

Justice Committee

Human Trafficking and Exploitation (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Law Society of Scotland's Criminal Law Committee ("the Committee") welcomes the opportunity to consider and respond to the general principles of the Human Trafficking and Exploitation (Scotland) Bill introduced into the Scottish Parliament by the Cabinet Secretary for Justice, Michael Matheson MSP on 11th December 2014 and has the following general comments to make.

General Comments

The Committee welcomes the policy intent of the bill and in particular the desire to prevent and tackle human trafficking and exploitation in Scotland and, with particular reference to Paragraph 3 of the Policy Memorandum, welcomes the Scottish Government's commitment to work in partnership with relevant agencies on International and UK level in order to make Scotland a hostile place for traffickers and to better identify and support potential and confirmed victims.

The Committee highlights that, in order to ensure the rights of victims to access and support are properly resourced, consideration has to be given to additional costs and refers to paragraph 36 of the Financial Memorandum based on an anticipation of a possible increase in the number of requests as between 10% and 20%.

On the basis of this policy intent, and that the Scottish Government favours a victim centred approach to human trafficking, the Committee questions why there is no provision in the bill covering the duties of public authorities with regard to human trafficking other than the duty to provide the police with anonymised information in terms of Section 34 of the bill.

The Committee believes that duties to the victim are not confined to the criminal law aspects of human trafficking and more consideration could therefore be given to specific support and assistance over and above that as imposed upon Scottish Ministers in terms of Section 8 of the bill.

With particular reference to Paragraph 5 of the Policy Memorandum, the Society responded to Jenny Marra MSP's consultation in January 2014. At that time, the Society recognised that there had been a low number of prosecutions in Scotland in terms of Section 22 of the Criminal Justice (Scotland) Act 2003 which created the offence of engaging in trafficking people into, within or out of the UK for the purpose of exploitation by way of control over an individual for prostitution or involvement in the making or the production of obscene or indecent material, with a maximum penalty of fourteen years of imprisonment.

The Society, in its response to Jenny Marra MSP's consultation, considered that there had been a conflation between human trafficking and asylum and therefore welcomed a proper definition of human trafficking in Scotland where the prosecution should be afforded sufficient flexibility, in particular with regard to a person committing an offence of human trafficking where he or she facilitates another person's travel.

The Committee notes that this definition is contained within Part 1 of the bill.

With particular reference to the Scottish Parliament's Justice Committee's call for written evidence, the Committee should like to respond as follows:

1. The creation of a single human trafficking offence for all forms of exploitation for adults and children (Part 1 of the Bill)

The Committee welcomes the creation of the single offence of human trafficking.

With particular reference to Paragraph 2 of the Policy Memorandum, the Committee notes that "the trafficking for human beings for exploitation is a serious, complex and multi-faceted crime. It is an international and cross border crime, although trafficking can also occur within Scotland and within the UK. It involves the transport of both children and adults for a variety of exploitative purposes."

Accordingly, the Committee, while welcoming the creation of a single offence of human trafficking for all forms of exploitation for adults and children, this must also provide for suitable flexibility and prosecutorial discretion.

The Committee recognises that the creation of this offence is in implementation of a number of international instruments including the Council of Europe Convention on Action against Trafficking in Human Beings, done at Warsaw on 16 May 2005 and also the EU Directive on Human Trafficking (Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings) and protecting its victims, which the United Kingdom as Member State has now opted into. The Committee is pleased to note that, in identification of the EU Directive, Section 1 of the bill provides for the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons for the purposes of exploitation which is defined in Section 3 of the Bill.

The Committee is also pleased to note that, in terms of Section 1 (2) of the bill, it is irrelevant whether the other person (the person being trafficked) consents to any part of the arrangement or facilitation of the travel.

The Committee makes specific reference to there being no separate child trafficking offence.

While the Committee notes that the necessary support for children who may be victims of trafficking is already enshrined in legislation, it believes it would be helpful if specific reference could be made to child victims of trafficking, particularly so given that provision is made for child victims of trafficking within both the COE Convention and EU Directive.

2. Increasing the maximum penalty from fourteen years to life imprisonment for this offence

The Committee notes the provisions at both Section 1 (5) (b) of the bill which provides for a sentence to imprisonment for life or a fine (or both) on conviction on indictment of the offence of human trafficking and also Section 4 (4) (b) of the bill which provides for a sentence of imprisonment for life or a fine (or both) on conviction on indictment of the offence of slavery, servitude and forced or compulsory labour.

The Committee also notes that the current maximum penalties for offences in terms of the existing law (notably Section 22 of the Criminal Justice (Scotland) Act 2003 which created an offence of engaging in trafficking people into, within or out of the UK for the purpose of exploitation by way of control over an individual for prostitution or involvement of the making or production of obscene or indecent material, has a maximum penalty of fourteen years imprisonment.

In terms of Article 4 of the EU Directive (penalties), Member States shall take the necessary measures to ensure that an offence concerning trafficking in human beings is punishable by a maximum penalty of at least five years of imprisonment and an aggravation of this offence, i.e where a victim was particularly vulnerable or a child victim, was committed within the framework of a criminal organisation, was committed deliberately or by gross negligence endangering the life of the victim or was committed by use of serious violence or has caused particularly serious harm to the victim, then Member States shall take the necessary measures to ensure that such an offence is punishable by a maximum penalty of at least ten years of imprisonment.

The Committee also notes, however, in terms of Clause 5 of the Modern Slavery Bill, a UK parliamentary bill at present before the House of Lords, the maximum penalties in relation to an offence of either slavery, servitude and forced or compulsory labour or human trafficking would be life imprisonment.

