



Northern Ireland  
Assembly

Committee for Justice

# OFFICIAL REPORT (Hansard)

Human Trafficking and Exploitation (Further  
Provisions and Support for Victims) Bill:  
Northern Ireland Human Rights Commission

16 January 2014

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**Members present for all or part of the proceedings:**

Mr Paul Givan (Chairperson)  
Mr Raymond McCartney (Deputy Chairperson)  
Mr Sydney Anderson  
Mr Stewart Dickson  
Mr Tom Elliott  
Mr William Humphrey  
Mr Alban Maginness  
Ms Rosaleen McCorley  
Mr Jim Wells

**Witnesses:**

Ms Leanne Cochrane	Northern Ireland Human Rights Commission
Dr David Russell	Northern Ireland Human Rights Commission

**The Chairperson:** I formally welcome to the Committee the witnesses from the Northern Ireland Human Rights Commission: Dr David Russell, the deputy director; and Leanne Cochrane, who is a researcher. Thank you for taking the time to come to talk to us. The session will be recorded by Hansard and published in due course. I invite you to make some opening comments, and I am sure that members will have some questions. I hand over to you.

**Dr David Russell (Northern Ireland Human Rights Commission):** Thank you, Mr Chairman. The Northern Ireland Human Rights Commission welcomes and is grateful for the opportunity to provide evidence to the Committee. The commission does so pursuant to its statutory duty under section 69(4) of the Northern Ireland Act to advise the Assembly whether a Bill is compatible with human rights.

As you will know, the commission has provided written advice to the Committee on relevant obligations in international human rights treaties ratified by the United Kingdom. In addition, we have directed the Committee to a number of soft law standards on human trafficking that may be of strong persuasive value in your deliberations.

In advance of the Bill being introduced to the Assembly, the commission also provided advice to Lord Morrow. The commission is generally welcoming of the proposed legislation, to the extent that its purpose is to protect some of the most vulnerable members of our society. Moreover, it appears to do so by attempting to harmonise existing domestic laws and increase the level of protection for victims.

To assist the Committee, I want to highlight some of the issues contained in the commission's submission rather than going through it verbatim: first, on the issue of human trafficking; and, secondly, on paying for a person's sexual services. The commission notes that the proposed sentencing of those prosecuted for human trafficking offences is a minimum of two years. Importantly, however, clause 4 provides for judicial discretion. This removes any risk of a blanket approach that would have run counter to human rights law and the requirement for proportionate sanctions and consideration of cases on an individual basis. On a related matter however, the commission advises that there is a need for the Bill to recognise the difference between adult and child offenders. In accordance with the UN Convention on the Rights of the Child (UNCRC), those under the age of 18 must be assured lesser culpability, and any sanction should be premised on the evolving capacity of the child and recognition that imprisonment should be a measure of last resort.

Clause 8 suggests that victims will not be prosecuted if they have committed a criminal act as a direct consequence of trafficking. The commission advises that this should indeed be a strong presumption. However, victims of criminal offences, including those committed by persons who have been trafficked, are, under human rights law, required to be guaranteed an effective remedy. There is a tension, therefore, in the proposal that we suggest be scrutinised by the Committee. The commission advises that, at the very least, any suggestion of blanket immunity for offenders should be removed.

On clause 12, which seeks to establish a child trafficking guardian, the commission notes that the Council of Europe group of experts stated:

*"a system of guardianship is essential to ensure the children's protection and rehabilitation, assist in severing links with traffickers and minimise the risk of children going missing."*

Speaking in the context of the United Kingdom as a whole, this group of experts also noted:

*"a social worker or a voluntary advocate fall short of providing a legal guardian who can act independently with authority and uphold the child's best interests."*

The commission advises that the Committee scrutinise the current provision for unaccompanied children and examine, in particular, whether the critical independence aspect of the guardianship role is being met.

