

SUBMISSION TO THE SCOTTISH PARLIAMENT'S JUSTICE COMMITTEE: THE HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) BILL

Amnesty International Scotland

Introduction

1. Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are accessed and enjoyed by all. Our purpose is to protect individuals wherever justice, fairness, truth and freedom are denied. Amnesty International conducts extensive research and monitoring of human rights abuses around the globe; and carries out awareness-raising and campaigning to promote and protect human rights; the fundamental entitlements and freedoms that we can, and should, expect in our lives. These rights are enshrined in the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948.
2. Amnesty International is independent of any government, political ideology, economic interest or religion and represent more than 20,000 Amnesty members and a broad activist network including 123 local, youth and student groups in Scotland.
3. Amnesty International campaigned for a robust approach to the prevention and combating of human trafficking during negotiations on the text of the Council of Europe Convention on Action against Trafficking in Human Beings (Human Trafficking Convention), and continues to work to promote states' ratification of and compliance with this Convention. We have also contributed to a range of reports, including those published by UK Anti-Trafficking Monitoring Group (ATMG), of whom we are members.
4. Amnesty International placed human trafficking in Scotland under the spotlight in our 2008 publication 'Scotland's Slaves'¹. This report highlighted the prevalence of human trafficking in Scotland. The research focused on women and girls trafficked into the UK for the purpose of sexual exploitation and domestic servitude, although it identified recommendations relevant to all trafficked persons including calling on the Scottish Government to take a lead on the implementation of the parts of Council of Europe's Convention on Action Against Trafficking in Human Beings, for which it is responsible within its devolved powers. These include:

Article 10 - Identification of the victims

Article 12 - Assistance to victims (including accommodation and support)

¹ http://www.amnesty.org.uk/sites/default/files/scotlands_slaves_2008.pdf

Article 26 - Non-punishment provision (for victims coerced into crime)

5. Amnesty International Scotland welcomes the introduction of the Scottish Government's Human Trafficking and Exploitation (Scotland) Bill, intended to simplify and consolidate legislation to improve prosecution rates whilst ensuring victims of all the forms of this heinous violation of human rights, are adequately and appropriately supported.
6. To successfully achieve these aims, this submission proposes that:
 - The wording of the offences should be brought into line with internationally-recognised definitions
 - A broad non-prosecution principle and statutory defence should be included on the face of the Bill
 - The Bill should also include a provision on Independent Legal Guardians for all separated and unaccompanied children, making specific reference to the crime of 'child trafficking', in recognition of the specific vulnerabilities and needs of children.
 - The Scottish Government commit to examine potential for the development of a specific Scottish National Referral Mechanism (NRM) based on a multi-agency, multi-disciplinary approach which provides a human rights framework for the identification and support of victims of trafficking.

The creation of a single human trafficking offence for all forms of exploitation

7. Whilst we welcome the government's intention to consolidate and simplify legislation, we are concerned that the definition of human trafficking contained within the proposed legislation deviates significantly from the internationally accepted definition:

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."²

8. Furthermore, Article 5 requires that the conduct set out in Article 3 be criminalized in domestic legislation which should adopt the broad definition of trafficking prescribed in the Protocol, enabling the legislative framework to respond effectively to trafficking which:
 - Occurs both across borders and within a country (not just cross-border)
 - Is for a range of exploitative purposes
 - Victimized children, women and men

² See also Article 4(a), Council of Europe Convention on Action against Trafficking in Human Beings, 2005; Article 2, EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

9. We believe that the use of the word 'travel' in Clause 1 (a) - not present in the Council of Europe Trafficking Convention nor the 2011 EU Trafficking Directive - is used to encompass all of the other acts (recruitment, transport, transfer etc.) and therefore wrongly emphasises movement of an individual and is suggestive of international trafficking, rather than internal. We furthermore believe that deviating from internationally accepted definitions may complicate transnational crime investigations with countries which do operate within this internationally accepted framework.
10. As the definition of human trafficking which is used throughout the Bill, including for the purposes of support provision and protection set out in Part 2, it is vital that the definition accurately reflects the scope and complexities of the crime of human trafficking. Greater accuracy would be achieved by aligning it closer with the accepted internationally-adopted definition.

