

Human Trafficking and Exploitation (Scotland) Bill: Evidence for the Scottish Parliament's Justice Committee

Introduction

1. My role as Scotland's Commissioner for Children and Young People is to promote and safeguard the rights of children and young people by promoting awareness and understanding of children's rights, keeping under review the law, policy and practice relating to the rights of children and young people, promoting best practice and undertaking research.
2. I welcome the introduction of the Human Trafficking and Exploitation (Scotland) Bill and the opportunity to provide comment. I hope that the measures contained within the Bill and the proposals for a Strategy will help to tackle human trafficking and better enable the protection of the rights and meet the needs of those who have been trafficked to ensure that a victim-centred, rights-based approach to human trafficking is embedded in both policy-making and practice across Scotland.
3. However, I am concerned by the lack of reference to the rights and vulnerability of trafficked, exploited and separated¹ children on the Bill and have focused my evidence on how this must be addressed.
4. The Bill provides an opportunity to identify how the specific rights, vulnerabilities and needs of these children are taken into account and should be clear that duty-bearers must act in accordance with international and national law within the context of Scotland's existing legislative and child protection framework. This is particularly important for 16 and 17 year olds, where it must be clear that they are children foremost and should not be dealt with in the adult processes of identification, protection and support.
5. In 2011 my office published a report 'Scotland: A safe place for child traffickers?'² which looked into the nature and extent of child trafficking in Scotland, stating that the poor response to the needs of child victims of trafficking and the lack of successful criminal prosecutions "makes Scotland a welcome place for child traffickers." It highlighted the need to urgently review the National Referral Mechanism and for more awareness and understanding about child trafficking.

Children's rights in the context of child trafficking and exploitation

6. There is a clear international legal framework on human trafficking, forced labour and exploitation and human rights that should underpin the proposed legislation. In particular, the Bill must be fully compliant with the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('the EU Directive'), which has direct legal effect in Scotland.³
7. In the specific context of child victims of trafficking, a number of articles of the United Nations Convention on the Rights of the Child (UNCRC) are of particular significance, including Article 3 (best interests of the child); Article 11 (measures to combat the illicit transfer/ non-return of children abroad); Article 12 (the voice of the child); Article 19 (protection from abuse or

¹ Throughout my response I have used the word 'separated' to include 'unaccompanied' unless otherwise specified.

² Scotland's Commissioner for Children and Young People, *Scotland: A safe place for child traffickers?* 2011

³ The UK is also expected to comply with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Council of Europe Convention on Action Against Trafficking in Human Beings.

neglect); Article 32 (protection from harmful work); Article 34 (freedom from sexual exploitation and abuse); Article 35 (measures to prevent the abduction of, the sale of or traffic in children); Article 36 (protection against exploitation prejudicial to the child's welfare); and Article 39 (measures to promote physical and psychological recovery and social reintegration of a child victim). It is also important to consider the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which the UK has ratified.

Particular vulnerabilities of children

8. The Bill must recognise children as a vulnerable group in line with this international framework, which identifies children as having particular vulnerabilities and being among those most exposed to the risk of being trafficked. Paragraph 8 of the EU Directive states "children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings."⁴ Paragraph 23 states that particular attention should be paid to unaccompanied child victims of trafficking in human beings as they "need specific assistance and support due to their situation of particular vulnerability."
9. It is well understood by practitioners that these children may have experienced significant trauma and may not understand that they have been trafficked or may wish to return to their trafficker. My report highlighted the need for increased awareness and understanding with respect to the rights of trafficked children.
10. ECPAT UK has stated that separated children, including those who are unaccompanied and trafficked, are likely to have a complex range of needs, based around underlying and often pre-existing vulnerabilities, by virtue of their backgrounds, experiences, and their journeys.⁵ My office's report states that children's rights "are often not upheld with children facing discrimination as a result of their age, and often their views are not sought or, if they are, then discounted."⁶
11. The system of protection envisaged for identifying and protecting child victims of trafficking in Scotland should be designed to take into account evidence that child victims of trafficking have accounted for a significant proportion of the total number of separated children supported in Scotland, and that victims of trafficking are often not immediately identifiable as having been trafficked or exploited. The Bill must therefore consider the rights of separated children.
12. The complete absence of children from this Bill fails to take into account the vulnerabilities of children and young people as in need of specialist care and support when identified as trafficked, exploited or separated. While a model of identification, protection and support for children who have been trafficked, exploited and separated must be located clearly in the existing child protection system and in the context of Scottish legislation relating to children and young people, this should be clearly outlined in the Bill. This should include precise definitions of their rights and entitlements and recognition of their particular vulnerabilities and needs, with the aim of putting the rights of trafficked, exploited and separated children clearly in legislation in one accessible place in order to assist service providers to understand their duties as duty-bearers. This is not a call for a parallel system of protection for trafficked,

⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

⁵ ECPAT UK, *On the safe side: Principles for the safe accommodation of child victims of trafficking*, 2011 and Rigby, P., Malloch, M. & Hamilton Smith, N., *Towards better survivor care: A report on child trafficking and care provision*, 2012.