On paying for the sexual services of a person and, more specifically, the subject of prostitution, the commission's advice is that the criminalisation of that activity is neither required nor prohibited by international human rights treaties. However, the commission reminds the Committee that the protection of vulnerable persons should be a matter of priority when addressing the question of what might be a reasonable and proportionate interference with the rights of others: for example, the extent to which the right to a private life may be interfered with by the Bill must be considered in light of the duty on the state to protect those who are forced into prostitution. In that regard, members may already be aware that, in 2012, the UN Committee for the Elimination of Discrimination against Women (CEDAW) welcomed the criminalisation of paying for prostitution in Norway. That law is not dissimilar to what is being proposed in the Bill. Crucially, the UN also advised on the need to study the effects of the new Norwegian law. Therefore, the commission welcomes the inclusion of a similar requirement to monitor impact in clause 6(6).

One matter in the draft that is of serious concern to the commission is the fact that it does not extend criminalisation to include paying for the sexual services of a child. There may be a view that this issue is already addressed through the law in article 37 of the Sexual Offences (Northern Ireland) Order 2008. However, the commission today advises that the current legislation concerning children is, in its view, inadequate. It is an offence to pay for the sexual services of a child between the ages of 13 and 18 if the purchaser does not reasonably believe that the child is 18 or over. It is currently for the prosecution to prove that the purchaser does not reasonably believe that the child is 18 or over. It is, therefore, the case that the prosecution must prove beyond reasonable doubt that the purchaser did not reasonably believe that the child was over 18.

Last July, CEDAW recommended to the UK Government that they revise their legislation by shifting the burden of proof from the prosecution to the purchaser of sexual services. The commission advises the Committee that, if clause 6 is implemented in its current form, it will be easier to penalise persons who pay for sex with adults than those who pay for sex with children. In the commission's view, children must be protected by the provisions of the Bill.

Finally, the commission advises the Committee that the United Kingdom will be examined on the fulfilment of its obligations under the UN optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in June this year. The Bill provides a timely opportunity and will no doubt be considered by the United Nations with regard to how Northern Ireland is moving forward to protect its children.

**The Chairperson:** Thank you very much. It is timely that you are here. We got letters from Lord Morrow and the Minister regarding the minimum custodial sentences applying to children. There will be an amendment now to make sure that that is not the case; so, there have been some developments on that particular issue that I am sure the commission will welcome.

**Mr Wells:** I am trying to tie you in. Are you in favour of clause 6? You seem to dance around it. You said that it is not necessary but it could not be prevented. You are the guardians of human rights. Do you believe it is right for anybody to have the right to buy sexual services from an adult or a child?

**Dr Russell:** I am going to dance around it slightly again, but I will do my best to answer it directly.

**Mr Wells:** Why, as the Human Rights Commission, are you dancing around it at all?

**Dr Russell:** The commission will only premise its advice on what is available in the international treaties. I was clear from the off that there is no requirement in international law to criminalise or not criminalise the purchasing of sex from an adult. There is clearly the requirement in the instance of children. However, what the commission is saying is that we recognise that one of the primary driving purposes of the Bill is to protect vulnerable people, and we look to other international examples of what has happened in other countries, most notably the case of Norway, where international committees such as CEDAW have actually welcomed the criminalisation of the purchasing of sex. So, there is no human right one way or the other. The protection of vulnerable people is welcomed, in principle, and therefore the commission's view is that, that being the priority of the Bill, we welcome its thrust.

**Mr Wells:** So, you do support clause 6.

**Dr Russell:** Yes, we think that the principle of clause 6 is welcome.

**Mr Wells:** As you know, since you made your submission, the Government at Westminster have introduced a draft modern slavery Bill. For all sorts of reasons, that has major implications for Lord Morrow's Bill. You recommended in your submission that clause 1 should be amended to reflect the international definition of trafficked human beings. If the definition that appears in the draft modern slavery Bill were transposed into Lord Morrow's Bill, what would your view be then?

**Ms Leanne Cochrane (Northern Ireland Human Rights Commission):** Do you have the definition that is in the draft Modern Slavery Bill?

**Mr Wells:** I do not have it before me yet, but I am advised that there is a definition in it.

**Ms L Cochrane:** Is it the definition of the international standards?

**Mr Wells:** I do not know. I could soon look that up for you.

**Ms L Cochrane:** We have not considered it yet, because it does not apply to Northern Ireland.

**Mr Wells:** I think that is a reasonable response, given the fact that it has come very late in the day for us. It would be interesting if you would have a look at that to see if that changes your submission on clause 1. My next question is also on that same Bill, which has a different definition of trafficking. Again, presumably you have not had a chance see whether you would amend your submission on that either.