Absence of recognition and support for child trafficking victims

11. Clause 3 (8) of the Bill includes the words 'young' or 'youth', neither of which are defined within the Bill. 'Child' and 'children' should instead be used and defined as any person under the age of 18, in line with the definition found in the UN Convention on the Rights of the Child, the Convention and the Directive. The absence of children in the Bill undermines the horrific experiences of child victims of trafficking, and seems incongruous with the fact that such a large majority of trafficking victims are in fact children. According to the International Labour Organisation (ILO), children make up 26% of trafficking victims internationally for purposes of forced labour and sexual exploitation³. This figure does not include trafficking for the removal of organs or for forced marriage/adoption unless the latter practices lead to a situation of forced labour or service.
12. Additionally, it should be recognised that children can not give consent to being exploited, even if they are aware/agreeable to being moved and a separate 'Child Exploitation Offence' reflecting that no proof of force, threats or other forms of coercion are necessary, and ensure criminalisation even when the child appears to be a 'willing' participant in the acts which constitute the exploitation.
13. Under international law, the UN Trafficking Protocol, the Convention and the Directive, the presence of any of the 'means' to show compulsion are irrelevant when defining a child as a victim of trafficking or exploitation. These legal aspects should not then become relevant or necessary in determining whether a trafficked or enslaved child is entitled to such protection. Both the Modern Slavery Bill⁴ and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act in Northern Ireland (the 'Northern Ireland Act')⁵ make specific reference to children in their respective provisions and have made clear that the test of compulsion is unnecessary to prove in cases involving children.

³ ILO (2012) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_181953.pdf

⁴ Clause 45 (4) <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0069/15069.pdf>

⁵ Clause 22 (6) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland), 2015 http://www.legislation.gov.uk/niu/2015/2/pdfs/niu_20150002_en.pdf

14. Although it is our understanding that the government intends for the Children and Young People (Scotland) Act 2014 to cover child trafficking victims, we believe this would be problematic. We therefore call for the inclusion of a separate section within the Bill - Part 2: Protection of Victims, which recognises child trafficking victims and provides them with adequate and appropriate support and assistance. This would include the duty on local authorities to act in the best interests, as defined in the UN Convention on the Rights of the Child, of any potential child trafficking victim.
15. To not enshrine the rights of child victims in this important legislation would be a disservice to child victims and would be an opportunity missed to put in one place all the relevant law, provisions and rights of all victims, not just adults, of these crimes.

Child Guardians / Advocates

16. The needs of child trafficking victims are distinct from those of adult victims, due to their particular vulnerability. Children and young people are often separated from their parents or primary carers during the trafficking process and their age can accentuate the trauma of exploitation.
17. We therefore call for specific provision within the Bill of a system of legal guardianship for all separated and unaccompanied children, the appointment of which should be mandatory as soon as the child is identified as a potential victim of trafficking.
18. The concept of guardianship has already proved to be beneficial for children who have been trafficked, or for unaccompanied children seeking asylum; as evidenced by the current guardianship service in place in Scotland⁶. A provision to put guardians on a statutory footing would ensure that guardians have the full legal status they need to advocate effectively alongside existing services, including holding authorities to account over poor practice.
19. A guardian can ensure a child receives the medical, legal, practical and educational support they need in order to rebuild their lives, and to help prevent them facing further exploitation or harm from traffickers.
20. A 'Presumption of Age' clause, similar to that found in Article 13(2) of the Directive and Article 10(3) of the Convention, should be included in Bill to ensure that, where there is reason to believe that a victim is a child, they are treated as such until the final determination (including resolution of disputes) of their age.

⁶ The Scottish Guardianship Service, delivered in partnership between Aberlour Childcare Trust and Scottish Refugee Council, has already helped support more than 100 unaccompanied young people going through the asylum system, some of whom are victims of trafficking. See 'She endures with me': Final evaluation of the Scottish Guardianship Service Pilot <http://www.scottishrefugeecouncil.org.uk/guardianship>

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

21. Amnesty International believes that it is essential that victims of human trafficking are protected from prosecution or punishment for criminal activities that they have been compelled to commit as a direct consequence, or manifestation of, being subject to trafficking. We also believe that the need to avoid detention of people who are suspected of being trafficked should be addressed either as part of the Bill or the policy emanating from it.
22. Although provisions in Part 7 of the Bill place a duty on the Lord Advocate to issue guidelines to prevent the prosecution of trafficking victims who have committed an offence, we would argue that this provision is not strong enough. We therefore strongly support the creation of a statutory defence which protects victims of trafficking, who have engaged in criminal activity, from prosecution and criminalisation.
23. International law makes it clear that our legal system must take adequate steps to ensure the criminalisation of victims of trafficking does not occur:

