

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written submission from the Legal Services Agency Ltd

Introduction

1. Legal Services Agency (LSA) is Scotland's largest law centre tackling the unmet needs of those in disadvantage. It does so through the provision of legal advice, representation in courts/tribunals, research, publications, seminars and education.

2. LSA protects the rights of refugee and migrant women, children and young people through its Women and Young Persons' Department. This department is funded by the Scottish Government Violence against Women Fund, Comic Relief, Paul Hamlyn Foundation and the Prevention of and Fight against Crime Programme of the European Union. It has a specific remit to provide legal representation to victims of human trafficking across Scotland as well as to contribute to research, training and policy matters in this area.

3. Therefore, taking into account its field of work, this response largely focuses on the aspects of the Human Trafficking and Exploitation (Scotland) Bill (the Bill) which affect the identification and protection of victims of human trafficking and exploitation.

Context

4. In preparing this submission, LSA has taken into account the international and European standards in this area that the UK Government has ratified but which Scotland must ensure compliance with. This not only includes the Council of Europe Trafficking Convention and the European Convention on Human Rights referred to within the Bill but other international and European standards, most particularly the EU Directive on Human Trafficking⁴¹ which has direct legal effect within Scotland.

5. LSA is also mindful of legislation currently being enacted in this area in England and Wales and Northern Ireland. Bearing in mind the international standards that the UK Government has ratified, it cannot be the position that any victim of human trafficking and exploitation is either better or worse protected depending on where they are identified within the UK. Any such disparity will likely be exploited by traffickers whilst clearly sending out the wrong message in terms of prevention and protection in this area.

6. However, LSA has also taken into account the devolved competences of the Scottish Parliament. Whilst immigration and the formal identification of victims of human trafficking through the process of the National Referral Mechanism (NRM) are reserved matters, victim care and support fall within the devolved competence of the Scottish Parliament.

7. Public authorities within Scotland have a duty to identify and protect potential victims of human trafficking **regardless** of their identification and/or participation with the NRM. For the most part, these authorities fall within the devolved competence of the Scottish Government with Scotland possessing its own unique law enforcement, child protection, legal and justice system. This is why Scotland requires its own legislation in this area and whilst its key principles should be consistent with the rest of the UK, complete consistency in terms of the details may not always be achievable.

8. Scotland has demonstrated good practice in terms of victim identification and care in the area of human trafficking. LSA is therefore keen to ensure that the Bill reflects and builds upon this good practice whilst encapsulating the necessary key principles from the international and European standards. It is keen to ensure a consistent approach with the rest of the UK, where appropriate, taking into account the existing protections and processes built into the Scottish legal system and framework.

Aim/Legislative Intent of the Human Trafficking and Exploitation Bill

9. It is noted that the Bill aims to legislate in the area of human trafficking and exploitation. Offences of human trafficking, slavery, servitude and forced or compulsory labour are defined within Part 1 of the Bill.

10. However, later parts of the Bill only provide protection and/or relate to human trafficking. For instance:

- Clause 7(2)(b) only refers to the offence of human trafficking (section one) and not the offences contained within section 4 of the Bill. It is however clear from Clause 7(1)(b) that such offences are to be covered by this section.
- Clause 8 of the Bill relating to the provision of support and assistance only relates to victims of human trafficking and not victims of the offence contained within section 4 of the Bill.
- Part 3 of the Bill relating to the confiscation of property does not cover the offences contained within section 4 of the Bill.

11. It is not clear why a distinction would be made in the above noted areas. It is therefore presumed that the Bill intends to provide similar protections for all of the offences listed in Part 1 and that these parts of the Bill simply need corrected.

Offences

Human Trafficking

12. Article 2 of the EU Trafficking Directive clearly sets out the definition of the criminal offence of human trafficking that Scotland must adopt. This definition recognises that human trafficking is a process often made up of different acts and actors.

13. Section 1 of the Bill does not however reflect this definition and is therefore not in compliance with European law. This is because the drafting of the offence focuses on the arrangement and facilitation of another person's travel.