**Dr Russell:** Let us assume that it does reflect the international standard and that it is brought into force in Northern Ireland and captured in the current Bill. Then, the commission would, of course, welcome it. What the international treaty bodies have called for is the harmonisation of domestic legislation with the international standard. The top end of the Bill is obviously quite complex around

definitions, because it pulls in a number of pieces of legislation that are already in place. If the answer to your question, when we go back to it, is that, for example, it reflects the EU trafficking directive, then yes, the commission would be in favour of it.

**Mr Wells:** I thought you might have alluded to this in your presentation, but you did not do so. The Department of Justice, which has been lukewarm about the Bill from the word "Go" — let us be honest about it — and some parties in the Assembly oppose clause 4 because it sets a minimum sentence. They believe that that would fetter judicial discretion. Why do you believe that clause 4, as presently worded, would uphold the ability of judges to apply proportionate sentences as well as keeping within human rights standards?

**Ms L Cochrane:** We gave extensive advice on clause 4 in our written submission. For us, the fact that clause 4 contains an exception allows for judicial discretion. In the light of that, we did not take an objection to clause 4 other than it did not explicitly articulate the different culpability of children.

**Mr Wells:** So, you are content that clause 4, as worded, does meet international human rights standards.

**Dr Russell:** It allows for a reflection of the severity of the offence. As we said in the opening statement, it allows for judicial discretion, because exceptional circumstances are written into clause 4. Our only concern with the clause is that it does not distinguish between children and adults as offenders.

**Mr Wells:** The vast majority of submissions on this legislation have been on clause 6. At the last hearing a week ago we had three hours of amendments, and not one line of it was on anything but clause 6. Clearly, it is the contentious issue. However, I seem to get from your submission that you do not see anything inherent in the banning of the purchase of sexual services from a prostitute, or let us assume it is adults in this case, that contravenes any international human rights convention.

**Dr Russell:** No, quite the contrary; if I was not clear from the off, I will try to say it now. To the extent that the purposes of that clause, and the Bill as a whole, is to protect vulnerable people, including those forced into prostitution, the question is whether it is reasonable and proportionate therefore for the state to criminalise that activity. In the commission's view, protecting vulnerable people has to be the priority. We are talking about trafficked persons, women and girls who are extremely vulnerable, and that should be the priority. Our general position is that we welcome clause 6.

**Mr Wells:** What if the person is not vulnerable or trafficked? We had a representative from the International Union of Sex Workers here last week, and she said that she was perfectly happy to sell her services. How does that fall into your definition?

**Dr Russell:** That may well be, but the question is whether it is reasonable and proportionate for the state, in order to protect the rights of the most vulnerable members of society, to restrict the rights of others. In the commission's view, those who are vulnerable should be the priority in this instance.

**Mr Wells:** I agree on that, but you mentioned the right to private life. You do not see any conflict there. Someone may argue, "I have a right to exercise my right in my private life to buy the services of a prostitute, particularly if it is not a vulnerable person". That does not impinge that particular right under the European convention.

**Dr Russell:** It certainly interferes with the right to private life — there is no denying that — but the question is whether it is reasonable and proportionate to do so. In the commission's view, it would be reasonable and proportionate to do so given the gravity of the offences being committed against vulnerable people.

**Mr Wells:** I may come back later on, Mr Chairman, but that is fine.

**Ms McCorley:** Go raibh maith agat, a Chathaoirligh. Thanks for the presentation. I want you to talk a bit more about the impact on children because these would be matters of grave concern. What further measures need to be taken to safeguard the rights of children?

**Ms L Cochrane:** There are two issues, really. First, there is article 37 of the Sexual Offences Order, which David alluded to. Paying for the sexual services of a child is criminalised, but if the child is over 13 and under 18 the prosecution must first prove that the purchaser did not reasonably believe that the child was over 18. That is a very high burden of proof and CEDAW called that into question and asked that the burden of proof be shifted so that it would become a defence that the defendant, the purchaser, would have to prove.

