls for the decriminalisation of sex work, in the global effort to tackle the HIV/AIDS epidemic.*"¹² And the World Health Organisation (WHO), the Joint United Nations Program on HIV/AIDS (UNAIDS), and United Nations Population Fund (UNFPA) recommended in 2012 that "*All countries should work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers.*"¹³

While there may, or may not, be unspoken agreements in place with UK law enforcement not to interpret existing laws in ways that could target consenting adult sex workers and their friends and family, the fact that such broad, open-ended and easily misused language still exists on the statute books is a cause for concern - especially as we see an aggressive 'Strathclydisation' of policing around Scotland.¹⁴

The development of this current trafficking legislation is an opportunity to address the errors of the past, not repeat and escalate them.

At a minimum Clause 3 (3) should be rewritten to remove the words 'influence' and 'aiding' and 'abetting'. The crime should be 'exercising control or direction' that shows a person is 'compelling' another's prostitution or 'employing/holding them under conditions of or equivalent to forced labour or slavery'. This would maintain maximum compatibility with existing legislation without creating additional harm.

Regarding Clause 3 (5) – other forms of sexual exploitation – this is an area where the international definitions lack clarity, and the inclusion of specific elements here is appropriate. Although some of the referred legislation still includes out-dated and problematic language,¹⁵ the overall principles outlined in terms of abuse of children,

¹¹ Even in the USA one of two President Bush era "anti prostitution pledges" preventing state funding being issued unless recipient organisations sign a declaration to 'oppose prostitution', was ruled unconstitutional by the Supreme Court. The first pledge related to HIV/AIDS work, and the second, which relates to anti-trafficking, has not yet faced legal challenge and remains in effect.

¹² <http://www.thelancet.com/series/hiv-and-sex-workers>

¹³ <http://apps.who.int/iris/handle/10665/77745>

¹⁴ <https://commons.scot/articles/3/manufacturing-consent-why-police-scotland-must-stop-before-it-searches>

¹⁵ 'consorting with a person of known immoral character' is a particularly Victorian example.

use of violence, force, coercion for personal gain, abuse of positions of trust etc. are generally appropriate to describe categories of 'other forms of sexual exploitation'.

Means and purpose

Palermo and EU Directive both use three elements in their trafficking definition: actions, means, and purpose (where the purpose is always exploitation). The draft Scottish bill does not use this structure, but instead tags elements of 'means' into each definition of exploitation. Abstracting out these elements and comparing them to the international definitions is illustrated in the following table.

Language of 'means' (Palermo/EU Directive)	Language of 'means' (draft Scottish bill)
threat or use of force, forms of coercion abduction fraud deception abuse of power or vulnerability 'purchasing' people or their service	holds, requires (4); control, direction, compulsion (of 'prostitution' 3(3)); involves (in indecent pictures of a child, child sex offences, sexual violence 3(4), 3(5)); encouraged, required, expected (to commit an offence re. tissue/organs 3(6)); force, threat, deception (for benefits 3(7)); use or attempt to use (abuse of power 3(8)); <u>influences, aiding, abetting</u> (of 'prostitution')

In the above table, the various types of 'means' are summarized from both the international legislation and the current draft Scottish bill. Much of the language is comparable, and clearly implies force, fraud and abuse of power. However, the final underlined terms do not necessarily imply force or fraud, and leaves a huge amount of room for multiple interpretations including those with significant human rights implications for sex workers.

Pressure to achieve prosecutions and convictions (two of the measures currently used in what limited monitoring and evaluation of anti-trafficking efforts exists) are a well-known contributing factor to miscarriages of justice.¹⁶ While broad definitions of laws may leave wide room for interpretation for law enforcement – including, perhaps, the opportunity to convict someone for something else when evidence to convict on the primary crime is insufficient - the risks of misapplication is high.

Clearer distinction is needed between friendly supportive actions between consenting adults and criminal acts of force or deception.

To prevent misuse of this law, to guide policing and judicial policy, and for the sake of clarity, the committee may consider adding a specific clause that asserts the primacy of human rights, and states categorically this bill/act is concerned only with abusive or exploitative practices, and no part of it should be used to prosecute non-exploitative behaviour engaged in by consenting adults.

¹⁶ See "Folk Devils and Moral Panics" by Stanley Cohen, and "Policing the Crisis" by Stuart Hall. Two standard sociology textbooks that still have great relevance to today's trafficking debates.

“Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.” UN Trafficking (Palermo) Protocol

These human rights include freedom of movement, freedom of expression, the right to work, the right to choose the nature of that work, the right to be adequately compensated for that work, the right not to be discriminated against and to live free from violence, rights to health, justice, accommodation and more. Should any clause of this bill be used to infringe the above rights, it may be open to legal challenge under human rights law.

Consent is never irrelevant to a person

Both Palermo and EU Directive include language stating the *“consent of a victim of trafficking ... to the intended exploitation ... shall be irrelevant where any of the means [of force, coercion, fraud etc] ... have been used.”*

It is vitally important to understand while this does mean that a person’s consent does not prevent the existence of an offence, a person’s consent is enormously important in considering how they see themselves and how they should be treated by both law enforcement and support agencies.

An employer who fraudulently recruits workers then pays and treats them appallingly badly is not exempt from committing an offence just because the worker consents to the arrangements – even if these terrible circumstances are actually better than the situation they might face back home. If they exploit their workers, they are guilty of an offence.

This may sound pedantic, but if this bill is to take a human-rights centred approach seriously, it must consider use of this word carefully. People affected by trafficking all over the world report many problems with ‘victim’ support services. These problems range from poor quality shelter accommodation and restricted movements, to mandatory medical testing, lack of privacy, not being listened to, long periods of waiting in limbo for legal proceedings, often followed by forced deportation without adequate compensation.¹⁷

What all these problems have in common is a lack of respect for the agency, voice and participation of those affected by trafficking. Many support services are provided by well-meaning and well-intended organisations, some have religious motivations and many have different (higher) class/caste donors and staff than the people they typically cater for. While some do provide excellent services, others are reported to consider those they care for inferior or less important, and maintain a ‘we know what’s best for you’ approach to care.

Even the international laws display an element of this attitude in assuming that repatriation will typically be the most appropriate response after identifying someone as trafficked, rather than prioritising adequate compensation, reparation, or the right

¹⁷ See, for example, “Collateral Damage” (GAATW), amongst others.

to continue working.¹⁸ (This is partly due to the politics of how international treaties are negotiated rather than ideology, but the final text has the same consequences.)

Listening to the needs and desires of trafficked persons should be the starting point for designing laws and policies. A number of organisations have conducted research with trafficked persons looking at both their trafficking experiences and their ‘after-trafficking support services’ experiences for many years. A number of common themes emerge including: understanding why people are motivated to migrate in the first place, what they hope to achieve by working abroad, and what faces them back home when they return. For many, returning home empty-handed is the biggest shame imaginable, a shame far greater than the choices of work they may have made while away, and being sent home empty-handed and against their will simply inspires them to migrate for work once more – leading to the by now well documented risk of “re-trafficking.”¹⁹

So while consent does not prevent the existence of an offence, it does speak volumes to the agency and ambition of the affected person. Someone who has consented to their working arrangements, for example: may be much less likely to consider themselves a ‘victim’; they may be uncomfortable with being associated with the word ‘trafficking’ (especially given its connotations with sex sector); their prime concern is likely to be receiving full back payment for services already rendered, and they may want to continue working and earning money independently even after being identified as trafficked. (These concerns may also apply to many who did not consent to their circumstances.)

This language of consent is especially problematic when talking about sex work, and, as with ‘end demand’ discourse, this language has been deliberately taken in a certain direction by prostitution-abolitionist/sex-work-prohibitionist groups.

Under no circumstances should this phrase ever be interpreted to mean the consent of an individual sex worker to engage in sex is ‘irrelevant’. As Glasgow based sex workers have pointed out, to treat “*our consent as meaningless – ... is the position of an abuser.*” Such a position has no place in law, public policy, or support services.²⁰

This choice of language is perhaps best avoided in this Bill. Clause (2) can be more inclusively written along the lines of “A person commits an offence irrespective of whether the other person agrees to any part of the arrangements.” This phrasing provides for prosecuting all offences that lead to exploitation without denying the agency or self-determination of the affected person.²¹

¹⁸ In Palermo, for example, the language of Article 8 (‘shall’ facilitate repatriation) is much stronger than Article 7 (‘consider’ leave to remain); and repatriation of victims is only ‘preferably’ voluntary.

¹⁹ These perspectives are illustrated in a range of publications by GAATW. See for example the 2010 series of working papers title “Beyond Borders.”

http://www.gaatw.org/index.php?option=com_content&view=article&id=107&Itemid=87

²⁰ See <http://confideinfo.com/why-have-we-set-this-up/>

And also, DeBoise, Crystal. “Human Trafficking and Sex Work: Foundational Social-Work Principles.” *Meridians: Feminism, Race, Transnationalism* 12, no. 1 (2014): 227–33. (A journal of Johns Hopkins University.)

