

## Justice Committee

### Human Trafficking and Exploitation (Scotland) Bill

#### Written submission from ECPAT UK

1. ECPAT UK is a leading children's rights charity working on the issues of child exploitation and child trafficking since 1993. It is active in campaigning and lobbying government, producing research, training frontline professionals and working with young victims of trafficking.

2. ECPAT UK has a long history of campaigning against child trafficking across the UK, and an ongoing programme of research, training and advocacy informs our campaigning efforts. ECPAT UK has been instrumental in raising awareness in government of the plight of children trafficked into the UK for all forms of exploitation. We also work directly with child victims of trafficking, which provides insight into the experiences of these children and the processes and systems that they encounter.

3. ECPAT UK is part of the consortium of charities known as the Anti-Trafficking Monitoring Group (ATMG), which monitors the implementation of the Council of Europe Convention against Trafficking in Human Beings and EU Trafficking Directive 2011/36. ECPAT UK is also a member of many working groups and consortiums and chairs the Home Office Modern Slavery Stakeholder Child Trafficking Sub-Group. The expert groups include: the ACPO Working Group on Child Abuse; the London Local Safeguarding Children Board Trafficking Sub-Group; Home Office Sexual Violence against Children and Vulnerable People; the Home Office Modern Slavery Stakeholder Training Sub-Group; the Fundamental Rights Agency expert group on children deprived of parental care and expert group on integrated child protection systems; the NWG Child Sexual Exploitation Policy Forum; the Refugee Children's Consortium. ECPAT UK was also a member of the Project Advisory Group of the Scottish Guardianship Pilot. We responded previously to the consultation by Jenny Marra MSP in January 2014.

#### Summary

4. ECPAT UK welcomes the opportunity to comment on the Human Trafficking and Exploitation (Scotland) Bill and sees its introduction as an important step forward in tackling the scourge of human trafficking and exploitation in Scotland – through legislation, policy and via a national strategy – putting victims' rights at the heart of this approach. As an organisation that has led on the issue of child exploitation and trafficking for more than 20 years in the UK, we feel well-placed to provide evidence to the Justice Committee that we hope will help to improve the understanding of this form of abuse and ensure there is robust legislation and policy to tackle it and protect its victims.

5. ECPAT UK is deeply concerned that the Bill makes no reference to children as victims of trafficking, slavery, servitude and forced/compulsory labour – despite the fact they are known to make up a quarter of all-known victims in the UK<sup>1</sup>. In the

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<sup>1</sup> UKHTC Baseline Assessment 2014

report by Scotland's Commissioner for Children & Young People, it was stated that a poor response to child victims and failure to successfully prosecute child abusers made Scotland "a welcome place for child traffickers"<sup>2</sup>. We believe it is hugely detrimental to not define children and take into account their specific needs, vulnerabilities and rights in this landmark legislation. In the context of Scotland's child protection system, we must certainly ensure those victims aged 16 and 17 are given the protection as children that they are entitled to and need, in line with international standards and legislation. This is particularly important, given that this age group of children represent the highest number of trafficked children in the UK<sup>3</sup>.

6. It is our firmly held belief that there are simple steps that can be taken to ensure children's rights are incorporated in this Bill so that these are implemented on a practical level that benefits these vulnerable children. These priority issues are outlined in more detail below but include: a definition of a child to be included in the Interpretation section of the Bill; a presumption of age clause to protect those undocumented victims; improved drafting of the Offences section to reflect the position of children and to more accurately interpret the definition of trafficking and forms of exploitation; the creation of a non-prosecution clause and statutory defence that directly reflects the position of children not requiring compulsion and affords them sufficient protection from criminalisation; a statutory guardianship system that gives guardians the legal status, powers and access to effectively advocate in a child's best interests and appoint legal representatives, when necessary.

### **General - definition of a child/presumption of age**

7. In order to comply with international standards, this Bill must clearly define a child as a person under the age of 18, in line with the UN Convention on the Rights of the Child, the Palermo Protocol<sup>4</sup>, the Council of Europe Convention on Trafficking (the 'Trafficking Convention') and EU Directive 2011/36/EU (the 'Trafficking Directive').

8. This definition of a child should be present in the interpretation of the Bill but should be clarified in various clauses of the Bill where there is currently ambiguity – such as use of the word 'young' and 'youth' in Clause 3(8). Child victims have particular vulnerabilities, as recognised by the EU Trafficking Directive and the Bill must account for this and ensure practitioners using the Bill are clear what constitutes a child in law.

9. It is also important that the Bill enshrines the 'presumption of age' principle of the Trafficking Directive. The Northern Ireland Human Trafficking & Exploitation Act and the Modern Slavery Bill both include this principle clearly on the face of the Bill, to bring the domestic legislation in line with Article 13(2) of the Trafficking Directive and Article 10(3) of the Trafficking Convention. This would ensure that, where there is reason to believe that a victim is a child, they are treated as such until a final determination (including resolution of disputes) of their age.

