

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written submission from Dr Paul Rigby, Dr Margaret Malloch, Dr Bill Munro and Dr Niall Hamilton-Smith

1. We welcome the opportunity to submit this written response on the Human Trafficking and Exploitation (Scotland) Bill. The views expressed in this response are personal contributions from the authors, based on their research and practice experience in relation to human trafficking and organised crime.

2. The complexities surrounding the exploitation of people cannot be addressed via the introduction of a single piece of legislation. However, the proposed Bill is welcomed as a starting point for Scottish legislation, policy and practice to begin to address the practice of human trafficking. The Bill identifies the wide-ranging issues that encompass many forms of exploitation and recognises some of the underpinning concepts of exploitation which will require significant action by wider civil society, nationally and internationally.

3. It is less than 10 years ago that Scotland, and many of its institutions, was largely in denial about the exploitation of people through human trafficking; the proposed Bill evidences the changes and is a recognition of the developments that have occurred in this short timeframe.

4. With its focus on services for victims of human trafficking (albeit only adults) the proposed Bill begins to address the concerns we have raised previously, that an emphasis on law enforcement often predominates to the detriment of a 'human-rights' model. Current international emphases on statutory responses directed towards crime prevention, 'undocumented migration', law enforcement and prosecution may have contributed to the criminalisation of victims, with rehabilitation and recovery becoming secondary concerns.

Definition

5. It is clear the offences will constitute the definition of human trafficking in Scotland. However, the wording in the Bill differs significantly from the internationally accepted definitions contained in either the Council of Europe Trafficking Convention or the EU Directive. The emphasis given to the word 'travel' as a key defining characteristic, relegates the other aspects of the accepted definitions of trafficking (recruitment, transport, transfer, harbouring) to a secondary status, and thus does not adequately convey all intrinsic elements.

Children

6. The proposed Bill largely overlooks children and consequently fails to adequately address the exploitation of children, nor recognise them as a particularly vulnerable group of people in line with international conventions and directives. References to youth or young do not adequately convey obligations to children under the age of 18 years. There must be reference in the Bill to a child being a person

under the age of 18 years, and a presumption of age similar to the EU Directive article 13(2). Responses in Scotland have been compromised by confusion in relation to the presumed age of a young person and differential treatment for 16 and 17 year olds. In relation to the commission of offences there needs to be clarity that in addition to consent being irrelevant, the absence of any coercion or threat is also irrelevant, in determining if a child is a victim.

7. In relation to victims services, while there is now recognition that child trafficking should elicit a child protection response, various definitions of a child in Scots law in relation to interventions and provision of services has resulted in some children not being adequately protected. A model of identification, protection and support for children who have been trafficked should be located in an integrated child protection system. The shortcomings of the system in relation to trafficked and separated children have been documented in Scotland (Rigby 2009; 2010; Rigby et al 2012a and b; SCCYP 2011); however it is important the Bill is explicit in making reference to the existing legislation to ensure protection is located in an integrated child protection system taking account of specific trafficking based issues and the broader child's needs. There must be specific provision to ensure that all trafficked children can be referred to the Children's Hearing.

8. The EU Directive (article 14-2) makes explicit reference to the need for provision of a 'guardian' for trafficked young people. Guardians can be an essential component of an integrated child protection system. Inclusion in the Bill for the provision of a guardian system, to which public authorities should pay due regard, would further highlight the specific vulnerabilities of children, especially those with no parent or legal guardian.

Non prosecution

9. Part 2 of the Bill refers to the prosecution of victims, placing a duty on the Lord Advocate to develop guidelines for prosecutors, which may be revised, and which should outline factors for consideration in decisions relating to the prosecution of a victim of human trafficking. However despite the current existence of COPFS guidance in Scotland, concerns have been expressed that victims of human trafficking continue to be prosecuted for crimes they have been compelled to commit; that the guidance is not always applied in practice, and that key practitioners (social work practitioners outwith Glasgow, duty solicitors, the procurator fiscal service and even judges) have limited awareness of it (see Malloch, Warden and Hamilton-Smith, 2012). This situation is also noted in England and Wales and has resulted in cases where victims of human trafficking have been imprisoned or detained (Hales and Gelsthorpe, 2012). We would argue for a presumption of non-prosecution in circumstances where a potential victim of human trafficking is charged with an offence related to their victimisation and that the onus should be on the court to evidence that any proposed prosecution is in the public interest. The case for non-prosecution is particularly pertinent in the case of child victims of human trafficking and this would appear to merit specific reference in the Bill.

