



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Advice to the Committee for Justice on the 'Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

1. The Northern Ireland Human Rights Commission ('the Commission'), pursuant to Section 69(4) of the Northern Ireland Act 1998 is obliged to advise the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Committee for Justice ('the Committee').
2. The Commission bases this advice on the full range of internationally accepted human rights standards. The Northern Ireland Executive is subject to the obligations contained within the international human rights treaties that have been ratified by the United Kingdom. In the context of trafficking in human beings ('THB'), the relevant treaties include the:
 - 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 ('UN Trafficking Protocol');²
 - UN Convention on the Elimination of All Forms of Discrimination Against Women ('UNCEDAW');³
 - UN Convention on the Rights of the Child ('UNCRC');⁴
 - UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ('UNCRC Optional Protocol on Child Prostitution');⁵
 - Council of Europe Convention on Action against Trafficking in Human Beings ('CoE Trafficking Convention');⁶ and,
 - European Convention on Human Rights ('ECHR'), as incorporated into domestic law by the Human Rights Act 1998.

¹ Ratified by the UK on 9 February 2006.

² Ratified by the UK on 9 February 2006.

³ Ratified by the UK on 7 April 1986.

⁴ Ratified by the UK on 16 December 1991.

⁵ Ratified by the UK on 20 February 2009.

⁶ Ratified by the UK on 17 December 2008.

3. Furthermore, the Commission references the international human rights treaties that the UK Government has not yet ratified but as a signatory has indicated an intention to comply, which in this context includes the:
 - CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.⁷
4. In addition to the treaty standards, there is a body of 'soft law'. These standards are non-binding but are of strong persuasive value. The relevant standards include the:
 - UN OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking ('UN Recommended Principles'); and
 - UNODC Model Law Against Trafficking in Persons ('UNODC Model Law').
5. Finally, the EU issues Directives which form part of the domestic legal order once the transposition date has passed. From April 2013, EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('EU Trafficking Directive') can be relied upon by individuals in the domestic courts.

Definition of human trafficking and slavery offences (clause 1)

6. Clause 1 of the Bill sets out a definition of a human trafficking offence as an offence under the Sexual Offences Act 2003, Sections 57-59 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Section 4. It also defines a slavery offence as an offence under the Coroners and Justice Act 2009, Section 71.
7. The UN 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.

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'.

⁷ Signed by the UK on 5th May 2008.

8. The UN Trafficking Protocol, Article 3 and the CoE Trafficking Convention, Article 4 define THB 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.⁸ The EU Trafficking Directive, Article 2 mirrors this structure and requires that the following intentional acts are 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.

9. Under the EU Directive, Article 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.' Furthermore, if the act involves a child, then the offence of THB will not require any of the means enumerated in the preceding paragraph.⁹ A child is to be understood as any person under the age of 18 years.¹⁰

10. 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.

11. The Commission notes that the structure of the domestic THB framework does not harmonise with the international standards and is spread across many different legislative instruments. For example, 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. Under the 2004 Act, 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. 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),

⁸ CoE Trafficking Convention, Explanatory Report, para 74.

⁹ See EU Directive, Article 5; CoE Trafficking Convention, Article 4(c); and UN Trafficking Protocol, Article 3(c).

¹⁰ See CoE Trafficking Convention, Article 4(d); UN Trafficking Protocol, Article 3(d); and EU Directive, paragraph 22.

(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.¹¹

12. Furthermore, 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. Under the 2003 Act, 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 offence'. A 'relevant offence' is defined in major part by reference to the offences contained within the Sexual Offences (NI) Order 2008.
13. In addition to the offences specified in clause 1 of the Bill, the Commission notes that there are other legislative instruments in NI which do not explicitly deal with trafficking or slavery but restrict related exploitation. For example, under the Gangmasters (Licensing) Act 2004, a gangmaster is defined as a person who supplies a worker to do work for another person.¹² 'Work' under the Act means: agricultural work; gathering shellfish; and processing or packaging any produce derived from agricultural work or shellfish, fish or products derived from shellfish or fish.¹³ The Act makes it an offence to: operate as a gangmaster without a license; to be in possession of a false license or related document; and to enter into an arrangement with an unlicensed gangmaster.¹⁴ In addition, the Sexual Offences (NI) Order 2008, as amended by the Police and Crime Act 2009, makes it an offence to pay for the sexual services of a person subject to exploitation.¹⁵ 'Exploitative conduct' under the Order involves

¹¹ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Section 4(4) (as amended by the Criminal Justice Act (NI) 2013 and the Borders, Citizenship and Immigration Act 2009).

¹² Gangmasters (Licensing) Act 2004, Section 4.

¹³ Ibid., Section 3.

¹⁴ Ibid., Sections 12 and 13.