14. It is firstly unclear why the word "travel" is utilised in the Bill when it is a term not mentioned in any of the international and European standards. In common parlance, travel is associated with international movement. It is however known that not all cases of human trafficking involve international movement. Indeed, the NRM statistics from 2014 showed that the sixth largest number of referrals were from the UK.ⁱⁱ These referrals largely reflect child victims of commercial sexual exploitation from England. It is concerning that these cases, identified as human trafficking within England and Wales, may not be classed as an offence in Scotland if there is a pre-disposition within the offence to international movement.

15. Travel has a very distinct meaning within the English language. However, in the Bill, travel is said to **include** the terms contained within the EU Directive definition that focus on the trafficking process, namely "*recruitment, transportation, transfer, harbouring or reception*" of a person including the "*exchange or transfer of control*" over that person. It is unclear why the term "travel" has been used to encompass all the different acts of human trafficking particularly when the trafficking process is understood.

16. Furthermore, the international definitions make it clear that an individual cannot consent to be exploited (as opposed to consenting to travel as noted in section 1(2)).

17. In practice, the identification of a victim of trafficking starts from the exploitation/intended exploitation. Inquiries are then made around about the other individuals potentially involved in this exploitation and their roles.

18. In the cases that LSA have been involved in, there is often a recruiter who transfers the individual into the control of an agent who then transports the individual into the receipt of another person. This person is then harboured and exploited by different individual (s). This is a process involving different actors and acts.

19. All would arguably be guilty of human trafficking as understood by the EU Trafficking Directive yet not all would be covered by the offence of human trafficking contained within the Bill as not all are linked to the actual "travel" element. Furthermore, there may be difficulties in establishing that certain of the actors, i.e. the recruiter or the person who arranges the travel, intended that the person would later be exploited as is required in order to establish the offence of human trafficking in the Bill (*clause 3(a)*).

Exploitation for the Offence of Human Trafficking

20. The Bill makes it an offence to traffic a person to secure services and benefits for another (*Clauses 7 and 8 of the Bill*). This part requires to be strengthened to ensure that its terms include exploitation specifically referred to in the EU Trafficking Directive including begging or forced criminality. LSA recommends this clause clearly expressing that these types of exploitation are included within this offence.

21. Clause 8 of the Bill refers to a person being “chosen” for exploitation due to expressly defined personal characteristics. It is submitted that this is the wrong terminology to use. It does not reflect how a person’s experiences are disclosed and therefore would be difficult to prove. There are many characteristics that lead to an individual being more vulnerable to the offences contained within the Bill and LSA recommends a more generic reference to the abuse of a position of a vulnerability which would include, but not be restricted to, the characteristics noted in the Bill.

22. Clause 8 in narrating these characteristics refers to “young” and “youth” yet no reference is specifically made to children which is a key characteristic targeted by traffickers and is specifically contained within a similar section within the Modern Slavery Bill in England and Walesⁱⁱⁱ.

23. It is also unclear why the Bill – referred to as targeting Human Trafficking and Exploitation – only criminalises the exploitation of children and the vulnerable for the securing of services and benefits when there is a link to “travel”. The same point can be made with the reference to prostitution and sexual exploitation.

24. It is not clear why these activities would be classed as an offence for a child who has “travelled” but not where the exploitation by a person can be established yet not the “travel”. LSA supports the Anti-Trafficking Monitoring Group’s position on this point as contained within their briefing on this topic submitted for the Modern Slavery Bill^{iv}.

Slavery, Servitude and Forced or Compulsory Labour

25. Within Section 4 of the Bill, no reference is made to the irrelevance of consent in terms of establishing whether slavery, servitude, forced or compulsory labour has occurred.

26. The irrelevance of consent is mentioned in relation to the offence of human trafficking in section 1(2) of the Bill and is referred to within the Modern Day Slavery Bill in relation to the same offences. It is therefore presumed that this is simply an oversight and will be remedied.

27. This offence also refers to personal characteristics of an individual which may make that person more vulnerable to the commission of this offence. LSA again recommends a more generic reference to vulnerability that includes, but is not restricted to, the characteristics noted in this section of the Bill.