Provision of services

10. The Bill uses the terminology of the National Referral Mechanism (without this being mentioned), with 'reasonable grounds' 'conclusive determination' and 'relevant periods' being central to the provision of services. The provision of services to victims of trafficking should not be contingent on the victim status being conferred on a person by a 'competent authority'. In respect of children specifically it is not necessarily the case that decisions about trafficking status, and ultimately provision of services, should rest with an additional 'bureaucratic' layer of decision making. The National Referral Mechanism is presently under review across the UK; for children in Scotland especially, other models of decision making are possible within the existing integrated child protection system.

Offences by bodies corporate etc

11. A section on offence by corporations is welcomed. Human trafficking operates in the global context of a system of economic and personal relationships characteristic of modern society, of which Scotland plays a major role. Any representation of human trafficking and exploitation should not only focus on the context of external threats or organised gangs, but on all aspects of individuals and societal institutions that allow exploitation to flourish. It is important to acknowledge that trafficking requires the active and conscious co-operation of a number of elements of legitimate society, including police, politicians, judges, lawyers, accountants and business executives in many areas of the world (Ruggiero, 1997 and 2013).

12. Civil society, governments and the private sector have a role in the ongoing exploitation of people around the world. Major social and political drivers, such as profit maximisation and cost reduction, perpetuate the potential exploitation of people on a global scale. Human trafficking in Scotland reflects this complex mix of factors, where individual and corporate actors all contribute to the exploitation of the vulnerable.

Strategy

13. A proposed duty for a human trafficking and exploitation strategy that is regularly updated may be a useful approach to monitor progress. Any such strategy or monitoring should include clarification of what the indicators of progress or effectiveness of the strategy are. A duty to notify and provide information about victims should also be supplemented by similar details about known or suspected perpetrators.

14. A cautionary note about any developments relates to the fact that Scotland is developing legislation, strategy, policy and practice in the arena of human trafficking in the absence of any robust evidence to the extent, nature and scope of the issues, nor any clear conceptual and practical understanding how best to provide intervention and support services. Trafficking as a key area of public policy in Scotland (and the UK) has developed in an evidence and information vacuum with little understanding of the broader socio-political issues due to the absence of any clear social and critical analysis.

Final comments

15. With the complexities of human trafficking and exploitation, complexities that transcend nation states, legislation and responses, the proposed Bill is a welcomed first step to address the exploitation of people via a single piece of legislation. While broadly welcomed as a legislative response, there are some clear notes of caution. Trafficking in Scotland will not be prevented until there are global political, social and structural changes that address those institutions and systems that encourage and permit the buying, selling and exploitation of people for financial or personal gain. The proposed Bill will be one step in implementing national change, unfortunately it will not be sufficient without addressing the wider societal attitudes that prevail, and have done so for many years.

16. A global and local socio-political understanding and critique of the issues is required if long term solutions are to be found, as many global institutions and governments rely on the exploitation of people to varying degrees to maintain economic and political status quo. The fluidity of people, types of exploitative behaviour, and vested interests, may challenge any attempts to address global issues that are located in prevailing macro-economic and capitalist systems where the 'exploitation' of people is, to a greater or lesser extent, the modus operandi of legitimate and illegitimate 'business'. In many respects it is the close link between the 'legal' and 'illegal' that has contributed to many types of exploitative behaviour now 'labelled' as human trafficking, and this will confound efforts to address issues via a legislative response alone.

17. There is a danger that in the desire to address such complex issues, the complexities are overlooked, or observed through a reductionist lens that identifies only deserving and undeserving, victims and perpetrators. Human trafficking is only one manifestation of the exploitation of people whose experiences cannot be deconstructed to a simple label of 'trafficking victim'. Focussing on one 'type' of exploited or abused person will not be sustainable or effective in the short or long term without cognisance being paid to the broader issues.

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