

MODERN SLAVERY BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD
MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Modern Slavery Bill. The memorandum has been prepared by the Home Office. The Home Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.
2. This memorandum also considers the Bill provisions in light of those rights set out in the United Nations Convention on the Rights of the Child (“UNCRC”). Not all of the Articles of the UNCRC are relevant to the Bill, but the Government has had particular regard to Article 3 (treating the best interests of the child as a primary consideration), Article 34 (protecting the child from all forms of sexual exploitation and abuse), Article 35 (preventing the abduction, sale of or traffic in children for any purpose) and Article 36 (protecting the child against exploitation) as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (“the Optional Protocol”). We have given examples of how these and other Articles have been taken into consideration in the analysis below. In the Government’s view the Bill is consistent with UNCRC, and will enhance the rights of children.

Summary

3. The Bill is in five parts:
 - Part 1 makes provision in respect of offences of slavery, servitude and forced or compulsory labour and human trafficking;
 - Part 2 makes provision for slavery and trafficking prevention orders and risk orders;
 - Part 3 makes provision for an Anti-slavery Commissioner;
 - Part 4 makes provision for the protection of victims;
 - Part 5 makes consequential and general provision.
4. The Government considers that the clauses of and Schedules to this Bill which are not mentioned in this memorandum do not give rise to any human rights issues.
5. The Government considers that in affording increased protection for victims, and potential victims, of slavery and human trafficking and therefore enhanced protection of their ECHR rights, the Bill represents a substantial human rights enhancing measure.
6. For the same reasons, the Government considers that the Bill substantially enhances the rights of children under the UNCRC.

Part 1: Offences

ECHR

7. Part 1 of the Bill provides for three offences in respect of slavery and trafficking. Clause 1 contains an offence of slavery, servitude and forced or compulsory labour. This offence is the same as the offence in section 71 of the Coroners and Justice Act 2009, save for the additional provisions in clause 1(3) and (4) and an increase in the maximum penalty to life imprisonment. It is being re-enacted to be placed in the same piece of legislation as the trafficking offence in clause 2. Part 1 also includes associated provisions on penalties, sentencing, enforcement and forfeiture.

Slavery, servitude and forced or compulsory labour offence

8. The offence in section 71 was enacted in the Coroners and Justice Act 2009. This enabled the United Kingdom to address the criticisms in the European Court of Human Rights judgment in *CN v UK* 13 November 2012, 4239/08¹. The Court in this case emphasised that domestic servitude is distinct from trafficking and exploitation and involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another. The Court considered that due to the absence of a specific offence of domestic servitude, the domestic authorities were unable to give due weight to these factors. Keeping the offence separate in the Bill is the easiest way to achieve the specificity required by case law and therefore to meet the requirements of Article 4.

Human trafficking offence

9. Clauses 2 and 3 of the Bill contain a new trafficking offence covering both sexual and non-sexual exploitation. They combine the offences currently found in sections 59A of the Sexual Offences Act 2003 and the offence in section 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, without making any substantive changes, save for the addition of clause 2(3) and an increase in the maximum penalty to life imprisonment. The combined offence contains, in particular, detailed provisions on what form of physical movement of the victim is required and the meaning of exploitation. These provisions enhance legal certainty and assist in ensuring that the offence is, in the Government's view, sufficiently certain for the purposes of Article 7 ECHR.

Offending with intent to commit human trafficking

10. Clause 4 creates an offence of committing another offence with the intention of committing the trafficking offence or with the intention of committing an inchoate offence concerning the trafficking offence. This is modelled on the existing offence in section 62 of the Sexual Offences Act 2003. The clause 4 offence does not criminalise any new conduct as it is contingent on the commission of an existing offence. What it

¹ See also *Asuquo v UK* which was settled and *Kawago v UK* which was struck out on the basis of the Government's unilateral declaration.

does is permit the imposition of a higher sentence if the necessary intention is made out. Accordingly, no ECHR issues arise over and above those relating to penalties and sentencing more generally.