Victim Identification and Access to Support

28. LSA commends the Bill for including a duty to secure support and assistance for victims of human trafficking within the Bill (Clause 8). LSA however believes that this section can be strengthened to reflect current practice within Scotland.

29. The first point is the lack of reference to children which is discussed in the next section of this submission.

30. The second point is that the European legal standards make it clear that the duty to provide support and assistance relates to the broader definition of a victim of human trafficking contained within these standards and not the narrower definition of the offence contained within the Bill.

31. The third point is that this section of the Bill appears to restrict access to care and protection to the identification of a victim through an NRM system. LSA does not recommend this approach.

32. The current NRM process has attracted criticism and is under review which means that its operation is likely to significantly change.

33. Furthermore, government figures demonstrate that a significant number of potential victims of human trafficking do not enter the NRM. LSA are aware of cases where individuals have not wanted to enter into the NRM yet key professionals assess and identify them as victims of human trafficking. These individuals may have wished to co-operate with the police and will have needed access to material assistance such as housing and other support to do so. It is the position of LSA that these individuals have been identified as victims of trafficking by public authorities competent to make such an assessment and therefore must be able to access the support they are entitled to under European law. The enabling of this will ensure increased intelligence and increased prosecutions in this area.

34. It is LSA's understanding that the Scottish Government has implemented a flexible approach to the provision of material assistance since the implementation of the NRM model in 2009. The individual cases referred to above would therefore have been accommodated and supported regardless of their participation in the NRM if the professional agencies involved could establish a case for doing so. This contrasts to the more rigid provision in England and Wales which has been strictly linked to an individual's participation in the NRM.

35. The Scottish approach thus far has been the approach most closely aligned with best practice and one which ensures compliance with European law. On the face of it, the Bill constrains this approach by appearing to link it to an NRM. If this is what the Bill intends to do, it is a regression of current Scottish practice and will lead to breaches of European law in individual cases.

36. LSA therefore recommends that the Bill specifically defines a victim in the interpretation section of Part 2, Protection of Victims with reference to the definition contained within the EU Directive.

37. The European standards **already** place a duty on public authorities to identify, assess and provide support to **all** victims of human trafficking. This is regardless of whether a status has been conferred on that individual from an NRM. If the individual is assessed to fall within this definition by public authorities competent to do so (rather than formally designated Competent Authorities) then that individual **is** entitled to the protections and rights contained within and protected by the Trafficking Convention, the ECHR and the Trafficking Directive.

38. LSA recommends that Clause 8 sets out these broader principles whilst leaving the details of how these would be achieved to strategy/regulations outside of the Bill.

Legal Advice

39. LSA is pleased that legal advice has been referred to within the duty to support and assist. LSA has been involved with an EU Project looking at the European standards surrounding early legal intervention in cases involving victims of human trafficking. A report has been published from this Project recommending access to early legal intervention as a right for all detected/suspected and identified victims of human trafficking, which encompasses comprehensive and freely accessible legal advice and legal representation in every aspect of civil, criminal and administrative law. This is regardless of a referral to any formal process of identification such as an NRM.^v

40. The position in Scotland has been that the legal aid system does ensure that, in theory, access to free legal advice and assistance is available in a broad area of legal matters that relate to human trafficking across Scotland. The Scottish Government also funds LSA to provide an enhanced legal service in this area.

41. LSA would be keen to ensure that the funding arrangements in Scotland around free legal advice continue to ensure sufficient flexibility in order that victims can access early and effective legal intervention in all legal aspects relevant to their status as a victim of human trafficking.

Children

42. LSA is concerned by the fact that Bill does not refer to children. This position is in complete contrast to the Modern Slavery Bill and the Northern Irish legislation.

43. Reference is made to the European Commission's Mid-Term Report on the Implementation of the EU Strategy towards the eradication of trafficking in human beings^{vi}. This report notes that children are particularly vulnerable to victimisation and re-trafficking within the EU and that this is why the EU Trafficking Directive sets out a number of provisions based on the principle of the "best interests of the child" which require to be taken into account when looking at child victims of human trafficking.