<http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/meridians/v012/12.1.deboise.html>

²¹ See also language used in draft Modern Slavery Bill: consent ‘does not preclude’ existence of an offence.

Increasing the maximum penalty from 14 years to life imprisonment for this offence;

Some crimes associated with trafficking are serious, cruel and certainly deserving of life sentences.

However, concerns raised above about the clarity and scope of the trafficking definition combined with the risk of (public or political) pressures on police and judiciary to prosecute and convict trafficking offenders also raise the possibility of wrongful prosecutions and convictions.

Due process of appeal, and guidance that this Bill should focus on coercion, fraud and abuse, and not the non-exploitative behaviours of consenting adults, would help prevent this.

Establishing statutory aggravations to any criminal offence where the offence is connected with human trafficking, and where the offence has been committed by a public official in the course of their duties;

This aggravation is in line with EU Directive, and is appropriate - within the above concerns about miscarriages of justice and deliberate or accidental targeting of non-exploitative behavior of consenting adults.

Placing a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences;

The principle of non-prosecution and non-punishment may be implied here, however, for the sake of clarity and emphasis, the Bill might make reference to Article 26 of the CoE Convention and Article 8 of the EU Directive, and state that the Lord Advocate's guidance should be on how best to implement this article domestically.

Placing a duty on Scottish Ministers to secure the provision of relevant immediate support and recovery services for the victims of trafficking;

No two trafficking 'victims' experiences are the same. Even when two people follow the same journey and experience the same events, the psychological impact and consequences can vary greatly. Trafficking support services should be centred around the needs and desires of the affected person(s).

As mentioned above, this includes catering for people who may not consider themselves as 'victims', who may be very keen to continue working during and after the determination of their trafficking status (for adequate compensation), and who may be likely not to wish to return home without having achieved the goals which inspired them to travel in the first place (often saving money or sending money home). They might even reject any form of assistance or support that has the label 'trafficking' attached, such is the stigma still associated with that word after so many years of conflating it with the sex sector.

In all these cases, and for many trafficked persons more generally, adequate compensation for work and services already rendered should be a high priority in terms of reintegration, in addition to basic needs and psycho-social support.

Additional compensation for suffering caused, or reparations from the state who bear responsibility for the environment in which exploitation took place, should be *in addition* to adequate wages and remuneration for the work they have already done. While Palermo and EU directive emphasise the importance of smooth arrangements for repatriation, and the voluntary nature of such where possible, neither adequately reflect the views of trafficked persons who frequently point out that returning home empty handed is one of the worst outcomes they face, and many choose to migrate again if this happens. This point cannot be emphasised enough. Migrant women and men who have been unlucky with their migration experiences do not appreciate privileged superior 'we-know-best' attitudes. Listening to their needs with an open mind should be a top priority for all trafficked persons support services.²²

Independent Advocacy is very relevant in this regard in order to minimise conflicts of interest between day-to-day care providers and the best interests of the affected person. This submission endorses the proposal from Scottish Independent Advocacy Alliance previously submitted under the consultation initiated by Jenny Marra MSP, and calls for a right to Independent Advocacy to be specified under Part 2 of the draft bill.²³

The dignity, independence and human rights of people affected by trafficking must come first. A compensation fund would be a welcome development, but any kind of 'victim/survivor fund' should be named positively and without reference to the word 'trafficking' or 'victim'. For example, a "Migrant Workers Justice Fund" or similar.

The provisions for survivors outlined in Part 2 are all welcome, especially the need for consent of adults to assistance and non-conditionality of cooperation with prosecutions.

Several protections outlined in the international conventions are absent from the current draft but are also important to include. These include:

- The primacy of protecting the privacy of trafficked persons (both from media and from communities and families back home, and covering release of any identifying details not just names/nationalities)
- The need for victim/witness protection when appropriate
- Protection from re-victimisation through court proceedings (use of audio/video links, confidential depositions etc.)
- Provision of opportunity to work or keep working, and earn their own income, even after being identified as trafficked
- Provision of educational opportunities
- Right to remain for people with undocumented immigration status

While the last of these clearly relates to reserved matters, the others do not and could be considered for inclusion in this Bill. For matters that are reserved, representations could be made to Westminster to ensure that relevant legislation complies with EU Directive.

²² These perspectives are illustrated in a wide range of publications by GAATW. See for example the 2010 series of working papers title "Beyond Borders."

http://www.gaatw.org/index.php?option=com_content&view=article&id=107&Itemid=87

²³ See "Scottish Independent Advocacy Alliance", submission to Jenny Marra MSP's consultation on human trafficking. (Copy is on file with SPICE at Holyrood.)

