

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written submission from the Anti-Trafficking Monitoring Group

1. The Anti-Trafficking Monitoring Group (ATMG) monitors the UK's compliance with, and implementation of, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, as well as the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. The eleven organisations belonging to the ATMG are:

AFRUCA (Africans Unite Against Child Abuse)

Amnesty International UK

Anti-Slavery International

Bawso

ECPAT UK

Focus on Labour Exploitation (FLEX)

Helen Bamber Foundation

Kalayaan

POPPY Project (of Eaves Housing for Women)

TARA project (Trafficking Awareness Raising Alliance, of Community Safety Glasgow (CSG))

UNICEF UK

Summary

2. The ATMG welcomes the introduction of this Human Trafficking and Exploitation (Scotland) Bill, intended to simplify and consolidate legislation to improve prosecution rates and victim support provision. To successfully achieve these aims, this submission argues that:

- The wording of the offences should be brought into line with internationally-recognised definitions and a separate child exploitation offence introduced
- The meaning of 'exploitation' should be expanded and improved
- A broad non-prosecution principle and statutory defence should be included on the face of the Bill
- The support to be provided under Clause 8 should be provided based on needs, rather than tied to a decision under the NRM, and be provided to child victims as well as adults, and to victims of both Section 1 and Section 4 offences.
- The Bill should also include a provision on Independent Legal Guardians for all separated and unaccompanied children, and make reference to the duties and obligations of the Independent Anti-slavery Commissioner as they pertain to Scotland.

The creation of a single human trafficking offence for all forms of exploitation for adults and children

3. **Clause 1:** Whilst we welcome the government's desire to consolidate and simplify legislation in one Act, we are concerned with the drafting of the offences,

particularly Clause 1. The definition of human trafficking contained within the Clause 1 offence deviates significantly from the internationally-accepted definition¹, which contains three distinct elements- the 'act', 'means' and 'purpose'. The specific vulnerabilities of children are recognised through the simpler definition of child trafficking which recognises that no 'means' (threat or use of force or other forms of coercion etc.) have to be present in the trafficking of children, because the consent of a child to their exploitation can never be considered valid.

4. This offence does not adhere to this accepted definition, only making reference to the 'acts' and 'purpose' (exploitation). Within these elements there is further deviation from international norms. For instance, the word 'travel' in Clause 1 (a), which is not present in the Council of Europe Trafficking Convention (the 'Convention') definition nor the 2011 EU Trafficking Directive (the 'Directive'), is used to encompass all of the other acts (recruitment, transport, transfer etc.). In doing so, it incorrectly places the focus on the movement of an individual (yet trafficking can occur merely when an individual is 'harboured', without movement), and is suggestive of international trafficking, rather than internal.

5. The international definition of trafficking provided in the UN Human Trafficking Protocol contemplates the following act elements: recruiting, transporting, transferring, harbouring or receiving a person (through particular means). These are disjunctive acts meaning they do not require evidence that somebody recruited and then moved/transported a victim. Rather, one need only establish one of the listed act elements to meet this first requirement. There can be no doubt that these are disjunctive as they are meant to target the various players along the trafficking continuum. It would be odd in law and policy if you could only prosecute those who transport but not those who recruit.

6. We do not agree² that deviating away from internationally accepted definitions will make prosecutions easier. Adopting such a different definition may complicate transnational crime investigations with countries which do operate within this internationally accepted framework. British Child Sexual Exploitation (CSE) cases may also be more difficult to prosecute under this legislation if police and prosecutors place unnecessary significance on if the child has been moved. At present the Clause 1 Offence is used as the definition of human trafficking throughout the Bill, including for the purposes of support provision and protection set out in Part 2, it is vital that it accurately reflects the international definition and the international norms providing protections to all victims of trafficking. Greater accuracy would be achieved by aligning it closer with the Convention and Directive definition.

