



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response of the Northern Ireland Human Rights Commission to the
Department of Justice consultation on 'Human trafficking and slavery:
strengthening Northern Ireland's response'**

1. The Northern Ireland Human Rights Commission ('the Commission'), pursuant to section 69(1) of the Northern Ireland Act 1998 keeps under review the adequacy and effectiveness in Northern Ireland ('NI') of law and practice relating to the protection of human rights. In accordance with this statutory function, the Commission submits the following advice to the Department of Justice ('the Department') on the consultation 'Human trafficking and slavery: strengthening Northern Ireland's response' ('the proposals').
2. The Commission bases this advice on the full range of internationally accepted human rights standards. The NI Executive is subject to the obligations contained within the international human rights treaties that have been ratified by the United Kingdom ('UK'). In this context, the relevant treaties include:
 - United Nations ('UN') Convention on Transnational Organised Crime;¹
 - UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the UN Convention Against Transnational Organised Crime ('Palermo Protocol');²
 - League of Nations, Slavery Convention 1926;³
 - UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;⁴
 - International Labour Organisation ('ILO') Forced Labour Convention (No. 29);⁵
 - Council of Europe Convention on Action against Trafficking in Human Beings ('CoE Convention');⁶ and,

¹ Ratified by the UK on 9 February 2006.

² Ratified by the UK on 9 February 2006.

³ Ratified by the UK on 18 June 1927.

⁴ Ratified by the UK on 30 April 1957.

⁵ Ratified by the UK on 3 June 1931.

⁶ Ratified by the UK on 17 December 2008.

- European Convention on Human Rights ('ECHR'), as incorporated into domestic law by the Human Rights Act 1998.
3. In addition to the treaty standards, there is a body of 'soft law' which has been developed by the human rights organs of the United Nations. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:
 - OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking ('OHCHR Recommended Principles').
 4. Finally, the NI Executive is also obligated under the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('EU Directive'). The EU Directive can be enforced in domestic courts.⁷

Method of legislating

5. The Commission notes that the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill ('Lord Morrow's Bill') is currently at the Committee stage of the NI Legislative Assembly. **In order to ensure minimum delay in maximising the protections for rights-holders, the Commission advises that this Bill is an appropriate legislative vehicle to bring forth the Department's proposals.**

Offences

Consolidation of offences of human trafficking

6. The Department proposes to create a new consolidated offence of human trafficking.
7. The OHCHR Recommended Principles, Guideline 4 notes the 'urgent need to harmonise legal definitions ... in accordance with international standards' and urges States to consider,

amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements.

⁷ It has had vertical direct effect from 6 April 2013. 'Vertical' direct effect means that individuals can invoke a European provision in relation to the State.

Guideline 4 further notes that, 'an appropriate legal framework consistent with the international standards will also play an important role in the prevention of trafficking and related exploitation'.

8. The Commission notes that the current domestic human trafficking framework is spread across a number of legislative instruments. The general offence of 'trafficking people for exploitation' is found in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Section 4 (as amended by the Criminal Justice Act (NI) 2013 and the Borders, Citizenship and Immigration Act 2009). The narrower offence of 'trafficking for sexual exploitation' is contained within the Sexual Offences Act 2003, Sections 57-59 (as amended by the Criminal Justice Act (NI) 2013).
9. **The Commission welcomes the proposal to consolidate the two human trafficking offences into a single offence.** This will provide greater harmonisation with the international standards.

Definition of offence of human trafficking

10. The Palermo Protocol, Article 3 and the CoE Convention, Article 4 define human trafficking as having three component parts: (1) the act - what is done; (2) the means - how it is done; and (3) the purpose - why it is done. The EU Directive, Article 2 mirrors this structure and requires that the following intentional behaviour is punishable:

the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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.

11. Under the EU Directive, Article 2(2), a 'position of vulnerability' means 'a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.' The Explanatory Report to the CoE Convention further elaborates that this can include social or economic vulnerabilities.⁸ Furthermore, if the act involves a child, then the offence of human trafficking will not require any of the means enumerated in the definition. A child is to be understood as any person under the age of 18 years.

⁸ CoE Convention, Explanatory Report, para 83.