Penalties and sentencing

11. Clause 5 covers the penalties for the offences in clauses 1 and 2 giving each a potential life sentence, as well as the offence in clause 4. Clause 6 covers two sentencing provisions relating to the offences in clauses 1 and 2. The offences are included in Schedule 15 to the Criminal Justice Act 2003 which means offenders will qualify for the 'dangerousness' sentence provisions in that Act, including a life sentence under s.225(2). In addition the offences are included in Schedule 15B to the 2003 Act, which means offenders will qualify for the '2-strikes' automatic life sentence provided for in s.224A of that Act. As a consequence of these clauses those found guilty of the clause 1 and 2 offences might potentially receive a life sentence with a "whole life order".
12. The ECtHR Grand Chamber judgment in *Vinter and others v United Kingdom* (66069/05) took the view that whole life orders under the 2003 Act were incompatible with the Article 3 guarantees in the absence of an adequate mechanism for review due to the lack of clarity in domestic law. The imposition of a whole life order was not, of itself, incompatible. The Court of Appeal (having considered the *Vinter* decision) subsequently held in *R v McLoughlin* [2014] EWCA Crim 188 that the domestic law of England and Wales provides for the "possible exceptional release of whole life prisoners" and all other life prisoners. In its view the Secretary of State is bound to exercise his power of compassionate release under s.30 of the Crime (Sentences) Act 1997 in a manner compatible with principles of domestic administrative law and with Article 3. The Court of Appeal held that it was "entirely consistent with the rule of law that such requests are considered on an individual basis against the criteria that circumstances have exceptionally changed so as to render the original punishment which was justifiable no longer justifiable." The Court held that s.30 provides for that possibility and hence gave to each such prisoner the possibility of exceptional release. Accordingly, the Government is satisfied that the provisions of the Bill that provide the potential for an offender to receive a "whole life order" are compatible with Article 3.

Confiscation of assets

13. Subsection (2) of clause 7 adds the offence of slavery, servitude and forced labour to the list of offences set out in Schedule 2 to the Proceeds of Crime Act 2002 ("POCA"). A person convicted of an offence listed in Schedule 2 to POCA is deemed to have a 'criminal lifestyle' for the purposes of the confiscation order regime in Part 2 of POCA. When making a confiscation order against a person deemed to have a criminal lifestyle, the court will apply the statutory assumptions in section 10 of POCA. These assumptions effectively require the defendant to prove that his or her assets are not the proceeds of crime to avoid having them taken into account when the amount of any confiscation order against them is calculated.

14. It is well established that the confiscation order regime in POCA may engage Article 6 and Article 1, Protocol 1 (“A1P1”) of the ECHR. In *Phillips v UK*², the European Court of Human Rights considered the ECHR compatibility of the confiscation order regime in the predecessor to POCA (the Drug Trafficking Act 1994), upon which the confiscation order regime in POCA is based. The court held that Article 6(2) was not applicable in confiscation proceedings, and that Article 6(1) did apply, but was not breached in light of the safeguards built into the statutory regime. The court also held that whilst A1P1 was engaged by the confiscation regime, it was a proportionate means of combating and deterring drug trafficking and accordingly found no breach.
15. The Supreme Court has also considered the compatibility of the confiscation order regime in POCA and its predecessors with Article 1, Protocol 1 on a number of occasions, most recently in *R v Waya*³. In that case the court reiterated that the regime was a proportionate means of achieving the legitimate aim of ensuring that criminals (and especially professional criminals engaged in serious organised crime) do not profit from their crimes, and sending a strong deterrent message to that effect – provided that it is "given effect" in accordance with section 3(1) of the Human Rights Act 1998 in a manner which is compliant with the ECHR.
16. The Government does not consider that adding the offence of slavery, servitude and forced labour to the list of offences set out in Schedule 2 of POCA will affect the compatibility of the regime as a whole with Article 6 and A1P1 of the ECHR.