7. **Clause 3:** The types of exploitation listed in Part 3 'Meaning of exploitation' do not cover all types of exploitation that individuals may be subjected to now and in the future. To 'future-proof' the list, it must remain non-exhaustive. The terminology used

¹ See Article 4(a), Council of Europe Convention on Action against Trafficking in Human Beings, 2005; Article 2, EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

² Paragraph 8, Policy Memorandum

http://www.scottish.parliament.uk/S4_Bills/Human%20Trafficking%20Bill/b57s4-introd-pm.pdf

'only if one or more' in Clause 3(1) must be replaced with 'shall include' or 'at a minimum', as in other international instruments. To make sure that cases of forced criminality and forced begging³ are captured and highlighted under Clause 3(7)- '*Securing services and benefits*', they could be explicitly listed (e.g. 'for example, criminal activities and begging' or 'for financial gain or employment').

8. The factors listed under Clause 3(8) (a) as the grounds on which someone may be 'chosen' for exploitation do not adequately capture the reasons why someone may be vulnerable. The problem with this approach is that 'vulnerability' is often complex, multi-faceted and cumulative, rather than definable by one single element. Certain factors known to increase trafficking vulnerability, for example socio-economic deprivation or immigration status, have been overlooked in the Bill. It is also very difficult to prove that a person has been 'chosen' as a result of a vulnerability factor. Given the similarities between the drafting of this clause and its equivalent in the Modern Slavery Bill, we wish to direct the Committee to Helen Bamber Foundation's submission to the Joint Committee on the draft Modern Slavery Bill⁴, which further details the potential problems with this wording. At a minimum the term 'abuse of a position of vulnerability', a term much-deliberated⁵ in international law which covers both pre-existing vulnerabilities and those created by the trafficker, should be incorporated into this subsection, and other subsections which make reference to vulnerability factors or 'characteristics', and included in the Clause 1 offence.

9. Clause 3 (8) includes the words 'young' or 'youth', neither of which are defined within the Bill. 'Child' and 'children' should instead be used and defined as any person under the age of 18, in line with the definition found in the UN Convention on the Rights of the Child, the Convention and the Directive. The same definition can be found in the Modern Slavery Bill⁶, and in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act in Northern Ireland (the 'Northern Ireland Act')⁷.

10. **Clause 4:** To ensure that the maximum number of convictions is achieved under this offence the list of 'personal circumstances' should be widened to encapsulate all known vulnerability factors, as detailed above. An 'irrelevance of consent' sub clause, present in Clause 1(2), should be included in Clause 4, to bring it into line with international norms and both the Modern Slavery Bill and the Northern Ireland Act. It is a long-standing principle of international human rights law that no

³ Included as types of exploitation in Article 2(3) of the Directive

⁴Written evidence submitted by the Helen Bamber Foundation (HBF) to the Joint Committee on the draft Modern Slavery Bill. See specifically under heading: 'The specific vulnerability of victims of trafficking explained'.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-modern-slavery-bill-committee/draft-modern-slavery-bill/written/5967.html>

⁵ See the UNODC 2012, Issue Paper on Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons. http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf

⁶ See Clause 53(3) <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0069/15069.pdf>

⁷ See Clause 25 (1), Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland), 2015 http://www.legislation.gov.uk/ni/2015/2/pdfs/ni_20150002_en.pdf

person can consent to slavery, servitude or forced labour; consent is irrelevant to a situation in which personal freedom has been taken away⁸.

11. We urge the Scottish Government to include a separate **‘Child Exploitation Offence’** within this Bill, to recognise the specific vulnerabilities of being a child, and enable prosecutions in cases where the current offences would fail. This child exploitation offence would:

- Include a simpler definition of exploitation that makes clear that no proof of force, threats or other forms of coercion are necessary, and ensure criminalisation even when the child appears to be a ‘willing’ participant in the acts which constitute the exploitation;
- Enable prosecutions in cases where the high threshold of slavery, servitude and forced or compulsory labour has not been met, and in cases where the exploitation could be evidenced but the ‘travel’, required in Clause 1(a), is difficult to prove;
- Raise awareness amongst police, prosecutors and other relevant authorities of the separate and more serious nature of crimes committed against those under 18;
- Include a clear definition of the types of exploitation that would fall under this offence, including sexual exploitation, forced labour, domestic servitude and forced criminality.