The Committee refers to paragraph 10 of the Financial Memorandum. In 2013 four people were convicted in Scotland of human trafficking offences and the average custodial sentence for those convicted was 847 days (just under two years and four months). The Committee therefore questions whether there is any evidence to suggest that the current maximum penalties of fourteen years of imprisonment applicable in Scotland for existing human trafficking related offences are insufficient and whether a maximum sentence of life imprisonment is therefore required.

3. Establishing statutory aggravations to any criminal offence where the offence is connected with the human trafficking, and where the offence has been committed by a public official in the course of their duties (Sections 5 and 6 of the bill).

The Committee has no particular comment with regard to Section 5 of the bill and notes that this is already contained at sections 83 and 84 of the Criminal Justice (Scotland) Bill and that it is proposed that these sections are accordingly removed from the Criminal Justice (Scotland) Bill at Stage 2.

The Committee notes that section 5 follows a recommendation of the Equality and Human Rights Commission that a trafficking background should be made a statutory aggravation in the sentencing of those convicted of related criminal offences.

The Committee also notes that Section 6 of the bill is in implementation of Article 4.3 of the EU Directive which states that “Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 (offences concerning trafficking in human beings) was committed by public officials in the performance of their duties is regarded as an aggravating circumstance.

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

The Committee welcomes the provisions at Section 7 of the bill.

In particular, this duty takes into account Article 8 of the EU Directive which states the following:

“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2”.

The Committee recognises the protection of the independence of the Lord Advocate in terms of Section 48 of the Scotland Act 1998 in taking decisions about the prosecution of crime.

The Committee is aware of existing Lord Advocate’s guidelines and welcomes the provision to place these on a statutory footing although is of the view that consideration could be given to the Lord Advocate issuing draft guidelines for public consultation prior to publication.

The Committee, however, believes that, in circumstances where the Lord Advocate decides to prosecute, some consideration should be given to the introduction of a statutory defence for a person who commits an offence as a consequence of having been trafficked.

The Committee notes in particular Paragraph 274 of the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings which states the following.

“Each Party can comply with the obligation established in Article 26 (Non-punishment provision) by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims when the above mentioned legal requirements are met, in accordance with the basic principles of every national legal system”.

While it is recognised that this may place the burden on victims to prove their connection between their offending behaviour and trafficked status, the Committee questions whether the provisions at Section 7 of the bill meet with the non-punishment provision at Article 26 of the Council of Europe Action against Trafficking in Human Beings and Article 8 of the EU Directive.

The Committee also notes Clause 45 of the Modern Slavery Bill will provide for a defence for slavery or trafficking victims who commit an offence which is to extend to England and Wales and believes that similar provision should be inserted in this bill.

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

The Committee, while referring to its general comments above, welcomes the provisions at Section 8 of the bill.

In particular, the Committee notes of the Council of Europe Convention Article 12 (Assistance to victims) and Article 11 of the EU Directive.

The Committee welcomes the placing of assistance and support for victims of trafficking in human beings on a statutory footing. The provision at Section 8 (5) (b) of the bill is particularly welcome and reflects Article 11.3 of the EU Directive which states that “Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to directive 2004/81/EC or similar national rules”.

The Committee notes that these provisions are limited to adults.

Although the Committee notes that existing children’s legislation provides for services to be provided to potentially trafficked children, it again questions why the duty to secure support and assist child victims of human trafficking is not reflected on the face of the bill.

The Committee also notes that there is no reference at Section 8 as to how Scottish Ministers are to secure support and assistance. In this respect, reference is made to Clause 49 of the Modern Slavery Bill where the Secretary of State must issue guidance to such public authorities and other persons as the Secretary of State considers appropriate about (b) arrangements for providing assistance and

support to persons who there is reason to believe may be victims of slavery or human trafficking.

The Committee considers that the issuing of such guidance is necessary in order that Scottish Ministers discharge their Section 8 duty.

6. Establishing trafficking and exploitation prevention orders and risk orders

The Committee notes the provisions at Part 4 of the bill.

In particular the Committee notes that the Serious Crime Bill will extend to Scotland Serious Crime Prevention Orders which include orders which can be imposed following a conviction of an offence of human trafficking. Accordingly, there is the potential for duplication.

The Committee is concerned that a person who has not been convicted of a trafficking or exploitation offence can have a trafficking and exploitation risk order (TERO) imposed in terms of Section 22 of the bill. The Committee notes that there is no provision for any level of suspicion that the Chief Constable must have in making such a risk order.

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

The Committee welcomes this duty in terms of Part 5 of the bill.

It is noted that there is no timescale within which Scottish Ministers must prepare a trafficking and exploitation strategy, albeit the strategy must be reviewed within three years of either the strategy being published or the date of the most recent report on the strategy.

The Committee also notes that, although Scottish Ministers may by regulations specify a Scottish public authority for the purposes of having to provide such information and assistance to the Scottish Ministers as they may reasonably require and otherwise co-operate with the Scottish Ministers in order to co-operate of the strategy, there is no provision as to how a Scottish public authority is to provide such information and assistance or otherwise co-operate.

In all the circumstances, the Committee believes, while the publication of a strategy is welcome, what is more important is to give effect to the United Kingdom's International obligations, particularly in terms of the EU Directive and the Council of Europe action against Trafficking in Human Beings in terms of human trafficking.

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

The Committee notes the terms of Section 34 of the bill and refers to its general comments above. While similar provision is contained at Clause 51 of the Modern

Slavery Bill, there is no provision at Section 34 to disapply information to be provided to the Chief Constable if that disclosure contravenes the Data Protection Act 1998. The Committee believes that a similar disapplication should be placed on the face of the bill,

Alan McCreadie
Deputy Director, Law Reform
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