⁶ Scotland's Commissioner for Children and Young People, *Scotland: A safe place for child traffickers?* 2011

exploited and separated children, but for clarity over their entitlements within the existing system to ensure that this contains all of the necessary support provisions to take into account their particular vulnerabilities. Children who are trafficked may not fit neatly into current child protection arrangements, and consideration should be given as to how their best interests can be taken into account within the existing framework.

13. The following comments focus on areas of the Bill where this significant omission should be addressed. In particular there should be:

A definition of a 'child'

14. The interpretation section of the Bill should clearly define a child for the purposes of this legislation, and in line with international law, as any person under 18. Clause 3(8) of the Bill includes the words 'young' and 'youth', neither of which are defined in the Bill. 'Child' should instead be used and defined in accordance with the United Nations Convention on the Rights of the Child.⁷
15. Including a clear legal definition of a child in the Bill would recognise the legal differences between trafficking adults and children, in terms of the particular vulnerabilities of children outlined above, and removing any potential ambiguity relating to care and support provisions for 16 and 17 year olds.
16. Chapter 1, Part II of the Children (Scotland) Act 1995, which identifies the duties and powers of local authorities to safeguard and promote the welfare of children, defines a child as a person under the age of 18 years old (Section 93(2)(a)) and therefore is clear that the duties of the local authority to child victims of trafficking extend to children up to age 18. The Scottish Government's 2014 Child Protection Guidance states that "it should be noted that the Palermo Protocol broadens the scope of a child to under 18 and local procedures should reflect this."
17. Further, Article 2(6) of the EU Directive defines child as any person below 18 years of age. The Directive is directly effective in all parts of the United Kingdom, including Scotland.

Reference to services for children who have been trafficked, exploited and separated in line with existing processes

18. The Bill should include clarity with regard to the services these groups of children are entitled to under the provisions in the child protection system and the Children (Scotland) Act 1995, the Children's Hearings (Scotland) Act 2011 (where relevant and appropriate), the Children and Young People (Scotland) Act 2014 and the proposed Criminal Justice Bill. This would—in line with the overall stated intended purpose of this Bill—draw together existing legislation in one place so that local authorities and others are clear with respect to the rights of trafficked, exploited and separated children.
19. This should include consideration of the specific assistance, support and protective measures that should be available to child victims in line with Articles 13-16 of the EU Directive and existing measures available to children and young people in Scotland through the child protection and GIRFEC framework and identified by a wellbeing assessment. This may include access to services that may assist in physical and psycho-social recovery, including

⁷ Article 1 of the UNCRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

interpretation, legal advice and representation, counselling and child and adolescent mental health services.

20. The Bill should also be clear that child victims of trafficking will be assisted to access free, specialist legal advice and representation, in line with a rights-based approach to protection and support of child victims, at the earliest opportunity, as mandated by Article 15(2) of the EU Directive.
21. This legislation should be accompanied by clear statutory guidance which identifies the links between existing legislation and policies in order to further streamline service provision for trafficked, exploited and separated children. This is particularly important for those children who we know fall through the gaps in current child protection processes and for 16 and 17 year olds.

A clause on the best interests of the child

22. The Bill should include a clear duty on local authorities to act in the best interests of trafficked, exploited and separated children, giving due regard to their particular vulnerabilities, in line with the existing provisions in the Children (Scotland) Act 1995 and Article 3 of the United Nations Convention on the Rights of the Child.

Provision for 16 and 17 year olds and presumption of age

23. There should be specific reference to the status of child victims of trafficking in relation to the use of section 25 of the Children (Scotland) Act 1995 (including 16 and 17 year olds) to provide accommodation and support and clarity relating to when Local Authorities must provide services under section 25 as opposed to under section 22. The aim of this is to address the often inconsistent treatment by local authorities in respect of duties owed by them to separated children, including trafficked children, who arrived in Scotland at the age of 16 or 17 years old, under the Children (Scotland) Act 1995.⁸ This is in line with the legal opinion from Janys M. Scott QC.
24. I am also concerned that the Child Impact Assessment produced by the Scottish Government on this Bill states that “where individuals of unknown age could only previously have received children’s services, this is no longer the case as services will now be available for trafficked adults.” It is important that systems take into account that a number of child victims can, at some point, be subjected to dispute with regard to their age, even if they are later accepted to be under 18. The Bill should therefore provide clarity that in cases of doubt with regard to age, potential victims of trafficking should be treated as a child (defined as under 18 years of age) until an age assessment has been concluded. This is particularly important in cases where there may be a lengthy wait to receive an age assessment and is in line with the requirements of Article 13(2) of the EU Directive and with Part 5, section 50 of the Modern Slavery Bill in England and Wales.