Forfeiture and detention of vehicles, ships and aircraft

17. Clauses 11 to 12 concern the forfeiture and detention of vehicles, ships and aircraft. These provisions are based on section 60A and 60B of the Sexual Offences Act 2003 extended to the new combined trafficking offence in clause 2. The Sexual Offences Act provisions were themselves based on provisions in sections 25C and 25D of the Immigration Act 1971 and all provide for more bespoke provision for forfeiture in trafficking than that in section 143 of the Powers of the Criminal Courts (Sentencing) Act 2000. Clause 11 gives a discretionary power to the Court on conviction of the trafficking offence to order the forfeiture of vehicles, ships and aircraft used in conjunction with the offence. The clause determines from whom the forfeiture occurs and in clause 11(6) provides for an opportunity to make representations. Clause 12 allows the detention pre trial of vehicles, ships and aircraft that might be forfeited on conviction. Again in clause 12(4) there is a mechanism through which release of the vehicle, ship or aircraft may be sought. These provisions may engage both the ECHR rights in Article 1 of Protocol 1 (“A1P1”) and Article 6. So far as A1P1 is concerned the Government considers that any interference is justifiable in the public interest in preserving evidence, preventing the commission of further crimes and in the case of forfeiture, punishment. So far as Article 6 is concerned the Bill provides for a process by which the owner may make representations before the Court and leaves the ultimate decision on forfeiture or detention to the Court (who must act compatibly with Convention rights). This provides an ECHR compliant mechanism for determining these matters.

² (2001) 11 BHRC 280

³ [2012] UKSC 51

UNCRC

18. In relation to UNCRC and the Bill provisions on offences, the Government is mindful of Articles 3 and Articles 34 to 36 of UNCRC. The Bill provisions give further effect to those obligations by consolidating the existing law prohibiting slavery, servitude, forced or compulsory labour and human trafficking, as well as criminal conduct preparatory to a human trafficking offence. Clause 1 has been revised from the existing offence in section 71 of the Coroners and Justice Act 2009 to specifically reference that when determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard is paid to all the circumstances, including any of the person's personal circumstances such as their age or family relationships that make them especially vulnerable. The human trafficking offence in clause 2 explicitly covers exploitation where a child is used to provide services, benefits or enable another to acquire benefits where the child is chosen because of their age and they would accordingly not be likely to refuse to be used in that way (clause 3(6)). Accordingly, the particular vulnerable position of children is expressly recognised in both offences. The offences in clauses 1 and 2 also form part of how effect is given to the obligations in Article 3 of the Optional Protocol to criminalise conduct in relation to the sale of children, child prostitution and child pornography.

Part 2: Slavery and trafficking prevention orders and risk orders

ECHR

Slavery and trafficking prevention order ("STPO")

19. Part 2 of the Bill makes provision for the slavery and trafficking prevention order (clauses 15 to 22) and slavery and trafficking risk order (clauses 23 to 28).

20. An STPO can be made in relation to a person who has been convicted of a slavery or human trafficking offence (defined in Schedule 2) if the prohibitions in it are considered to be necessary to protect a person or persons in the United Kingdom from harm caused by that person committing an offence in Part 1 of this Bill. An STPO may be made by the court following a person's conviction (see clause 15), or at a later time on the application of the police, an immigration officer or the National Crime Agency ("NCA") as a freestanding matter (clause 16). An STPO prohibits the person from doing anything described in it and may have effect for a fixed period of least 5 years; it may include prohibitions in relation to foreign travel (clauses 18 and 19).

Slavery and trafficking risk order ("STRO")

21. An STRO can be made by the court on the application of the police, an immigration officer or the NCA in relation to a person who it considers has acted in a way which makes it necessary to protect a person or persons from harm caused by the person concerned committing an offence in Part 1 of this Bill (clause 23). Unlike an STPO, a conviction is not a condition for obtaining this order. An STRO prohibits the person from doing anything described in it and may have effect for a fixed period of least 2 years; it may include prohibitions in relation to foreign travel (clauses 24 and 25).