Please see the footnoted briefing⁹ for further information as to the necessity and importance of this separate child exploitation offence. It is important to note that several concessions have been made regarding the position of children in the offences in the Modern Slavery Bill, for example, to reflect the special position of children and to ensure that the Clause 4 offence incorporates the various forms of exploitation that can occur.

Increasing the maximum penalty from 14 years to life imprisonment for this offence/Establishing statutory aggravations

12. The ATMG welcomes that the maximum penalty for both the Clause 1 and Clause 4 offences be increased from 14 years to life imprisonment to acknowledge the gravity of this crime, as too the inclusion of statutory aggravations in Clauses 5 & 6.

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

13. The ATMG is supportive of measures taken to protect victims from being prosecuted for crimes committed as a direct consequence of their trafficking or exploitation, given that significant numbers of victims in the UK are being punished

⁸ See UNODC, 2014, ‘Issue Paper The Role Of ‘Consent’ In The Trafficking In Persons Protocol’. http://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf

⁹ Refugee Children’s Consortium Committee Stage Briefing – House of Lords, Child Exploitation Offence, December 2014 http://www.antislavery.org/includes/documents/cm_docs/2014/r/rcc_briefing_modern_slavery_bill_hol_committee_child_exploitation.pdf

and prosecuted¹⁰, despite the existence of international obligations to prevent this¹¹. However, the ATMG has several concerns with the current provision.

- Firstly, the clause only states that the Lord Advocate must prepare and publish *guidelines* for prosecutors about the prosecution of potential or confirmed victims of trafficking or exploitation. Victim protections and rights should be clearly laid out on the face of the Bill.
 - The Bill should include both a broad non-prosecution principle and a statutory defence. Article 8 of the Directive obliges states to *not impose penalties* (including administrative penalties) and *not prosecute* victims. Accompanying guidance to this clause must make clear that police must use their discretion not to prosecute and that prosecutions must be stayed as early as possible. In cases involving children, the guidance must make clear that children (including older children at 16/17 years) suspected of being victims of slavery and trafficking should be referred as soon as possible to a Children's Hearing. The statutory defence should act solely as a final safeguard; protecting those who fail to be identified as victims prior to prosecution and whose case reaches court.
14. The drafting of this current provision is also of concern -
- There is a lack of consistency between Clause 7(1), which relates to both Clause 1 **and** 4 offences, and Clause 7(2), which relates only to the Clause 1 offence. Both sub-clauses should refer all offences covered in the Bill.
 - This provision does not differentiate between adults and children and, as currently drafted, is not suitable for the latter. Sub clause (2) includes a test of compulsion- that the person was compelled to commit crime and that compulsion was directly attributable to offence of human trafficking. Under international law, the UN Trafficking Protocol, the Convention and the Directive, the presence of any of the 'means' to show compulsion are irrelevant when defining a child as a victim of trafficking or exploitation. These legal aspects should not then become relevant or necessary in determining whether a trafficked or enslaved child is entitled to such protection. Both the Modern Slavery Bill¹² and the Northern Ireland Act¹³ make specific reference to children in their respective provisions and have made clear that the test of compulsion is unnecessary to prove in cases involving children.

In light of these concerns, we recommend the current provision be replaced with the wording of the non-prosecution provision contained in Jenny Marra MSP's proposal¹⁴, at page 26¹⁵.

¹⁰ See 'Victim or Criminal?', RACE in Europe project, Anti-slavery International, September 2014 <http://www.raceineurope.org/wp-content/uploads/2014/01/UK-Chapter-FINAL-3.pdf> and L and Others [2013] EWCA Crim 991 <http://www.bailii.org/ew/cases/EWCA/Crim/2013/991.html>

¹¹ Under Article 26 of the Trafficking Convention and Article 8 of the Trafficking Directive.