44. The Mid-Term report highlights internal trafficking within the EU as dominating its statistics in relation to human trafficking with 1% of victims registered being aged 12-17. Reference is also made to the prevalence of UK children in last year's NRM statistics. The Bill therefore requires to ensure that protection is available for **all** children and not just third country national children.

45. The Mid-Term report makes clear that the EU Strategy in this area focuses on comprehensive child-sensitive protection systems ensuring interagency and multidisciplinary coordination being crucial to the identification and protection of children. LSA is in agreement with this approach.

46. Scotland has a specific child protection framework, distinct from the other parts of the UK, which requires to be referenced when legislating in this area. This incorporates the GIRFEC Model as well as the Children's Hearing System and the provisions laid out in the Children (Scotland) Act 1995, the Children Hearings (Scotland) Act 2011 and the Children and Young People (Scotland) Act 2014.

47. The identification, assessment and protection of child victims of human trafficking and exploitation therefore must be located within and be the responsibility of this child protection framework. However these children have specific needs and vulnerabilities that also require to be recognised and protected within this system [Articles 13-16 of the EU Trafficking Directive] and the Bill should at the very least incorporate the general principles within statute from these sections of the Directive.

48. In doing so, there are issues specific to the Scottish child protection framework that require to be thought about, for instance:

- The Definition of a Child
 - Child protection mechanisms and procedures are often restricted to children under the age of 16 within Scotland.
 - This can cause problems in practice with the protection and support of victims of child trafficking and exploitation who are aged 16 and 17. This is concerning when one considers that the highest percentage of child victims of human trafficking LSA deals with are aged 16/17.
 - European law is clear that a child victim of human trafficking is aged 18 and under. The definition of a child, consistent with European law, therefore requires to be clearly reflected within the Bill.
 - Cases of forced criminality for all children under the age of 18 should be referred to the Children's Hearing System and not dealt with within the adult justice system. This may require amendments to existing legislation^{vii}.
- Assessment of Needs and Access to Protection
 - The EU Directive requires an individualised assessment of need and access to appropriate care and protection for all children under age 18.
 - LSA published a report looking at the inconsistency of treatment for 16/17 year old separated children, including victims of trafficking, across Scotland in terms of the care and support they receive^{viii}.
 - The report found that in order to comply with the relevant legal obligations in this area, separated children who have been trafficked should be accommodated and supported under section 25 of the Children (Scotland) Act 1995. This includes those aged 16 and 17.
- Age assessment
 - Age assessment within Scotland is increasingly commonplace with victims of human trafficking from outside the EU.
 - This is not an assessment process commonly found within the Scottish child protection framework.
 - The European standards in this area afford specific protections and rights to a child believed to be a victim of human trafficking. This includes the presumption of the individual's stated age until resolution

of the age dispute^{ix}. These protections must be included within the Scottish Bill, in the same manner as England and Wales and Northern Ireland, as they cannot be found anywhere else in the Scottish child protection framework.

49. The above should not entirely be set out in a strategy document. LSA recommends that the Bill at least enshrines the key principles relating to the identification and protection of children as contained within the EU Trafficking Directive with the strategy and other documentation making it clear how the additional needs of trafficked children will be met within Scotland within the current processes and framework for children.

Guardianship

50. Northern Ireland and England and Wales have the right to an independent guardian for child victims of trafficking and exploitation within their legislation.

51. LSA is therefore concerned that the Bill, on the face of it, provides an inconsistent and less favourable system of protection for children in Scotland compared to the rest of the UK. It is therefore imperative that the Bill refers to the principle of providing an independent legal guardian for child victims of human trafficking.

52. The omission of a guardian in the Bill is surprising given the existence in Scotland of the Scottish Guardianship Service. This service was the first of its kind in the UK and is now funded by the Scottish Government. This service provides an independent specialist advocate to child victims of human trafficking from outside the EU. At the present time, this service is not contained within statute and would not cover all child victims of human trafficking, namely from Britain or the EU.