12. EU Directive, Article 2 further notes that 'exploitation' shall include:

as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

The preamble to the EU Directive further notes that the definition of exploitation is intended to cover illegal adoption and forced marriage.⁹ It also states that 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, 'inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.'¹⁰

13. In the domestic context, the Commission notes that under Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, an offence occurs if a person has committed the *act* of 'intentionally arrang[ing] or facilitate[ing]' a person's entry into, exit from or travel within the UK for the purposes of exploiting (or believing that another person will exploit) that person. Section 4(4) states that a person is deemed to have been exploited if:

- (a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),
- (b) he is encouraged, required or expected to do anything—
 - (i) as a result of which he or another person would commit an offence under section 32 or 33 of the Human Tissue Act 2004 as it extends to Northern Ireland; or
 - (ii) which, were it done in Northern Ireland, would constitute an offence within sub-paragraph (i),"
- (c) he is subjected to force, threats or deception designed to induce him—
 - (i) to provide services of any kind,
 - (ii) to provide another person with benefits of any kind, or
 - (iii) to enable another person to acquire benefits of any kind, or
- (d) a person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—
 - (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
 - (ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.

14. Under the Sexual Offences Act 2003, an offence occurs if a person has committed the *act* of 'intentionally arrang[ing] or facilitate[ing]' a person's entry into, exit from or travel within the UK for the *purposes* of committing (or believing that another person will commit) a 'relevant

⁹ EU Directive, para 11.

¹⁰ Ibid.

offence'. A 'relevant offence' is defined in major part by reference to the offences contained within the Sexual Offences (NI) Order 2008.

15. The Commission advises that the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 definition of human trafficking follows a different construction to the international standard. It separates out the 'act' component,¹¹ but amalgamates the 'means' and the 'purpose' components under the overarching definition of 'exploitation'.¹² The Sexual Offences Act 2003 takes a similar approach. The result is that at times, the Bill's definition is broader than the international definition¹³ and at other times, it may be interpreted as narrower.
16. The international definition includes circumstances where a person has been trafficked for purposes other than slavery, servitude, forced or compulsory labour, sexual exploitation and the removal of organs¹⁴ and where the means exercised over the victim amounts to an 'abuse of power or of a position of vulnerability'.¹⁵ Vulnerabilities can include those which occur as a consequence of the victim's 'social or economic' status.¹⁶ By comparison, Section 4(4)(c)-(d) of the 2004 Act (and Clause 3(5)-(6) of the Modern Slavery Bill) acts as a 'catch-all' by making it an offence to traffick for a broad range of other purposes¹⁷ but only where the victim has been subjected to force, threats or deception,¹⁸ or in the absence of one of these means, where the victim is ill, disabled, young or related to the perpetrator.¹⁹
17. **The Commission advises the Committee that it is unclear whether or not an interpreting court would regard the domestic definition as encompassing all the abuse of power and vulnerability scenarios envisaged by the international standards.**
18. **The Commission recommends that the definition of human trafficking within any forthcoming legislation be re-drafted in order to follow more closely the three component part structure of the international definition.**

¹¹ Modern Slavery Bill, Clause 2.

¹² Ibid., Clause 3.

¹³ See for example, *Queen v. Matyas Pis*, [2012] NICC 14 where there was no coercion or other 'means' employed against two adults. In this case a 3 year sentence divided into 18 months imprisonment and 18 months on license was imposed for the domestic trafficking offence. (This example is applicable as the Bill consolidates existing definitions with minimal alteration to content.)

¹⁴ For example, begging. See EU Directive, Article 2(3). See also CoE Convention, Explanatory Report, para 85-6 and Palermo Protocol, Legislative Guide, para 34.

¹⁵ Palermo Protocol, Article 3(a), CoE Convention, Article 4(a) and EU Directive, Article 2(1).

¹⁶ CoE Convention, Explanatory Report, para 83. See also Palermo Protocol, Legislative Guide, para 34 and EU Directive, para 12.

¹⁷ This includes for example, begging and shop-lifting. See Modern Slavery Bill, Explanatory Notes, para 24.

¹⁸ Ibid., Clause 3(5).

¹⁹ Ibid., Clause 3(6) and Explanatory Notes, para 25.