¹⁵ Section 15, Policing and Crime Act 2009, inserting Article 64A, Sexual Offences (Northern Ireland) Order 2008.

using force, threats, any other form of coercion, or any form of deception.¹⁶

14. **The Commission advises the Committee that it should scrutinise the domestic legislation to ensure that the totality of offences which constitute THB under the international standards are covered by the domestic law.**
15. **The Commission further advises that harmonisation of the domestic law with the international standards would be enhanced if the Bill is amended to state the international definition of THB as well as identifying the legislative instruments that address related exploitation.**

Minimum sentence for adult offenders (clause 4)

16. Clause 4 of the Bill seeks to establish a minimum penalty of two years imprisonment for trafficking and slavery offences. The Bill provides for the possibility that this minimum can be waived at the discretion of the court in exceptional circumstances.
17. The UN Convention Against Transnational Organised Crime, Article 11 stipulates that the commission of a trafficking offence¹⁷ 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.¹⁸
18. The CoE Trafficking Convention, Article 23 and the EU Trafficking Directive, Article 4 require trafficking offences to be punishable by 'effective, proportionate and dissuasive' sanctions. Such penalties should allow for a deprivation of liberty.¹⁹
19. Furthermore, the European Court of Human Rights ('ECtHR') has determined that THB falls directly within the remit of ECHR, Article 4 which prohibits slavery and forced labour.²⁰ In order to ensure that the rights

¹⁶ Ibid., Article 64A(3).

¹⁷ As defined within the UN Convention on Transnational Organised Crime.

¹⁸ UN Convention on Transnational Organised Crime, Article 11(2).

¹⁹ CoE Convention, Article 23 and EU Directive, Article 4.

²⁰ *Rantsev v. Cyprus and Russia*, ECtHR, Application No. 25965/04 (7 January 2010), para 282.

guaranteed within the ECHR are practical and effective and not theoretical or illusory,²¹ Government is under a positive obligation to institute effective penalties for conduct that violates an ECHR right.²² The ECtHR considers the effectiveness of judicial decisions regarding penalties according to their efficacy, preventative and deterrent nature.²³

20. 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'.²⁴ In this regard, the Court has found that certain blanket and indiscriminate provisions do not satisfy the proportionality test.²⁵ Furthermore, 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.²⁶
21. The Commission notes that in NI, THB offences are triable on indictment only, with a maximum sentence of imprisonment up to 14 years.²⁷ Sentencing guidelines for the NI Crown Court are provided within the case law of the NI Court of Appeal. To date, the NI Court of Appeal has not issued sentencing guidelines for trafficking offences.
22. The Sentencing Council for England and Wales has laid down sentencing guidelines concerning trafficking for the purposes of sexual exploitation.²⁸ These Guidelines set out a starting point of two years for the offence of trafficking for the purposes of sexual exploitation where no coercion exists.²⁹ The Guidelines state as follows:

Type/nature of activity	Starting point	Sentencing range
Involvement at any level in any stage of the trafficking operation where the victim was coerced	6 years custody	4–9 years custody
Involvement at any level in any stage of the trafficking operation where there was no coercion of the victim	2 years custody	1–4 years custody

²¹ *Nikolova and Velichkova v. Bulgaria*, ECtHR, Application No. 7888/03 (20 December 2007), para 61.

²² *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.

²³ *Ibid.*, para 143. *Opuz v Turkey*, ECtHR, Application No. 33401/02 (9 June 2009), para 170.

²⁴ *Hirst v UK*, ECtHR, Application No. 74025/01 (6 October 2005), para 71.

²⁵ *Ibid.*, para 82.

²⁶ UN Trafficking Principles and Guidelines, 15.3.

²⁷ Criminal Justice Act (Northern Ireland) 2013, Section 8.

²⁸ Sentencing Council for England & Wales, 'Sexual Offences Act 2003', Part 6D: Trafficking.

²⁹ *Ibid.*, p130-131.

23. In *Attorney General's Reference (Number 1 of 2008) Gibbons et al.*, the NI Court of Appeal explained the relationship between NI courts and the England and Wales Guidelines:

as we have repeatedly made clear, the guidance provided by the Sentencing [...] Council must always be regarded as secondary to the guidelines provided by the Court of Appeal in this jurisdiction. There will be occasions where the guidelines accord with local experience in which case they may be followed but there will also be occasions where they should not be applied.³⁰

24. In 2012, the NI Crown Court passed two judgments on THB offences within which it discussed the applicability of the England and Wales Guidelines: *R v. Matyas Pis*,³¹ and *R v. Rong Chen*.³²