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<sup>2</sup> Scotland's Commissioner for Children and Young People. Scotland: A safe place for child traffickers? 2011

<sup>3</sup> UKHTC Baseline Assessment 2014

<sup>4</sup> Palermo Protocol. See:

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

## Part 1 – Offences

10. There is no specific reference to children in the Offences section, despite the internationally agreed definition of child trafficking differing from that of adults<sup>5</sup>. There is no requirement to prove the ‘means’ by which a child is trafficked. The UN Trafficking in Persons Protocol unequivocally rejects the relevance of consent to the offence of trafficking in children. Trafficking in children is established by the fact of an ‘act’ and exploitative ‘purpose’, without ‘means’ required as an element of the offence. The purpose of this is to simplify the “evidentiary requirements for prosecutions involving children”<sup>6</sup>. The Scottish Bill must reflect this key difference in the definition in order to clarify that, in children’s cases, no consent can be possible to any exploitation.

11. The Bill, as drafted, does not reflect the accepted definition of human trafficking, as contained in the Palermo Protocol, the Trafficking Convention and the Trafficking Directive. The word ‘travel’ is not present in any of the above legislation and it is mistakenly used to encompass the ‘acts’ required in the trafficking definition (transfer, harbouring, receipt of persons, including the exchange or transfer of control over those persons). It is also problematic that the irrelevance of consent as defined in Clause 1(2) refers to the ‘travel’ of the person and not the ‘intended exploitation’ as is made clear in international trafficking legislation. This is not how the irrelevance of consent for children was intended. ECPAT UK believes this will cause difficulties in prosecutions and will not give children the special protection that they are entitled to in law.

12. ECPAT UK has campaigned, with the support of an extensive coalition of children’s charities, for a separate offence of child exploitation to recognise the specific vulnerability of children and to enable more convictions in their cases. The campaign has already achieved steps to improve the drafting of the offences, in particular, that of Clause 1 of the Modern Slavery Bill, which is similar to the offence in Clause 4 of the Scottish Bill – that of Slavery, servitude and forced or compulsory labour. These important alterations have significantly improved this offence.

13. They include:

- The need to have regard to the victim being a child as this is recognised as a particular vulnerability
- Consent (whether an adult or child) to any of the acts does not preclude a determination that a person is a victim of the offence
- Regard may be had to ‘any work or services provided by the person, including work or services provided in circumstances which constitute exploitation...’ (as defined by the definition of exploitation in the Modern Slavery Bill)

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<sup>5</sup> Palermo Protocol. See:

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>6</sup> UNODC: The role of ‘consent’ in the trafficking in persons’ protocol (2014)

14. ECPAT UK strongly recommends that the Justice Committee reflects these amendments made in the Modern Slavery Bill in the Scottish Bill but urges it to go further to protect child victims. In a letter to Peers in the House of Lords, dated 16 February 2015, Lord Bates said the Modern Slavery Bill makes clear that: 'Where a person deliberately targets a vulnerable person, such as a child, there is no requirement for any force, threats or deception to be used to induce the child into being exploited.' In the debate on this, Lord Bates made a commitment to ensure this is reflected in the prosecutorial guidance<sup>7</sup>. We urge the Justice Committee to put this statement on the face of the Bill and not leave it to guidance so that those using the Bill (and juries) are better able to understand the vulnerability of children as reflected in international law, which we believe would improve prosecution rates for children's cases.

## Part 2 – Protection of Victims

15. In ECPAT UK's opinion, the wording of the 'Prosecution of victims' section (Clause 7) is vague and falls far short of Article 8 of the Trafficking Directive, which provides for a broader non-prosecution principle for victims. We would welcome both a non-prosecution principle and a statutory defence of trafficking/ slavery/ servitude/ forced labour to protect victims who are criminalised unlawfully for crimes they are forced to commit. Both clauses should pay particular regard to children and clearly make the distinction between adults and children in these situations.

16. As currently drafted, the proposed guidelines outlined in the Bill make clear reference to 'compulsion'. The wording of Clause 7(2) is inappropriate for children as it requires compulsion to be present, which is in direct contradiction with children's inability to consent to their own exploitation. It is for this reason that the Modern Slavery Bill has been amended since its initial publication to create a specific sub-section for children – Clause 45(4). Despite this, the wording in the Westminster Bill still could yet be improved as it wrongfully imposes a 'reasonable persons test' that ECPAT UK believes introduces an element of compulsion that should not be present for children forced to commit crimes as a direct consequence of their being trafficked. Therefore, ECPAT UK recommends the Justice Committee introduces a similar statutory defence to that in the Northern Ireland Act, Clause 22(6), as well as a more general clause of non-prosecution of victims that does not require compulsion to be present for child victims. Children should not be criminalised and re-victimised for crimes they are forced to commit – the law must be clear on this.