22. In relation to both orders:

- the court may make an interim order (clauses 21 and 27);
- the person concerned (and others) may apply to vary, renew or discharge an order if circumstances change (clauses 20 and 26);
- the person concerned may appeal the making, variation or extension of an order (clauses 22 and 28); and
- breach of an order is an offence (clause 29).

23. Although the proceedings by which these orders are obtained are civil proceedings, the Government accepts that the burden of proof will be akin to the criminal standard⁴. In relation to Article 6, the Government considers that these proceedings (as civil proceedings) clearly satisfy any requirements arising under Article 6(1). The rules which govern applications for an order, whether under clause 15 or clause 16 or 23⁵, ensure participation of the person concerned in the court process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order affords further safeguards.

24. These provisions clearly engage Article 8(1). The effect of a person being made the subject of one of the proposed orders will constitute an interference with that person's Article 8(1) rights, and the issue by virtue of Article 8(2) therefore is whether such an interference is in accordance with the law, and is necessary in a democratic society in the interests of public safety, the prevention of crime, the protection of health or for the protection of the rights and freedoms of others⁶.

25. The Government is satisfied that the provisions in Part 2 are sufficiently certain. Their clear effect is that the court must be satisfied that there is a risk that the person may commit a slavery and human trafficking offence and may only impose such prohibitions as it considers necessary for the purpose of protecting persons from physical or psychological harm likely to occur if the individual committed such an offence. This requirement therefore ensures that any interference with a person's Convention rights will be in accordance with the law.

26. The Joint Committee on the Draft Modern Slavery Bill (in its report dated 3rd April 2014) argued at paragraphs 52 and 53 that there is a high threshold requirement of legal certainty in this context. This applies, the Committee argued, both in respect of the threshold requirements for the imposition of an order, and the clarity of the content of an order and its effects on an individual. The Committee argued that this translated into a practical issue for magistrates, who will be required to assess necessity without any guidance on the risk factors which they should consider to ensure an order is proportionate. The Committee also argued that there cannot be reliance on the duties of the court under section 6 of the Human Rights Act 1998 to rectify any such legal uncertainty.

⁴ See *R –v- Crown Court at Manchester ex parte McCann & Others* [2002] UKHL 39 and *Commissioner of the Police of the Metropolis –v- Ebanks* [2012] EWHC 2368).

⁵ See Part II of the Magistrates' Courts Act 1980.

⁶ These include, for example, observing the rights of potential victims under Articles 4 and 8 of the Convention.

27. The Government has considered the points made by the Committee but remains firmly of the view that the requirement of legal certainty is satisfied in respect of the provisions in Part 2. In particular, the Government draws attention to the high burden of proof which applies to these orders in relation to the threshold requirements for the imposition of an order (see paragraph 23 above), the test which identifies the matters about which the court must be satisfied (for example, category of persons at risk and type of harm to be prevented as set out at clauses 15(2), 16(2) and 23(3)) and the fact that statutory guidance will be issued which will describe risk factors and categories of restriction which may be contained in an order. The Government is accordingly satisfied that this framework will provide the necessary clarity as to what measures would be proportionate to the risk of harm posed by the individual concerned. The Government further notes that an equivalent framework has been in operation in relation to sexual harm since 2004 (see paragraph 33 below) and has not given rise to any issues in respect of legal certainty.
28. In assessing whether a particular interference with Article 8(1) rights is proportionate, the Government has taken into account the jurisprudence of the European Court of Human Rights on the duties of states in other, similar contexts. In relation to the prevention of sexual offending, the court in *Stubbings –v- United Kingdom*⁷ noted that Article 8 may impose positive duties on states to protect children and others from sexual offending. The Government considers that there are similar, parallel duties in respect of the protections which should be afforded to persons who may be victims of slavery or trafficking.
29. The provisions also confer on the police, an immigration officer and the NCA the power to apply for an order and confer on the courts the power to make an order. As a public authority, each will have a duty under section 6 of the Human Rights Act 1998 to ensure that their own actions are compatible with the Convention.
30. The requirement that the court must be satisfied that the order is necessary to protect a person from harm caused by the person in respect of whom the order is sought, in tandem with the participation of the person concerned in the court process (as described in paragraph 23), ensures that that person's Convention rights are safeguarded.
31. In relation to each order, the interference with Article 8(1) which may be justified under Article 8(2) is the imposition of prohibitions by virtue of the order. The interference will be in accordance with the law; there is clear provision in primary legislation governing the basis on which the court may make an order. The independent oversight by the court and the fact that statutory language means that the court may only make an order where it is satisfied that there is a risk of the person committing an offence it is necessary to protect people from harm likely to arise from such an offence ensures that the requirements in Article 8(2) are met.
32. The Government is also satisfied that either order cannot contain a prohibition which results in a breach of any other ECHR right, for example Article 5. The court would be constrained from making an order containing such a prohibition because of the requirement that it may only impose such prohibitions as are necessary to manage the risk posed by the defendant and its duty under section 6 of the Human Right Act 1998.