25. In *R v. Matyas Pis*, the Court applied the Guidelines.³³ In *R v. Rong Chen* however, the Court did not apply the Guidelines in totality, identifying 'major difficulty' concerning the requirement to adopt a starting point and in particular, the six year starting point for coercion cases regardless of the degree of coercion involved.³⁴ Judge Stephens stated,

I do not consider it appropriate that there should be no assessment of the degree of coercion before one increases a starting point by 4 years from 2 to 6 years custody. The difficulties with the feature of coercion continue because under the 2007 guidelines it is potentially an additional aggravating factor.³⁵... I consider it more appropriate to form one overall view on the facts of a particular case as to the degree of coercion involved and to take that factor along with the other aggravating and mitigating factors into account in imposing an appropriate sentence within the overall sentencing range.³⁶

26. The Commission notes that both cases are currently awaiting deliberation by the NI Court of Appeal and that in the absence of further guidance, the current starting point for sentencing to be applied following a conviction for trafficking for the purposes of sexual exploitation where there is no coercion is likely to remain as set out by the Sentencing Council at 2 years.

27. The Commission further notes that under both the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the Sexual Offences Act 2003, it is possible to be convicted of a domestic THB offence

³⁰ *Attorney General's Reference (Number 1 of 2008) Gibbons et al.* [2008] NICA 41, para 44.

³¹ *Queen v. Matyas Pis*, [2012] NICC 14.

³² *Queen v. Rong Chen, Simon Dempsey and Jason Owen Hinton*, [2012] NICC 26.

³³ *Queen v. Matyas Pis*, [2012] NICC 14, para 9.

³⁴ *Queen v. Rong Chen, Simon Dempsey and Jason Owen Hinton*, [2012] NICC 26, para 33.

³⁵ *Ibid.*

³⁶ *Ibid.*

that would not constitute THB under the international framework, namely because the domestic legislation does not always require one of the ‘means’ specified within the international definition.³⁷

28. **The Commission notes that the figure of two years proposed as the minimum sentence is not arbitrary but reflects a subtle increase on current sentencing practice.**
29. **The Commission advises however, that the existence of the exception under legislation should remain within the Bill to ensure that the sanctions imposed under clause 4 are considered proportionate for all THB offences, including those offences defined as trafficking domestically but which fall outside of the international standard.**

Minimum sentence for child offenders (clause 4)

30. Clause 4 of the Bill does not distinguish between child offenders and adult offenders concerning the implementation of the minimum sentence.
31. Under the international human rights standards, a child is defined as a person under 18 years old.³⁸ The UNCRC, Article 37(b) states that the ‘imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time’. According to the UNCRC Committee:

children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for lesser culpability of children in conflict with the law ... The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objective in dealing with child offenders.³⁹

32. **The Commission advises that the Bill should be amended to explicitly distinguish between child and adult offenders and reflect that the imprisonment of a child should only be used as a measure of last resort.**

³⁷ See for example, *Queen v. Matyas Pis*, [2012] NICC 14 where there was no coercion or other ‘means’ employed. In this case a 3 year sentence divided into 18 months imprisonment and 18 months on license was imposed for the trafficking offence.

³⁸ UNCRC, Article 1 states: ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ In NI, the age of majority is 18 under the Age of Majority (Northern Ireland) Act 1969. See also Article 3 of the CoE Convention.

³⁹ CRC Committee, General Comment 10: Children’s rights in juvenile justice (25 April 2007), para 10.

Aggravating factors (clause 3)

33. Clause 3 of the Bill sets out a number of aggravating factors to be considered by the court when sentencing for THB or slavery offences.

34. The concept of aggravating factors is an aspect of a proportionate sanction. The UN Recommended Principles, Guideline 4 states that:

where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.

Similarly, the UNODC Model Law states that aggravating factors 'can be added to the law, if and in as far as this is in line with existing aggravating circumstances with regard to other crimes'.⁴⁰

35. The CoE Trafficking Convention, Article 24 does not refer to the implementing instrument but states that the offence of THB should be regarded as aggravated where it:

- deliberately or by gross negligence endangered the life of the victim;
- was committed against the child;
- was committed by a public official in the performance of her/his duties;
- was committed within the framework of a criminal organisation.

36. The EU Directive 2011/36 further advises that 'where the offence is committed ... against a particularly vulnerable victim, the penalty should be more severe'.⁴¹ At the least, vulnerable persons should be understood to include all children, but could also include gender, pregnancy, state of health and disability.⁴² Furthermore, according to the EU Directive, where the offence has involved serious violence such as torture, forced drug/medication usage, rape or other serious forms of psychological, physical or sexual violence, or has otherwise caused particularly serious harm to the victim, this should be reflected in a more severe penalty.⁴³

37. In addition, the UN Model Law suggests that endangering life would also include exposing the victim to a life-threatening illness such as

⁴⁰ UNDOC Model Law, page 31.