17. With regard to support and assistance for child victims, the Bill, as drafted, makes no reference to child victims, which is extremely disappointing as the Human Trafficking Bill is a once-in-a-lifetime opportunity to identify the specific rights of all victims of trafficking, slavery, servitude and forced/compulsory labour and to house these rights and legislation in one easily accessible place. This would ensure practitioners utilising the law will be able to understand victims' rights, as well as criminal laws. The absence of a specific section on child victims – their special position in terms of law, their right to identification, protection and support – misses an opportunity to bring together in one place the existing rights of child victims of trafficking, slavery, servitude and forced labour in Scotland (as contained in the

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<sup>7</sup> HL 23 Feb 2015 : Column 1438

Children (Scotland) Act 1995, the Children's Hearings (Scotland) Act 2011, the Children and Young People (Scotland) Act 2014, among others).

18. ECPAT UK supports the position that support for child victims is embedded within the existing child protection system. However, the legislation on this issue must enshrine the relevant definitions, rights and entitlements of child victims of all forms of trafficking and exploitation. The particular vulnerabilities of children should be clearly defined in the Bill, in line with international legislation. Paragraph 23 of the Trafficking Directive clearly states that unaccompanied child victims of trafficking need "specific assistance and support due to their situation of particular vulnerability" – the Bill must reflect this.

19. There is no provision in the Bill for independent legal guardians for trafficked and separated children, which we believe must be introduced in order to give effective support for children and to ensure compliance with the EU Trafficking Directive and Trafficking Convention, as well as addressing the recommendations of the UN Committee on the Rights of the Child, GRETA and the Fundamental Rights Agency.

20. Clause 21 of the Northern Ireland Act currently provides a 'gold standard' with regard to support for children by including provision for independent legal guardians for separated and trafficked children. Westminster has responded to this by strengthening the enabling mechanism for independent Child Trafficking Advocates in the Modern Slavery Bill, giving the advocates (which are effectively guardians) a statutory footing and the ability to instruct legal representatives on the child's behalf, where necessary, as well as a duty to promote the child's best interests. It has also ensured the advocates are completely independent from others tasked with making decisions about the child, such as social workers.

21. There is already a strong guardianship service in Scotland, run by Aberlour. It is ECPAT UK's understanding that the service would benefit from strengthened provisions that would give more powers to the guardians and would bring it in line with domestic and international standards, at no extra cost. Ensuring that referral to the guardianship service was statutory would mean children should not fall through the gaps where poor practice may occur and would improve the standing of the existing service. Giving guardians some legal 'status' would mean that other statutory professionals give them the respect and freedom they need to work effectively, such as access to meetings, information and confidential documents relating to the child. This would reduce the need for guardians to negotiate their way into core meetings or sometimes be refused access to documents that they need in order to understand the child's situation and to advocate effectively. Guardians should also have the power to instruct legal representations, where necessary, as trafficked children are 'particularly vulnerable' and often cannot instruct lawyers to act in their best interests if they are still under the control of their traffickers or have little grasp or understanding of their rights and situation as victims of a very serious crime.

22. We believe that unless guardians are given legal 'powers', they are not able to as effectively represent and champion a child's best interests as they could be. Effective guardians need the ability to step in at the times when they are most

needed – to hold authorities to account and to instruct legal representatives on behalf of a child and represent their best interests. The UN Committee on the Rights of the Child as recently as July 2014 recommended that the UK Government “prioritize the appointment of a competent and statutory guardian...to safeguard the best interests of the child...and that [a child victim is] entitled to access, free of charge, a qualified legal representative”.

23. The Fundamental Rights Agency’s recent report on guardianship cites guardianship systems as fundamental to improving States’ child protection strategies and acknowledges the vital role guardians play in protecting children from trafficking and exploitation. The guidance establishes the core principles that should underpin any system of guardianship, which include: non-discrimination, independence, quality, accountability, sustainability and child participation. It states that basic requirements of guardianship systems must be laid down in legislation in order for them to be transparent and effective. It also states that guardians should exercise legal responsibility for the well being of the child and complement the limited legal capacity of the child.

24. Therefore, ECPAT UK strongly recommends that placing the guardianship service on a statutory footing, which would only strengthen the already much-respected system, making it easier for guardians to do their jobs and ensuring local authorities and other public agencies pay ‘due regard’ to the guardians and their work. ECPAT UK believes the drafting of the Northern Ireland Act’s Clause 21 expertly defines the role of guardians and their status as an agency with a statutory footing and we urge the Justice Committee to fully replicate this and ensure the rights of trafficked and separated children are transparent and enshrined in Scottish law.

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