⁷ (1996) 23 EHRR 213.

33. The Government also notes that the provisions in Part 2 of the Bill broadly reflect the provisions in Part 2 of the Sexual Offences Act 2003 (specifically sections 104 to 129, and the amendments made to them by Part 9 of the Anti-social Behaviour, Crime and Policing Act 2014) which govern the making of equivalent orders in relation to persons who pose a risk of sexual harm. Those orders have been made and overseen by the courts since 2004 and have not given rise to any ECHR incompatibility.
34. The Government considers, therefore, that the provisions in Part 2 are compatible with the Convention.

UNCRC

35. The Government considers that the provisions in Part 2 will enhance the relevant rights of the child under the UNCRC. These orders will protect children from physical or psychological harm caused by those who seek to enslave or traffic children. The provisions will also protect children from the risk of re-trafficking as they will help to ensure those who intend to re-victimise children are prevented from doing so. It is known that children often go missing and are in that time particularly vulnerable to re-trafficking, having been deceived into believing that their trafficker will look after them if they return to their exploitative situation.

Part 3: Anti-slavery Commissioner

ECHR

36. Part 3 of the Bill (clauses 34 to 38) creates a new Anti-slavery Commissioner. ECHR issues only potentially arise in respect of the duty to cooperate with the Commissioner (clause 37) in that it might include disclosure of personal information that engages Article 8. However, the Government considers that any such disclosure should be justified in that the role of the Commissioner is to improve the investigation and prosecution of trafficking and slavery offences and to improve the means by which potential victims of those offences are identified by public authorities. Further, the Bill provides that public authorities need not disclose information that breaches any restriction on disclosure (such as the Data Protection Act 1998). Further, each public authority is itself bound by the Human Rights Act 1998 and such disclosures should in any event only be made if compatible with Convention rights.
37. The creation of a new Commissioner to encourage good practice in the prevention, detection, investigation and prosecution of offences and the identification of victims and the strengthened protection for victims that should result, means that these provisions are a substantial human rights enhancing measure.

UNCRC

38. For the same reasons as those set out at paragraph 37, the Government considers that the creation of the new Commissioner substantially enhances the rights of children under the UNCRC. The work of the Commissioner in improving the investigation and prosecution of trafficking and slavery offences and the means by which potential victims of those

offences are identified by public authorities will certainly extend to children. The role will also have a close working relationship with the Office of the Children's Commissioner, who will retain their responsibility for promoting the rights, views and interests of children. The OCC particularly represent children who are vulnerable or who find it hard to make their views known and therefore continue to have an important role in representing trafficked children.