53. The EU Strategy stresses the need for effective guardianship systems in preventing further abuse, neglect and exploitation. The EU Mid Term Report refers to the Fundamental Rights Agency's Handbook in this area which is designed to help standardise guardianship practice and it provides guidance and recommendations in this area^x.

54. This Handbook suggests covering the specific needs and rights of identified or presumed child victims of trafficking by adapting, where necessary, guardianship systems established for **all** children in need of a guardian. It notes that the best way to promote the rights and well-being of a child victim of trafficking is by adhering to principles and safeguards common to all guardianship systems. The handbook therefore discourages the establishment of a separate guardianship system dealing **only** with child victims of human trafficking as guardianship systems are an integral part of child protection systems.

55. For the purpose of the Handbook, the guardian is considered to be an independent person who safeguards the child's best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way parents do. This is not the same as a social worker, a lawyer or a "legal representative" such as a curator or safeguarder appointed for the

duration of specific proceedings only. It would not appear to cover a named person as LSA currently understands this role. In order to meet these functions, the Handbook details a number of tasks that the guardian could achieve within its key areas of responsibility.

56. In looking at the best practice principles contained within the Handbook as well as the series of tasks outlined for guardians, it is submitted that the Scottish Guardianship Service carries out most of the duties recommended therein albeit for children outside of the EU. What the current services lacks is the legal status that inclusion within the Bill would facilitate ensuring that there is a duty to refer to them alongside a duty to have them involved as full participants in the child protection and legal processes children are involved within. This includes the sharing of information and due regard being given to their viewpoint in respect of the child.

57. Therefore the Scottish Government is already funding a model of recommended service provision although consideration would require to be given as to which body could act as a guardian for all other child victims of human trafficking and child exploitation (with the recognition that it may not necessarily be the same one). LSA is aware of cases of British children who may be potential victims of human trafficking. In these cases, their needs and vulnerabilities are such that the requirement for an independent guardian is high. No such provision exists at the current time within the Scottish child protection framework.

58. The Handbook refers to the guardian being able to exercise legal representation on behalf of a child. The legislation in Northern Ireland contains a power to instruct a solicitor on behalf of a trafficked child. A late amendment to the Modern Slavery Bill also contains a provision for an independent guardian with the power to instruct a solicitor. This legislation therefore enables the transfer of a parental right and responsibility to another agency.

59. LSA is hesitant to state that an independent guardian appointed for a child victim of trafficking would automatically have the parental right and responsibility to instruct a solicitor without the overview of the court. This is not to say that a guardian could not have this right and responsibility transferred to them through such a process.

60. LSA is mindful of the need for consistency across the UK in this area but is also aware of the overarching requirement of an integrated child protection framework for **all** children. The Scottish context therefore cannot be ignored in this regard.

61. The Scottish legal framework is very specific as to when a parental right or responsibility transfers to another individual who is not the parent. It is not normally automatic and it is often through a court process. LSA, together with a group of other individuals in the children's right sector in Scotland, considered this problem in 2013. This formed the basis of a submission to the Scottish Parliament's Education and Cultural Committee which is attached to this document. This paper concluded that the court system within Scotland could be utilised where individuals, such as the independent guardian, could be appointed to instruct a solicitor if necessary. It is

however admitted that, as far as LSA are aware, this is an untried process and one that would currently not apply to 16 and 17 year olds.

62. The benefit of such a system however is that it would enable the court to transfer the parental right and responsibility to the independent guardian where necessary and within the existing child protection and legal framework. Importantly it would be the court who would monitor and ultimately be held accountable for the exercise of this right. LSA is of the opinion that such a model is consistent with the EU Handbook on guardianship referred to above.

Non prosecution and non-punishment

63. The EU Directive requires a mechanism to ensure that the relevant authorities are entitled **not** to prosecute or impose **penalties** on victims of human trafficking for their involvement in criminal activities which they have been compelled to commit as a direct consequence of human trafficking.

64. LSA has welcomed the Lord Advocate's public position of a presumption not to prosecute in such instances^{xi}. LSA is also aware of the current COPFS Guidance on this issue from 2010.