19. **Alternatively, if the language of the domestic definition is retained, the Department should make clear the intention that the domestic definition be read to fully accord with the relevant international standards. The Minister for Justice may wish to propose that Departmental Guidance be issued to this effect following Royal Assent and prior to any Act coming into force.**

Offences of slavery, servitude and forced or compulsory labour

20. The Department proposes to bring the offence of slavery, servitude and forced or compulsory labour together with the human trafficking offence under the new legislation.
21. According to the Explanatory Report to the CoE Convention, '[t]rafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade.'²⁰ Furthermore, the European Court of Human Rights ('ECtHR') has held that human trafficking as defined by the CoE Convention and the Palermo Protocol falls within the remit of the ECHR, Article 4 prohibition on slavery, servitude, and forced or compulsory labour.²¹
22. **The Commission advises that, in accordance with the links identified in human rights standards, it is appropriate to consider the offence of slavery, servitude and forced or compulsory labour in tandem with the offence of human trafficking.**
23. The offence of slavery or servitude or forced or compulsory labour is presently 'construed in accordance with Article 4 of the [ECHR]'.²² The proposals suggest no change to this definition.
24. When interpreting ECHR, Article 4, the ECtHR has, in addition to the CoE Convention and Palermo Protocol, shown regard for the obligations found under the Slavery Convention 1926,²³ the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,²⁴ and the ILO Convention (Forced or Compulsory Labour) No 29.²⁵
25. **The Commission welcomes that the offence of slavery, servitude and forced or compulsory labour is construed in accordance with ECHR, Article 4.**

²⁰ CoE Convention, Explanatory Report, para 3.

²¹ *Rantsev v. Cyprus and Russia*, ECtHR, Application No. 25965/04, (2 January 2010), para 281-2.

²² Coroners and Justice Act 2009, Section 71.

²³ *Siliadin v. France*, ECtHR, Application No. 73316/01 (26 October 2005), para 122.

²⁴ *C.N. and V. v. France*, ECtHR, Application No. 67724/09 (11 January 2013), para 90.

²⁵ *Van der Musselle v. Belgium*, ECtHR, Application No. 8919/80 (23 November 1983), para 32.

NI Rapporteur/UK Anti-Slavery Commissioner

26. The Department proposes that the Anti-Slavery Commissioner's powers and jurisdiction, as proposed in the Modern Slavery Bill, be extended to include NI and that the NI Rapporteur as proposed in Lord Morrow's Bill, Clause 16 be dropped.
27. The CoE Convention, Article 29(4) provides that States consider establishing a national rapporteur or equivalent mechanism. The EU Directive, Article 19 makes this mandatory. The rapporteur or equivalent body is to function as a monitoring mechanism²⁶ which gathers statistics, assesses trends and evaluates the results of anti-human trafficking actions.²⁷ The mechanism must work in close cooperation with civil society.²⁸ The Explanatory Report to the CoE Convention cites the Netherlands as a relevant example, where the national rapporteur is,
- an independent institution, with its own personnel, whose mission is to ensure the monitoring of anti-trafficking activities. It has the power to investigate and make recommendations to persons and institutions concerned and makes an annual report to the Parliament containing its findings and recommendations.²⁹
28. At present, the Modern Slavery Bill, Section 31 proposes that the Anti-Slavery Commissioner make reports to the UK Secretary of State, who is in turn vested with the power to omit any material that he or she thinks,
- (a) is undesirable for reasons of national security
(b) might jeopardise an individual's safety, or
(c) might prejudice the investigation or prosecution of an offence.
29. **The Commission welcomes the principle of the proposals to establish a Rapporteur/Anti-Slavery Commissioner in compliance with the EU Directive.**
30. **The Commission advises that in order to ensure the maximum protection for rights holders in NI, the established mechanism should have a remit to cover both excepted and reserved matters.**

²⁶ CoE Convention, Article 29(4) and EU Directive, para 27.

²⁷ EU Directive, Article 19.

²⁸ Ibid. See also OHCHR Recommended Principles, Guideline 1, para 7.

²⁹ CoE Convention, Explanatory Report, para 298.

