

## Justice Committee

### Human Trafficking and Exploitation (Scotland) Bill

**Written submission from Dr Liz Campbell and Dr Sharon Cowan, School of Law,  
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We welcome the publication of the Human Trafficking and Exploitation (Scotland) Bill and its consolidation of existing offences related to human trafficking. However, we have concerns about some elements, namely the definition of exploitation and trafficking and exploitation risk orders. We offer some remarks on other elements of the bill, such as consent, exploitation, and the inclusion of the proposed substantive offences within the existing scheme of confiscation.

#### **Consent**

We agree that the consent of the person trafficked should be irrelevant to the question of whether or not an offence of trafficking has occurred. In these kinds of cases it is difficult to establish whether consent has occurred, and the precise nature of the conduct that has been consented to. A focus on the behaviour and knowledge or intention of the trafficker is appropriate for this kind of offence.

#### **Exploitation**

We are pleased to see that the Bill defines exploitation for the purposes of the offence of human trafficking. One concern, however, relates to s. 3(8)(a), which sets out some characteristics attaching to the trafficked person, that may have led to them being targeted by the trafficker. While some will have been exploited because of these particular characteristics, the concern is that in listing these exhaustively, other attributes which may render a person vulnerable to trafficking may be considered irrelevant, and unable to trigger a finding of 'exploitation'. Some writers, such as Martha Fineman,<sup>1</sup> have suggested that vulnerability is part of the human condition, and as such, it is not clear why only some attributes and not others (such as gender, old age, poverty and so on) appear in s.3(8)(a). This is also at odds with the non-exhaustive list of characteristics in section 4(3), regarding factors which can increase vulnerability to slavery.

#### **Definition of exploitation for purposes of offence of human trafficking**

We have some concerns about the breadth of the definition of exploitation in section 3. While the offence of human trafficking under section 1 is valid in respect of exploitation in the form of slavery, rape or organ-harvesting, sub-section (4) seems to include lawful activities, namely the making of indecent material. Sub-section (7) is notably broad, as it appears to include within the definition of exploitation lying to a person about

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<sup>1</sup> Martha Fineman (2008) "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law & Feminism* 20 1-23.

prospective employment. An intentionality requirement here regarding deception would be apt. This definition is overbroad and may thereby dilute the recognition of the harm in much exploitation that results from and after human trafficking.

### **Lifestyle offences**

We agree with the proposed categorisation of all trafficking and exploitation offences as “lifestyle offences” in order to trigger automatically the confiscation procedures in the Proceeds of Crime Act 2002.

A defendant is deemed to have a criminal lifestyle for the purposes of confiscation if the offence of which s/he was convicted is a criminal lifestyle offence mentioned in Schedules 2, 4 or 5 of the Proceeds of Crime Act 2002 (or if the offence constitutes conduct forming part of a course of criminal activity; or it is an offence committed over a period of at least six months and the defendant has benefited from that conduct). If the court decides, on the balance of probabilities, that the defendant has a criminal lifestyle it is obliged to make the following assumptions in deciding whether and to what extent he has benefited from his general criminal conduct: it must assume that any property transferred to him at any time within six years prior to the start of proceedings or after the date of conviction was obtained as a result of his general criminal conduct; that any expenditure incurred within six years before initiation of proceedings was met from property obtained as a result of his general criminal conduct, and that for the purpose of valuing any property obtained by the defendant, he obtained it free of any other interests in it.

Overall, this scheme of confiscation is draconian, though of course, this explains its appeal! It is applicable to first time offenders whose offences fall within the Schedule. In addition, it may be difficult to rebut the assumption that any property/income gained in the previous six years is derived from general criminal conduct.<sup>2</sup> Despite this, we do not feel that the assumptions relating to a criminal lifestyle are unduly broad or harsh, given that conviction on the criminal burden of proof is first required, and given the ability of the individual to rebut these assumptions.

### **Trafficking and exploitation risk orders**

We have serious concerns about the proposal in Part 4 to legislate for trafficking and exploitation risk orders (TEROs) as these are not predicated on criminal conviction. TEROs may be made by a sheriff if s/he is satisfied that the person against whom the order is sought has acted in such a way as to imply there is a risk that s/he may commit a trafficking or exploitation offence and that an order (requiring or prohibiting certain actions) is needed to protecting persons from the physical or psychological harm which would be likely to occur if s/he committed the offence.

As noted, TEROs may contain prohibitions and/or requirements, and in general must be

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<sup>2</sup> See J Ulph, ‘Confiscation orders, human rights, and penal measures’ (2010) *Law Quarterly Review* 251, 271.

in excess of two years. In addition, TEROs prohibiting travel may last for up to five years. So, these are not inconsequential orders which may affect various human rights, such as are protected by Articles 6, 8, and Article 1 of Protocol 1 to the European Convention on Human Rights.

The rationale for TEROs is that they would prevent human trafficking and its concomitant harms by limiting/directing the actions of the person who is the subject of the order. Certainly a TERO that restricts financial dealings or travel would be valuable if that individual planned to use such finances or make a particular journey to commit/facilitate human trafficking. TEROs mirror other civil orders that have been introduced across the UK, like Serious Crime Prevention Orders under the Serious Crime Act 2007. Whilst it is stated that such orders are of benefit in dealing with organised/serious crime by facilitating lifetime management,<sup>3</sup> we are not aware of data that substantiate this preventative claim. Similarly, the likely effectiveness of the proposed TEROs is unclear.

A fundamental concern is that of proportionality. We suggest that such an order would be proportionate in aiming to prevent trafficking and the attendant harm only where the person has been convicted of a relevant trafficking offence (such as the proposed trafficking and exploitation prevention order (TEPO) in the Bill). TEROs are civil orders and so do not attract the same due process protections as in criminal proceedings. And while TEROs are preventative rather than punitive, in essence they involve a stigmatising declaration by the State regarding the “riskiness” of the person. This suggests that such orders ought to follow from criminal conviction only as otherwise they constitute a disproportionate reaction to the claimed risk of criminality.

Finally, we are concerned that there is no explicit mention in the Act of the burden or standard of proof.

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<sup>3</sup> See <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/organised-crime-command/lifetime-management> (last accessed 23 February 2015).