65. The EU Directive refers to a mechanism that ensures an "entitlement" not to prosecute or penalise. The current COPFS guidance has not been sufficient on its own to ensure this in practice nor has the Lord Advocate's public position on the matter.

66. The current clause within the Bill, as drafted, falls short of the principles contained within the European standards in this area and indeed the Lord Advocate's public position on this issue as:

- a. There is no indication within the Bill of the presumption or entitlement **not** to prosecute. Indeed, the wording in the clause is further unhelpful in this regard with its reference to prosecution instead of non prosecution.
- b. There is no reference to the entitlement not to impose penalties in such situations as referred to in the EU Directive. Penalties would include detention.
- c. LSA would like more clarity on the **legal status** of the prosecutorial guidelines referred to in the Bill and how this will give effect to the presumption that victims of human trafficking will not be prosecuted or penalised.

67. Therefore in order to strengthen this clause and give better effect to the Lord Advocate's position, LSA recommends that the Bill replicates the overarching principle contained within the EU Directive, or at least state that it will have due regard to this principle. This would not fetter the discretion of the Lord Advocate.

68. LSA would also recommend that this clause specifically sets out the overarching principles to apply in respect of children under the age of 18 who are involved in forced criminality who should **never** be prosecuted, punished or detained in such circumstances. Any instance of forced criminality involving a child should be referred instead to the Children's Reporter.

Miscellaneous

The Bill does not refer to the rights and responsibilities of the UK Anti Slavery Commissioner as they will pertain to Scotland given its distinct legal framework and devolved competences in this area. LSA recommends that the Bill sets out the functions and remit of the role as it applies to Scotland.

In respect of the duty to notify and provide information about victims of human trafficking and exploitation, LSA would seek clarity on the definition of a public authority and the sanction for failure to comply. LSA further recommends that this Clause contains a provision that information does not require to be included if it would breach the Data Protection Act 1998 which is contained within the Modern Slavery Bill.^{xii}

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ⁱDIRECTIVE 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

ⁱⁱUK Human Trafficking Centre, NRM Year End Stats 2014

<http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/502-national-referral-mechanism-statistics-end-of-year-summary-2014>

ⁱⁱⁱ Clause 1(4) and 3(6)(a) of the Modern Slavery Bill

<http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0051/15051.pdf>

^{iv}Refugee Children's Consortium briefing paper: Modern Slavery Bill Committee Stage – House of Lords

December 2014

http://www.antislavery.org/includes/documents/cm_docs/2014/r/1_rcc_briefing_modern_slavery_bill_hol_committee_final.PDF

^v The Immigrant Council of Ireland : Early Legal Intervention for Victims of Trafficking, 2015

<http://www.immigrantcouncil.ie/index.php/research-publications/publications/928-rights-of-human-trafficking-victims-not-guaranteed>

^{vi} European Commission: Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, October 2014

http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20141017_mid-term_report_on_the_2012-2016_eu_strategy_on_trafficking_in_human_beings_en.pdf

^{vii} Article 2(6) of the EU Trafficking Directive.

^{viii} Legal issues in the accommodation and support of asylum seeking and trafficked children under the Children (Scotland) Act 1995, 2014

[http://www.lsa.org.uk/docs/SLF%20Report%20FINAL%20\(2\).pdf](http://www.lsa.org.uk/docs/SLF%20Report%20FINAL%20(2).pdf)

^{ix} Article 13(2) of the EU Directive.

^x European Union Agency for Fundamental Rights: 'Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking', 2014

http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf

^{xi}Letter from Lord Advocate on EU Directive 2011/36/EU on human trafficking, 2013

http://www.scottish.parliament.uk/S3_EuropeanandExternalRelationsCommittee/General%20Documents/LetterfromTheLordAdvocate.pdf and
<http://www.copfs.gov.uk/component/content/article?id=886:heads-of-prosecution-services-meet-at-historic-human-trafficking-summit>

^{xii} Clause 51(4) of the Modern Slavery Bill.