¹² Clause 45 (4) <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0069/15069.pdf>

¹³ Clause 22 (6) http://www.legislation.gov.uk/ni/2015/2/pdfs/ni_20150002_en.pdf

¹⁴ http://www.amnesty.org.uk/sites/default/files/proposed_human_trafficking_scotland_bill_sep_2013.pdf

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

15. Placing a *statutory duty on authorities to identify, protect and support* victims, as well as clearly stating the minimum standards victims are entitled to, is crucial for improving support standards and accountability. Insofar as Clause 8 achieves this, the ATMG welcome its inclusion. However, we are concerned that the support under this provision would only be provided to adults, not children, and only for victims of trafficking, rather than victims of all of the offences in the Bill. An extension of support provision to victims of slavery, servitude and forced or compulsory labour was recommended in the recent review of the National Referral Mechanism (NRM)¹⁶. Such an extension would be to take steps to meet obligations to identify, protect and rehabilitate victims of forced or compulsory labour, as set out in the recently-ratified Protocol to the 1930 ILO Forced Labour Convention¹⁷. If we are to improve prosecution rates for all of the offences, we have to identify and support all victims both of Section 1 and Section 4 offences.

16. The policy memorandum¹⁸ relating to this Bill argues that ‘existing children’s legislation...provides for services to be provided to potentially trafficked children (under age 18)’¹⁹. However, trafficked, enslaved and exploited children present with unique vulnerabilities. It is very concerning that there is no reference made to identification, support and protection for child victims on the face of the Bill. To not enshrine the rights of child victims in this important legislation would be a disservice to child victims and would be an opportunity missed to put in one place all the relevant law, provisions and rights of all victims, not just adults, of these crimes.

17. The terminology used in this provision mirrors that of the NRM, tying support provision to a positive Reasonable Grounds (RG) decision. Whilst 8 (3) (a) allows for the provision of support whilst awaiting the competent authority’s RG decision, it is not clear whether support can be provided *prior* to referral into the NRM, reflective of current practice. If an NRM referral is the only route to support provision, individuals may feel pressured to enter the NRM without being able (e.g. for reasons of trauma, mental capacity, continued influence of their traffickers) to provide **informed** consent. Government figures show that a significant proportion of potential victims chose not to enter NRM²⁰; further reason that support should be not tied to a referral.

¹⁵ Alternative language can also be found in Clause 15 of the ATMG’s Alternative Bill http://www.antislavery.org/includes/documents/cm_docs/2014/a/atmg_modern_slavery_human_traffic_king_and_human_exploitation_bill_03_10.pdf

¹⁶ Home Office, Nov 2014, Review of the National Referral Mechanism <http://webarchive.nationalarchives.gov.uk/20141202113128/https://nrm.homeoffice.gov.uk/documents/2014/11/nrm-final-report.pdf>

¹⁷ P29, Protocol of 2014 to the 1930 ILO Forced Labour Convention, see Art. 1 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_248900.pdf

¹⁸ Supra note 2

¹⁹ Para. 59, page 13

²⁰ 65% of the total number of potential victims identified in 2012 - see the UKHTC’s Baseline assessment in 2013 http://www.ecpat.org.uk/sites/default/files/ext-6538_ukhtc_strategic_assessment_on_human_trafficking_2012_v1.01.pdf

Support should instead be provided to victims *based on needs* as stated in the Bill's policy memorandum, para. 60.

18. The Bill makes no specific reference to the 'recovery and reflection' period. The duration of the reflection period varies between the Council of Europe Member States but should be (according to Article 13 of the Council of Europe Trafficking Convention) at least 30 days when there are reasonable grounds to believe that the person is a victim of trafficking. Empirical evidence suggests that a minimum period of 90 days is required for the cognitive functioning and emotional strength of a trafficked person to increase to a level at which they are able to make well-considered decisions about their safety and co-operation with the authorities against the traffickers, as well as to offer detailed evidence about past events. This is especially important in the case of children. The UN agencies, including UNICEF, encourage countries to include in their national legislation a period of reflection and recovery of a **minimum of 90 days** for all victims. For child victims, such decisions should reflect consideration of their best interests.