Guardianship service on a statutory footing

25. Provision should be made within the Bill for an independent guardianship service for children suspected of being trafficked, exploited and separated in order to (1) promote and protect

⁸ Ang, J., Legal issues in the accommodation and support of asylum seeking and trafficked children under the Children (Scotland) Act 1995

their best interests; (2) safeguard and promote their welfare; (3) participate effectively in multiple and complex legal processes, including identification as a victim of trafficking, criminal justice proceedings, asylum and immigration status determination and access to housing and children's services; (4) enable continuity of care and relationship building with someone with a clear overview of the child's situation.

26. This would place on a statutory footing implementation of the EU Directive Article 14(2), which calls for the appointment of a guardian "where the holders of parental responsibility are precluded from ensuring the child's best interests and/ or from representing the child."
27. This is also in line with clause 21 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) legislation in Northern Ireland.
28. An independent guardian would be an integral part of the child protection system in line with existing international best practice to assist, represent and support a child where the parent with parental responsibility is not in regular contact with the child or is outside the UK, is suspected of having committed an offence in relation to the child or has interests which conflict with those of the child.
29. A duty should be placed on the guardian to act in the best interests of the child and they must be equipped with the ability to assist children in obtaining legal advice, assistance and representation and to accompany children to meetings as an independent advocate.
30. In order to overcome some of the challenges faced by the existing guardianship service this would place it on a statutory footing. I would also recommend creating a duty for local authorities to recognise and pay due regard to the guardian.

Non prosecution of children and young people

31. Trafficked children must never be "punished, prosecuted or detained for any crime committed as a direct consequence of being trafficked."⁹ In 2008 the UN Committee on the Rights of the Child recommended that the UK "should always consider, both in legislation and in practice, child victims of these criminal practices (sexual exploitation and abuse), including child prostitution, exclusively as victims in need of recovery and reintegration and not as offenders."¹⁰
32. I welcome the provisions to place the Lord Advocate's guidelines on prosecuting someone who is, or appears to be, a victim of human trafficking on a statutory footing. However I am concerned that this would not always stop child victims of trafficking from being prosecuted for offences they committed while under the control of their traffickers. In practice the 'strong presumption' against prosecution in the Lord Advocate's guidance appears to be capable of being rebutted by reference to the seriousness of the crime. I have similar concerns with its focus on threats, violence and coercion, which may be difficult for the victim to prove and the lack of distinction in the policy between child and adult victims of trafficking.
33. I am also concerned about the restrictions applied in part 7(2) of the Bill with respect to the guidelines where the prosecutor must decide whether a person has been compelled to commit an offence. It should be clear that in cases involving children no proof of compulsion is necessary, in line with the international definition of trafficking.

⁹ UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, September 2006

¹⁰ Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, October 2008.

34. I therefore urge the Scottish Government to ensure that there is a clear and unambiguous provision within the Bill that takes a rights-based approach to non prosecution, prevents the unnecessary re-traumatisation of children and ensures that children who have been trafficked or suspected of being trafficked will not be prosecuted for offences that they may have committed while trafficked. This in clear alignment with Article 8 of the EU Directive, which states that necessary measures should be in place “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.”
35. It will also be important to ensure that protections in Scots Law are in line with those guaranteed through Part 5 of the Modern Slavery Bill for victims in England and Wales and Part 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) legislation in Northern Ireland to ensure seamless protection for victims throughout the UK.

A single human trafficking offence

36. I continue to support proposals to consolidate existing obligations and commitments with respect to human trafficking offences in Scots Law. A comprehensive and clearly defined criminal offence will help to reduce the existing complexity around current trafficking legislation.
37. The Scottish Government must ensure that the single offence covers all forms of child exploitation, and reflects as closely as possible, the definition articulated in Article 2 of the EU Directive. I am concerned that the definition as currently drafted focuses too narrowly on “travel” and falls short of the EU Directive definition.
38. In addition, such definition must clearly reflect the qualification in Article 2(5) of the EU Directive, under which it does not have to be shown that the ‘means’ in Article 2(1) were used in the commission of the offence where the victim is a child; those ‘means’ referred to are named in the second limb of the Directive’s definition, which reflect children’s particular vulnerabilities and the fact that where a child is victim of trafficking is concerned, no possible consent to exploitation should ever be considered legally valid.
39. I also support the call from Barnardo’s Scotland for Ministers to consider the inclusion of a statutory aggravation which would recognise the particular vulnerability of children, within sentencing of perpetrators where a trafficking offence has involved a child.

Please do not hesitate to contact Chloe Swift, Policy Officer, in the first instance, at chloe.swift@sccyp.org.uk with any questions, comments or concerns.

Scotland’s Commissioner for Children and Young People

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