“Member States shall, in accordance with the basic principles of their legal system, 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”⁷

24. It is also essential that the criminal justice response be backed up by greater awareness raising and training. Officials likely to come into contact with victims or potential victims of trafficking, whether in the prevention of or fight against trafficking, should be provided with adequate training in the specifics of trafficking and the related human rights implications. The Government must also invest in measures to raise awareness amongst the public and to encourage people to report potential cases of exploitation and trafficking.

The UK Anti-Slavery Commissioner

25. Amnesty Scotland is concerned that there is no reference to the Anti-Slavery Commissioner in the Bill. We believe that the Bill should explicitly state the legal duties and obligations of the Commissioner’s role as it pertains to Scotland; particularly in light of the concerns voiced regarding constrictions placed on both the Commissioner’s independence from the government, as well as his role and remit which has been narrowly defined with a primary focus on law enforcement response.

⁷ Article 8, EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims

Sexual Exploitation and Prostitution – The criminalisation of the purchase of sexual services as a human trafficking reduction measure

26. We very much welcome the intention of the proposed legislation to ensure that all offences which constitute human trafficking are contained within the one Act; including sexual exploitation through prostitution. However, we are concerned that the criminalisation of the purchase of sexual services, mooted for inclusion by a number of organizations, may be considered as a measure to reduce trafficking for the purposes of sexual exploitation.
27. Human trafficking and prostitution are two separate and complex issues and those engaged in selling sexual services and human trafficking are very complex social phenomena. We believe human trafficking and prostitution require more considered separate policy and legislative responses. The Convention on Action against Trafficking in Human Beings and the EU Trafficking Directive expressly provide measures to be taken for discouraging and reducing the demand for trafficking victims. The criminalisation of the purchase of sexual services is not one of the measures they recommend.
28. Amnesty International does not, therefore, believe that it would be effective or appropriate to attempt to address prostitution, nor include the criminalization of the purchase of sexual services as a means of reducing demand of sexual services, as part of the proposed Bill.
29. Amnesty International Scotland is concerned that, in the absence of thorough evidence-based research on the links between human trafficking and those who sell sexual services in Scotland, there is potential for any attempts to criminalise the purchase of sex to be counter-productive by driving trafficking for sexual exploitation and those who sell sexual services further underground, thus increasing the already vulnerable position of those involved. We are also concerned with the potential for diversion of criminal justice resources away from tackling trafficking.
30. These concerns are reflected by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) in their third general report which states that "The impact of criminalising the purchase of sexual services, seen as an anti-trafficking measure in some of the States evaluated by GRETA, must be assessed in the light of all possible consequences. This includes ensuring that the measures taken do not drive victims of trafficking for the purpose of sexual exploitation underground or make them more vulnerable, and also that they do not mobilise investigation units and prosecution authorities to the detriment of investigations of traffickers."⁸
31. Amnesty International Scotland is concerned that the outlawing of payment for sexual services of a person is a standalone measure, without further provision and support provided for those who will be directly affected as a result of this step, nor crucial protection and support for those seeking to exit the selling of sexual services. Further provision and support should be fully informed by a strong evidential base, which would include independent research and consultation with a range of stakeholders including, and especially, the rights

⁸ General report on GRETA's activities, covering the period from 01 August 2012 to 31st July 2013. Published October 2013.
http://www.coe.int/t/dghl/monitoring/trafficking/docs/Gen_Report/GRETA_2013_17_3rdGenRpt_en.pdf

holders. There is an insufficient evidential basis how this would reduce the demand for human trafficking for sexual exploitation in Scotland.

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

32. Whilst we welcome the provision of a duty upon Scottish Ministers to undertake and review a strategy on human trafficking; and the parliamentary scrutiny which that duty enables; we believe that it is imperative that the strategy be informed by rights-holders and those organisations who effectively represent the voices of those rights-holders. Additionally, the strategy should inform an action plan for implementation to enable more effective scrutiny, provide for more effective evaluation on an ongoing basis; as well as the identification of key stakeholders within that process.