31. **The Commission further advises that if the jurisdiction of the Anti-Slavery Commissioner is extended to NI, then the Modern Slavery Bill should be amended in line with the Netherlands example, to ensure that:**
- **the rapporteur mechanism can effectively carry out its functions and that his or her reports are not subject to arbitrary interference;**
 - **the NI Minister for Justice is the appropriate designated authority when deciding on matters pertaining to the devolved powers of the NI Executive; and,**
 - **the rapporteur's reports concerning devolved matters pertaining to NI are placed before the NI Assembly.**

Sentencing

32. The Department proposes to increase the maximum sentence for human trafficking offences and offences of slavery, servitude and forced or compulsory labour from fourteen years imprisonment to life imprisonment.³⁰
33. The UN Convention Against Transnational Organised Crime, Article 11 stipulates that the commission of a trafficking offence shall be liable to sanctions that take into account the gravity of that offence and that each Government,
- shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.³¹
34. The CoE Convention, Article 23 and the EU Directive, Article 4 require trafficking offences to be punishable by 'effective, proportionate and dissuasive' sanctions. Such penalties should allow for a deprivation of liberty.³²
35. Further, the ECtHR has determined that in order to ensure that the rights guaranteed within the ECHR are practical and effective and not theoretical or illusory,³³ Government is under a positive obligation to institute

³⁰ The proposals, para 5.4.

³¹ UN Convention on Transnational Organised Crime, Article 11(2).

³² CoE Convention, Article 23 and EU Directive, Article 4.

³³ *Nikolova and Velichkova v. Bulgaria*, ECtHR, Application No. 7888/03 (20 December 2007), para 61.

effective penalties for conduct that violates an ECHR right.³⁴ The ECtHR considers the effectiveness of judicial decisions regarding penalties according to their efficacy, preventative and deterrent nature.³⁵

36. In addition, the ECtHR will take into account the proportionality of the measure which requires a 'discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned'.³⁶ In this regard, the Court has found that certain blanket and indiscriminate provisions do not satisfy the proportionality test.³⁷ Of related interest, the UN Recommended Principles caution that legislatively mandated minimum penalties, particularly if set very high, may not satisfy the standard of proportionate sanction where the involvement in and benefit from the exploitation has been slight.³⁸
37. **The Commission notes that the sentencing structure contained within the proposals seeks to reflect the seriousness of the relevant offences. However, the Commission advises the Department to be mindful of the need to ensure that the sanctions imposed are proportionate.**

Civil Orders

38. The Department proposes to introduce new 'Slavery and Trafficking Risk Orders' ('STROs') which are not conditional on a previous caution or conviction for human trafficking or slavery offences. It is proposed that STROs could be imposed by the court where the individual is 'believed to be involved in trafficking or slavery'³⁹ and where it is satisfied that the Order is 'necessary ... to protect the public or individuals from physical or psychological harm'.⁴⁰ According to the proposals, 'this type of order is intended to be pre-emptive and to target offending behaviour at its earliest stages so as to prevent it from developing into serious criminal activity'.⁴¹ The proposed STRO would be imposed for a minimum of two years.⁴² Breach of a STRO is a criminal offence and would result in liability on summary conviction to imprisonment of up to six months and a fine of up to £5000.⁴³

³⁴ *Siliadin v France*, ECtHR, Application No. 73316/01 (26 July 2005), para 142; *Rantsev v. Cyprus and Russia*, ECtHR, Application No. 25965/04 (7 January 2010), para 284-285.

³⁵ *Ibid.* (*Siliadin v France*), para 143. *Opuz v Turkey*, ECtHR, Application No. 33401/02 (9 June 2009), para 170.

³⁶ *Hirst v UK*, ECtHR, Application No. 74025/01 (6 October 2005), para 71.

³⁷ *Ibid.*, para 82.

³⁸ UN Trafficking Principles and Guidelines, Commentary, para 15.3.

³⁹ The proposals, para 6.4.

⁴⁰ *Ibid.*, para 6.7.

⁴¹ *Ibid.*, para 6.4.

⁴² *Ibid.*, para 6.8.