Part 4: Protection of victims

ECHR

39. Part 4 of the Bill (clauses 39 to 44) provide a suite of measures for the protection of victims of slavery and human trafficking. These are:

- a defence for victims compelled to commit a criminal offence (clause 39);
- the extension of existing entitlements to special measures of human trafficking victims to equally include victims of slavery (clause 40);
- a power for the Secretary of State to make arrangements to enable child trafficking advocates to be available to represent and support child human trafficking victims (clause 41);
- a duty on the Secretary of State to issue guidance in relation to slavery and trafficking victims, including in relation to the provision of support to victims (clause 42);
- a presumption of age relating to assistance and support of trafficking victims (clause 43); and
- a duty on specified public authorities to notify the NCA about suspected victims of slavery or human trafficking (clause 44).

40. Whilst only the clause 44 provision potentially raises any ECHR issue, all these provisions concern the protection of victims of slavery and human trafficking, enhance the protection of those persons' ECHR rights and are accordingly significant human rights enhancing measures.

Duty to notify NCA about suspected victims of slavery or human trafficking

41. Clause 44 provides that public authorities specified by the Secretary of State are required to make certain disclosures to the NCA in respect of persons who they have reason to believe may be victims of slavery or human trafficking. What information must be disclosed will be specified by the Secretary of State in regulations and, in the case of adults, will allow names, addresses and other identifying information to be withheld if the potential victim does not consent. To the extent that specified bodies are required to disclose personal information, then Article 8 may be engaged. The purpose of the disclosure is to assist the NCA in its work in preventing trafficking: a legitimate purpose for the prevention of disorder or crime and for the protection of the rights and freedoms of others. The intention is that identifying information will not be disclosed without consent (other than in the case of children) and in any event the NCA will itself hold and use such information in accordance with the ECHR and Data Protection Act 1998 in relation to all those about whom a notification is made. There is also a safeguard at clause 44(4) of the Bill which provides that information shall not be required to be included in any notification if its disclosure contravenes the Data Protection Act 1998.

42. Accordingly, the Government is satisfied that these provisions are compatible with the ECHR.

UNCRC

43. In relation to the UNCRC, the suite of victim protection measures will particularly benefit children and is accordingly consistent with the protection of children's rights under the UNCRC. Child victims of clause 1 and 2 offences are often forced into criminality, such as cannabis cultivation and the statutory defence in Clause 39 is likely to particularly benefit those vulnerable young people. Moreover, the defence has been formulated in a way that ensures that the person's age is given specific consideration in the assessment of the defence (see clause 39(2)).
44. The enabling power in clause 41 for the Secretary of State to make arrangement for the appointment of child trafficking advocates means that advocates will be able to represent and support children who may be victims of human trafficking and accordingly takes account of children's particular need for support when navigating the complex support, legal and immigration systems. These measures will support Article 3 of UNCRC because advocates will be tasked with making the best interests of child victims their primary consideration; and also Article 12, as the advocates will ensure the child's views are voiced and respected taking into account the child's level of maturity and ability to form and express their opinions.
45. Article 13 of the EU Directive on human trafficking (Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims) provides that where a victim's age is uncertain and there is reason to believe they are a child, they should be presumed to be a child for the purposes of receiving assistance and support. Clause 43 includes provision to this effect. This is consistent with the underlying ethos of the UNCRC of protecting children in relation to provision of appropriate assistance and support.
46. In relation to clause 44, appropriate identifying information may be shared without a victim's consent. Article 12 of the UNCRC states that parties shall assure to the child capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with their age and maturity. However, the sharing of identifying information about this particularly vulnerable group, who are at high risk of re-trafficking, without their consent for law enforcement purposes is in accordance with the obligation on the UK under Article 3 of the UNCRC which ensures the best interests of the child are the primary concern in making decisions that may affect them; Article 11 to take measures to combat the illicit transfer and non-return of children abroad; and the UNCRC Optional Protocol which extends Article 11 to guarantee protection from the sale of children, child prostitution and child pornography. In addition, there are the additional safeguards already mentioned at paragraph 41 above. Accordingly, the Government is satisfied that clause 44 is consistent with the UNCRC.