19. The EU Trafficking Directive makes clear reference to the gender-specific nature of trafficking²¹. The Bill should acknowledge this and state that, where appropriate, assistance and support measures should also be gender-specific. In addition, we recommend that the term 'repatriation' in 8 (4) be replaced with 'safe return', to guarantee that UK nationals are recipients of the same support as foreign nationals.

Establishing trafficking and exploitation prevention orders and risk orders

20. In principle, we welcome these orders as a means of preventing perpetrators from committing future offences. Their impact and success will be dependent on their practical implementation.

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

21. In Clause 32 (4) specific mention should be given to both civil society and victims (where appropriate) as persons to be consulted with regards to the strategy. We also ask for clarification as to whether, for the purposes of this provision, NGO's would fall under the category of "public authority".

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

22. We welcome attempts to improve data collection. To capture a more complete picture, however, public authorities should also be mandated to submit data on perpetrators, as well as on victims.

Miscellaneous

²¹ See Preamble (3) and Article 1.

23. **Independent Legal Child Guardians:** The framework for a system of legal guardianship for all separated and unaccompanied children in Scotland should be set out in this Bill. This provision should ensure that:

- The appointment of an independent guardian is mandatory as soon as the individual is identified by authorities.
- Guardians are given the legal authority to act in a trafficked child's best interests and are able to instruct solicitors on their behalf.
- Advocates are given the powers to compel persons or bodies providing services or taking administrative decisions in relation to the child to pay due regard to their functions.

24. The current guardianship service in place in Scotland has already evidenced the benefits of appointing independent guardians²². A provision to put guardians on a statutory footing would bring existing policy underpinning this service into legislation, but go further to give guardians the full legal status they need to advocate effectively alongside existing services, access relevant meetings/materials and to hold authorities to account over poor practice. Given the existence of this current system, the financial implications of this provision would be negligible. We urge the Scottish Government to follow the example set in the Northern Ireland Act and allow guardians to continue supporting an individual until the age of 21.

25. **The Independent Anti-slavery Commissioner:** The Commissioner provided for in the Modern Slavery Bill is to have a UK-wide focus. The ATMG has highlighted its concerns throughout the Bill's passage in the Parliament that the Commissioner will lack the necessary remit and independence to undertake his/her work effectively and make a significant impact²³. To make sure the interests of Scotland are clearly represented, this Bill should explicitly state the legal duties and obligations of the Commissioner's role as it pertains to Scotland.

26. **Overseas Domestic Workers (ODWs):** We were extremely pleased to see that the House of Lords voted in favour of an amendment in the Modern Slavery Bill to reinstate protections available to ODWs prior to the visa change in April 2012. The Modern Slavery Bill now allows migrant domestic workers to change employer and renew their visa annually (as long as they are in full-time employment), and provides them with a three-month visa in order to find alternative work if identified as a victim of trafficking, slavery, servitude, forced or compulsory labour. We urge the Scottish Government to press Westminster to retain this vital provision in the Modern Slavery Bill to ensure that domestic workers in Scotland are protected from abuse.

27. **'Presumption of age' clause,** similar to that found in Article 13(2) of the Directive and Article 10(3) of the Convention, should be included in Bill to ensure that, where there is reason to believe that a victim is a child, they are treated as such until the final determination (including resolution of disputes) of their age.

²² "She Endures With Me", An evaluation of the Scottish Guardianship Service Pilot, 2013. http://www.aberlour.org.uk/assets/0000/9979/Summary_-_Evaluation_report_of_the_Scottish_Guardianship_Service.pdf

²³ ATMG briefing papers on this issue can be found here: <http://www.antislavery.org/atmg>

28. **Compensation orders-** Explicit mention should be made in the Bill to the compensation orders available in Scotland, under sections 249-253 of the Criminal Procedure (Scotland) Act, as mentioned in the Policy Memorandum document in Para. 101 (p.20).

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