⁴³ *Ibid.*, para 6.15

39. A Home Office memorandum on the Modern Slavery Bill states that 'although the proceedings by which these orders are obtained are civil proceedings, the Department accepts that the burden of proof will be akin to the criminal standard'.⁴⁴ The Commission therefore understands that the court must be satisfied beyond reasonable doubt that the person on whom the STRO is imposed will, in the future, be involved in human trafficking or slavery.
40. Under ECHR, Article 8(2) the right to a private and family life can be interfered with only where necessary in a democratic society and in pursuit of a legitimate aim. The necessity of the interference is evaluated by a proportionality test which balances the legitimate aim against the severity of the interference.⁴⁵ **The Commission advises that the inclusion of the term 'necessity' is appropriate as a directive to the court to apply the proportionality test.**
41. In light of the high standard of proof for a STRO, the introduction of the new preparatory offence to cover all forms of human trafficking and slavery,⁴⁶ and the fact that the definition of a human trafficking offence is expansive,⁴⁷ the Commission observes that the scenarios where a STRO could be imposed where a criminal offence has not been committed are likely to be limited. In addition, the Commission notes that because of the high burden of proof that must be satisfied, the imposition of a STRO may stigmatise the individual to a similar extent as they would be if convicted of a human trafficking or slavery offence.
42. The Commission further notes that the distinction between criminal and civil law is important in part because of the additional protections that the criminal law provides for defendants. For example, the ECHR, Article 6(2) requires that everyone charged with a criminal offence be presumed innocent until proven guilty according to the law. In *Engel and Others v Netherlands*, the ECtHR dictated that the domestic classification of an offence is not the only criteria for determining whether it is to be deemed civil or criminal. Two additional criteria apply: the nature of the offence;

⁴⁴ 'Draft Modern Slavery Bill, European Convention on Human Rights, Memorandum by the Home Office', para 15. Available at, <https://www.gov.uk/government/publications/draft-modern-slavery-bill>. This is based on the finding in *R v Crown Court at Manchester, ex p. McCann & Others*, [2002] UKHL 39, para 37 in relation to ASBOs.

⁴⁵ See for example, *Coster v. the United Kingdom*, ECtHR, Application no. 24876/94, (18 January 2001) paras 104 and 106, and *S. and Marper v. the United Kingdom*, ECtHR, Application nos. 30562/04 and 30566/04, (4 December 2008), paras 101 and 107.

⁴⁶ The proposals, para 3.6-3.10. Preparatory offences can be charged if a person commits any offence with the intention of committing a human trafficking or slavery offence.

⁴⁷ The exploitation need not have occurred, only the intention to exploit or the belief that someone else is likely to exploit. See the current definition under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Section 4 and the Sexual Offences Act 2003, Sections 57-59, and the proposed consolidation under the Modern Slavery Bill, Clauses 2 and 3.

and, the severity of the potential penalty which the defendant risks incurring.⁴⁸

43. **The Commission seeks information from the Department on the type of scenario where it is envisaged that a STRO would be imposed and advises it to ensure that the STRO does not become a vehicle by which the criminal law and its inherent protections for the defendant are circumvented.**

Improving data collection and assessment

44. The Department proposes to create a new requirement for public sector First Responders to report in the form of anonymised data all suspected cases of human trafficking to the UK Human Trafficking Centre.⁴⁹
45. The Palermo Protocol, Article 9(2), the CoE Convention, Article 5(2) and the EU Directive, Article 18(2) urge Government to undertake research in order to prevent human trafficking. The OHCHR Recommended Principles state that such research should be 'firmly grounded in ethical principles, including an understanding of the need not to re-traumatize trafficked persons'.⁵⁰ In addition, the CoE Convention, Article 11 explicitly requires Government to protect the private life and identity of trafficking victims.
46. **The Commission advises that because ethical research is essential to devising effective preventative methodologies, the proposal is appropriate.**
47. **The Commission further advises that the Department should consider how it will gather data when a victim reports to the third sector.**

April 2014

⁴⁸ *Engel and Others v. the Netherlands*, ECtHR, Application no.s 5100/71, 5101/71, 5102/71, 5354/72; 5370/72 (8 June 1976), para 82. The nature of the offence is deemed to be a more important factor than the domestic classification.

⁴⁹ The proposals, para 7.11 and 7.12.

⁵⁰ OHCHR Recommended Principles, Guideline 3, para 4.