The second issue is that, if Lord Morrow's Bill passes in its current form, you will create the circumstance where it is easier to prosecute purchasers of sex with adults, because there is no mens rea, if you like, attached to that provision, than it is to prosecute the purchase of sex with children over 13 and under 18, because, first of all, the prosecution must prove that high threshold. That would have to be amended if the Bill goes forward.

**Ms McCorley:** Do you believe that that could be easily done, that a form of words could be found that would provide that safeguard?

**Dr Russell:** It is quite interesting. In the initial consultation by Lord Morrow on the draft Bill, it applied to everyone. It is only since it was introduced in the Assembly that the Bill was changed to apply to only those over the age of 18. The original draft went some way towards addressing the issue. There is some complexity about it in that the same issue, the burden of proof, is found in a number of pieces of legislation; but we do not see any difficulty with drafting the current legislation in order to shift the burden of proof. I am not a legislative draftsman, but I assume that it would be simple to draft a clause that could be introduced.

**Ms L Cochrane:** We are not talking about statutory rape or anything like that; we are talking about child prostitution, and the international standards are very clear. There is a Council of Europe Convention in relation to criminalising the prostitution of children. Obviously, the laws that we have that also criminalise it have to be effective. That is what is really being called into question.

**Dr Russell:** The other thing that I said in my opening statement is that this Bill is extremely timely. The United Kingdom will be examined for the first time on the option of a protocol on child prostitution, and the commission's view is that a proactive measure such as this to protect children in the jurisdiction would be looked upon favourably by the UN. No doubt the United Nations Committee will want to consider the issue given that this is in passage at the minute.

**The Chairperson:** Can you elaborate a little bit more about the immunity aspect in clause 8? In Lord Morrow's Bill currently, if you are the individual selling the services you would be immune from prosecution. Can you elaborate more on the Human Rights Commission's position on that?

**Dr Russell:** Clause 8 deals directly with a person who has been trafficked having immunity from prosecution if they commit a criminal offence that is directly associated with the trafficking offence. Looking at the international standards, the best way that I can put this is to say that there is strong, persuasive value as to why you would want to do this given the vulnerability of trafficked persons. The commission is extremely mindful that, although what is being talked about here is regardless of whether someone has been trafficked or not, there is another victim as a result of the criminal offence that has been committed. They also have rights, including the right to an effective remedy.

Although there may be a desire, on behalf of the Assembly, to allow a clause that would have that strong, persuasive value, given the vulnerability of trafficked victims; as a direct consequence of trafficking, who knows what sort of offence may have been committed? It could be anything from theft to murder, and, as the Bill is currently drafted, the gravity of the offences that could fall within its remit are not captured, in the Commission's view. Our concern is that there should not be blanket immunity from prosecution for trafficked victims, but that we should recognise their vulnerability and that they might be forced into committing certain criminal offences. However, there should certainly be a mind to protect the victims of these criminal offences as well.

**The Chairperson:** So, there is merit in trying to find something in legislation that recognises the benefits of the non-prosecution of the victim if a form of words can be found?

**Dr Russell:** It would be the non-prosecution of the offender, if the offender was a trafficked person and if the criminal offence was as a direct consequence of them being trafficked. However, as I said, this needs to be balanced against the right to an effective remedy for the victim of that crime.

**The Chairperson:** OK. Any other members?

**Mr Elliott:** Chair, just on that point; that is a quite interesting analysis, David. I am concerned about this, as drafted, being abused by people who indicated that they were being trafficked but may not have been trafficked. Do you see any difficulties with that aspect?

**Dr Russell:** You raise a hypothetical scenario, but it is not a lot different to the one that I have just raised about the different types of offence. We have not looked at it in any detail. It would be interesting to know, for example, what the Public Prosecution Service's view might be of something like this. A degree of discretion should be afforded to the Public Prosecution Service regarding which criminal offences it does or does not pursue. I can only repeat that the commission is concerned by the concept of blanket immunity for trafficked victims from being prosecuted for criminal offences. Anything that suggests a blanket approach generally raises a human rights flag; in this instance, it would concern the rights of the victims of the criminal offence.

**Mr Elliott:** I think than you are saying that the general principle of what is suggested is OK but it needs amending to ensure that it is not abused.

**Dr Russell:** Exactly.

**The Chairperson:** Members have no other questions. Thank you very much for coming to the Committee. We appreciate it.