Whilst the duty will be on the Scottish Ministers, it is vital that police, justice and immigration officials and any other agencies involved with trafficked people should recognise their responsibility to uphold human rights to the highest standard. Amnesty International Scotland believes that developing and implementing the proposed strategy using a human rights-based approach will help achieve this.

33. In addition to the Scottish Parliament's oversight, Amnesty believes an independent and specialised Scottish human trafficking commissioner is required, with authority to monitor, investigate and report on responsibilities relating to human trafficking. The Council of Europe's Group of Experts on Action against Trafficking in Human Beings highlights the independent assessment of the effectiveness of anti-trafficking measures as one of the five key priorities for those addressing human trafficking.

National Referral Mechanism – Implementation of a Scottish model

34. Amnesty International is strongly supportive of a devolved national referral mechanism reflecting the victim-centred approach outlined within the proposed legislation. We need to ensure that the welfare of the potential victim is the primary concern and there is no refusal of asylum until after it has established whether or not that person has been the victim of trafficking.
35. Article 10 of ECAT relates to the Identification of Victims which should be done by Competent Authorities who should act as the access point to a range of rights intended to help people who have been trafficked such as healthcare, accommodation and legal advice. Without the right identification early on, especially for those with irregular immigration status could mean immigration detention, criminalisation and removal back to the country of origin without any risk assessment as to the risk of harm or re-trafficking on return.
36. We would particularly highlight the importance of the following proposals:

- Not allowing assistance and support for victims to be conditional on cooperation in the prosecution of traffickers.
 - Removing concerns such as asylum from any decision making as to the needs presented by a trafficked person.
 - The benefit of doubt being given in cases where the age of a person is unclear or disputed, but where they may be under 18, ensuring children receive immediate assistance, support and protection.
 - The inclusion of a right of appeal.
37. We believe the issue of effective and appropriate protection for victims and witnesses should be addressed directly within the proposed Bill. Article 28 of the Convention on Action against Trafficking in Human Beings requires that states 'adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators'.
 38. Victims require to be protected from retaliation and intimidation, and from the risk of being re-trafficked, during or after investigation and prosecution. Protection is also required for those who report offences and witnesses who give testimony, and possibly the family of the trafficked person.
 39. We would also request that consideration is given to extending the reflection and recovery period to at least 3 months from the date of a positive reasonable grounds decision. The UN agencies, including UNICEF, encourage countries to include in their national legislation a period of reflection and recovery of a minimum of 90 days for all victims⁹. For child victims, such decisions should reflect consideration of their best interests.
 40. Whilst we recognise and welcome the review of the current National Referral Mechanism¹⁰, commissioned by the Home Office in 2014, in recognition of the failure of the NRM to fulfil its function of ensuring that the human rights of trafficked persons are respected and to provide an effective way to refer victims of trafficking to services; we believe that Scotland is well positioned to be able to enact a multi-agency approach to the NRM.
 41. In Scotland the operation of the Competent Authority should be based on a multi-agency, multi-disciplinary model, where law enforcement and immigration officials share the function of identification with other relevant agencies, professionals and NGOs with expertise across all forms of trafficking in order to reduce the risk of missed identifications. Trained and qualified persons within all the relevant agencies must undertake key tasks in relation to identification and referrals.
 42. When trafficked persons who are reasonably suspected of having been subjected to sexual violence or sexual exploitation are interviewed to establish identification they should be entitled to the same 'best practice' procedures from

⁹ Joint UN Commentary on the EU Directive – A Human Rights based Approach (2011)
<http://www.refworld.org/pdfid/4edcbf932.pdf>

¹⁰ http://socialwelfare.bl.uk/subject-areas/services-activity/criminal-justice/homeoffice/170470Review_of_the_National_Referral_Mechanism_for_victims_of_human_trafficking.pdf

the police as other victims of rape and sexual violence in the UK, for example female victims should only be interviewed by female officers.

43. The EU Trafficking Directive 2011/36/EU makes clear reference to the gender-specific nature of trafficking¹¹. The Bill should acknowledge this and state that, where appropriate, assistance and support measures should also be gender-specific.

For further details please contact:

Siobhan Reardon
Programme Director – Scotland

Amnesty International UK
MWB Business Exchange
9-10 St Andrew's Square
Edinburgh, EH2 2AF
Direct Line: 0131 718 6684
Siobhan.reardon@amnesty.org.uk

¹¹ See Preamble (3) and Article 1.