Establishing trafficking and exploitation prevention orders and risk orders;

This submission raises a number of concerns in relation to prevention orders and risk orders.

Neither of these legal instruments are referenced in the international treaties on trafficking, and they seem to be conceptually relatively new even within the UK. Risk orders appear to draw from anti-terrorism legislation and the prevention of child abuse or adult sexual offences. They are very controversial given their restrictions on a person's liberties and enormous stigma, despite being able to be issued without a person having been convicted of any crime.

On the other hand, efforts at prevention of trafficking are encouraged by the international treaties, and it is possible, in exceptional circumstances, that there are times when action is needed in order to prevent a crime that is known to be about to occur. Whether there is adequate legal basis for such actions within existing laws is beyond the scope of this submission to consider in the time available.

However the following points, certainly deserve consideration by the committee:

1. The jurisprudence of pre-emptive justice is highly questionable
2. Thirteen pages out of thirty eight in this draft bill are devoted to these proposed forms of pre-emptive justice. Was similar time and effort spent considering mechanisms and funding for labour conditions inspections in at risk sectors (especially agriculture, food processing and hospitality) in order to identify people who have *already been* trafficked?
3. What exactly is the problem these wide ranging orders are supposed to solve?
4. What evidence base is there of cases where these orders would have made a difference?
5. What evidence base is there that these orders will even work in practice?

The concept of pre-emptive justice brings with it substantial risks, so great caution needs to be taken before implementing such wide reaching and human rights restricting legislation.

If they are included in the final legislation, it is vitally important these orders are used judiciously, and in a '*defensible and ethical*' manner "*that is proportionate to risk, legitimate to role [and] appropriate for the task,*"²⁴ as well as being subject to regular evaluation.

Alternative to risk and prevention orders?

The fact that these orders have evolved out of a context focusing on sexual abuse and terrorism suggest their inclusion is indicative of a continued misunderstanding in Scotland and the UK of what human trafficking actually is and how it should be framed.

²⁴ <http://www.rmascotland.gov.uk/frame/>

Through the Scottish/UK governments' lens, trafficking is:
(im)migration + (organized) crime + (sex crime) victims²⁵

Through the lens of migrants, survivors, people at risk of trafficking and those who work with and alongside them, the reality is more like this:

labour conditions + (migrant) worker rights + (other) human rights²⁶

Labour conditions in the latter framing include conditions of those working in the sex sector, many, or perhaps the majority, of whom see their activities as a form of work. So rather than exporting methodologies addressing sexual violence and *terrorism* to other sectors related to trafficking, the application of *labour* standards to sectors where they are not yet fully in place should be considered – most especially in the informal economy, including sex work.²⁷

For example, adapting, in participation with sex workers themselves, tools such as the ILO's 'six indicators' for forced labour in assessing whether someone working in the sex sector is being exploited or not could be worth exploring.²⁸

And giving sufficient resources to appropriate bodies to inspect and investigate labour conditions should be a top priority for anti-trafficking policy. The labour conditions inspection regime in the UK is so poor that, according to the UK's government's own research "*An employer can expect a visit from HMRC once every 250 years and a prosecution once in a million years...*" This in turn leads them to the conclusion that "*There seems to be little incentive for rogue employers to be compliant given the minimal chance of inspection and even smaller risk of prosecution.*"²⁹

While it is certainly possible that risk and prevention orders may prevent occasional crime in exceptional circumstances from being committed, adequate inspection of labour conditions will find far more people who are *already* victims of crime because

²⁵ <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/63/61>

²⁶ "Human trafficking is a labour issue, says Bandana Pattanaik (International Coordinator of the Global Alliance Against Traffic in Women)" <http://www.theguardian.com/global-development/video/2013/aug/01/human-trafficking-labour-video> ; See also: <http://www.theguardian.com/global-development/poverty-matters/2013/aug/01/human-trafficking-south-east-asian-women> "When we at the school first started looking at this issue, we focused exclusively on sex trafficking, ... but ... now... [t]here is a growing realisation that labour trafficking is a much wider, more subtle phenomenon, ..." Cathy Zimmerman, London School of Hygiene and Tropical Medicine.

²⁷ <http://www.nswp.org/resource/commentary-the-draft-protocol-combat-international-trafficking-women-and-children-supplemen> "NSWP recommends ... That States afford all sex workers ... the full range of protections under international labour and human rights standards. This follows the recent recommendation of International Labour Organization (ILO) that sex work be recognised and treated as labour." See also: <http://www.nswp.org/news-story/labour-laws-not-criminal-laws>

²⁸ Using ILO's six indicators, concern about forced labour is raised when two or more of the following are experienced by someone in their work: restricted movement, violence or abuse (including of a sexual nature), late or non-payment of wages, bonded labour, withheld identity or other important documents, and threats to report the worker to authorities. Isolated or individual incidents are normally covered by existing legislation on criminal justice (violence, abuse) or labour and civil laws (contract or employment disputes, small claims etc.)

²⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328010/MAC-Migrants_in_low-skilled_work_Summary_2014.pdf

their labour is exploited – including to the extent of meeting the definition of forced labour and trafficking.

Placing a duty on the Scottish Ministers to prepare, publish and regularly review and update a trafficking and exploitation strategy to be laid before the Parliament;

The strategy must include:

- Appropriate, and appropriately funded, independent primary research into the scale and scope of trafficking in Scotland, that incorporates gender perspectives as well as considering race/nationality/migrant status and inequality.
- This research should draw on experience of academic and private sector as well as civil society. Feminist participatory action research³⁰ might be a good starting point for some of this. Highest consideration needs to be given to appropriate research methods that do not cause fear or alarm to those working in at risk sectors.³¹
- The strategy should include adequate funding and support for *appropriate* labour conditions inspectors, especially in high-risk sectors.
- The strategy should require comprehensive and independently carried out human rights impact assessments of all areas affected by this legislation. Annually, or at a minimum every three years, and including assessment of unintended consequences.
- A monitoring mechanism should be established with a statutory requirement to review the legislation in the light of the result of human rights impact assessment.
- Special attention should be paid to rights of marginalized groups – such as migrant workers and workers in the informal economy (including domestic workers and sex workers) – in monitoring and evaluation of the legislation’s implementation.

Placing a duty on public bodies to provide anonymised data about potential human trafficking and exploitation victims to Police Scotland.

Anonymisation of data is highly important, and must include any potentially identifying information as well as the more obvious names, nationalities, places of work etc.

³⁰ FPAR seeks, among other things, to address the inequalities of power inherent in much research with marginalized groups. Search the internet for (lots) more information.

³¹ <http://www.nswp.org/news-story/new-police-policy-indoor-sex-workers-revealed-home-visits-condemned-raids-disguise>

Other issues of concern

No reference to NRM or identification measures

Reference to the widely criticized NRM and the role of UKBA in identifying trafficked persons is absent from the draft bill. This may relate to reserved powers and other issues as per the explanatory notes, but as far as possible with the remit of the Scottish Parliament, efforts to ameliorate the problems with NRM should be considered and adopted even if it means two different systems are in place across UK.

Need to mainstream human rights aspects

There is a need for consistent use of language and understanding across all actors and agents involved in anti-trafficking response. This should be firmly based in human rights law and customary principles and based on the best available evidence. Anti-trafficking training materials, and organisations providing trainings, should be independently assessed as part of a human rights audit to ensure that all those involved in anti-trafficking efforts are fully aware of and understand the human rights of those they seek to assist. Organisations working with trafficked persons and/or marginalized groups should listen to worker-led and self-organising groups from among the communities they serve (including migrant workers and sex-workers).

Boarding of vehicles, ships, aircraft (Modern Slavery Bill)

Detention of vehicles, ships and aircraft in relation to proceeds of crime are welcome and appropriate, and funds raised should be used for compensation of victims of trafficking crimes.

The proposed and related right to board such vehicles as outlined in the draft Modern Slavery Bill, may also be appropriate in some circumstances and it may be necessary to legislate if these police powers are currently lacking (such as in response to conditions of people working in the fishing industry in waters off Scotland's coast). However, these powers if granted must be used judiciously, and be based on intelligence led reasonably grounds for suspicion.

This is because we have an ethical duty to consider *unintended consequences* in all aspects of this law. Experiences from other places - e.g. Thailand³² - have shown that routine inspections of vehicles can lead to greater use of cramped and dangerous hidden compartments by both smugglers and traffickers. Such compartments are often over-crowded, lack adequate ventilation and have led on a number of occasions to death by suffocation. We must ensure that one of the unintended consequences of this bill is NOT an increase in deaths among smuggled or trafficked persons. The importance of this point cannot be underestimated. Restrictive immigration policies push migrants to unofficial channels – and this trafficking law must protect their safety and human rights not encourage practices that may lead to their deaths.

Steve Malloch
24 February 2015

³² <http://www.bangkokpost.com/opinion/opinion/454057/can-thailand-free-its-modern-day-slaves>