⁴¹ EU Trafficking Directive, paragraph 12.

⁴² Ibid.

⁴³ Ibid.

HIV/AIDS.⁴⁴ A final aggravating factor added under the UN Model Law is where the offence involves more than one victim.⁴⁵

38. The Commission notes that in both *R v. Matyas Pis* and *R v. Rong Chen*, the NI Crown Court applied the aggravating factors for the offence of trafficking for the purpose of sexual exploitation, as laid down in the Sentencing Guidelines for England & Wales.⁴⁶ The Guidelines state as follows:

Note: If the victim is under 13, one of the specific under-13 offences would normally be charged. Any commercial exploitation element would be an aggravating factor.

Additional aggravating factors	Additional mitigating factors
1. Large-scale commercial operation 2. High degree of planning or sophistication 3. Large number of people trafficked 4. Substantial financial (in the region of £5000 and upwards) or other gain 5. Fraud 6. Financial extortion of the victim 7. Deception 8. Use of force, threats of force or other forms of coercion 9. Threats against victim or members of victim's family 10. Abduction or detention 11. Restriction of victim's liberty 12. Inhumane treatment 13. Confiscation of victim's passport	1. Coercion of the offender by a third party 2. No evidence of personal gain 3. Limited involvement

39. The Commission notes that the domestic courts may consider additional aggravating factors at their discretion. Furthermore, domestic trafficking offences are structured so as, at times, aggravating factors constitute a component of the offence.⁴⁷
40. **The Commission notes that neither the Guidelines, nor clause 3 of the Bill include on their face the entirety of the required aggravating factors provided by the international standards.**
41. **The Commission advises that if clause 3 of the Bill remains within the legislation, then it should be amended to include, at a minimum, the totality of aggravating factors laid down under the international standards, for example, where the offence was committed within the framework of a criminal organisation.**

⁴⁴ UN Model Law, p 31.

⁴⁵ Ibid.

⁴⁶ *Queen v. Matyas Pis*, [2012] NICC 14, paras 9, 25 and 33; *Queen v. Rong Chen, Simon Dempsey and Jason Owen Hinton*, [2012] NICC 26, para 36.

⁴⁷ For example, in the case of child sex offences where the child is under 13 years old.

- 42. The Commission further advises that the Bill should explicitly state that the legislation does not restrict the court from taking into account additional aggravating factors.**

Paying for the sexual services of an adult (clause 6)

43. In the absence of exploitation, it is currently not a criminal offence to pay for the sexual services of an adult in NI. Clause 6(1) of the Bill aims to discourage the demand for THB by changing this aspect of the law and making it a criminal offence to pay for the sexual services of a prostitute over 18 years.⁴⁸ Clause 6(6) of the Bill further requires the Department of Justice to review the operation of this offence and report to the Assembly three years after the offence comes into effect.
44. The UN Trafficking Protocol, Article 9(5), the CoE Trafficking Convention, Article 6, the EU Trafficking Directive, Article 18(1) and the UN Recommended Principles, Principle 4 all require the adoption of appropriate measures or strategies to discourage the demand that fosters all forms of exploitation that leads to THB. According to the UN Trafficking Protocol, Article 9(5) and the CoE Trafficking Convention, Article 6, these measures can be, among others, legislative, social, cultural or educational. The Explanatory Report to the CoE Trafficking Convention notes that such measures represent a positive obligation on the State and that their aim should be the 'effective' dissuasion of client demand.⁴⁹
45. According to the Legislative Guide on the UN Trafficking Protocol, 'dealing with prostitution and related matters outside the scope of trafficking in persons is specifically reserved for the laws and policies of individual States parties'.⁵⁰ The Commentary on the UN Recommended Principles further elaborates that governments:

are not precluded by international law from regulating prostitution as they consider appropriate, subject, of course, to their obligation to protect and promote the human rights of all persons within their jurisdiction. Accordingly, rights based strategies to address demand for exploitative/trafficked prostitution can be considered either separately from or in conjunction with strategies aimed at addressing demand for prostitution more generally.⁵¹

46. In March 2012, the UN CEDAW Committee welcomed the introduction of an amendment to the Penal Code in Norway prohibiting the purchase of

⁴⁸ For discussion see, Lord Morrow, 'Proposed changes in the law to tackle human trafficking: Consultation Paper' (August 2012) p12.

⁴⁹ Explanatory Report to the CoE Trafficking Convention, paras 108 - 110.

⁵⁰ Legislative Guide on the UN Trafficking Protocol, para 33 and note 15.

⁵¹ UN OHCHR 'Recommended Principles and Guidelines: Commentary' (New York & Geneva: 2010), p 101.

sexual services and implementing punishment of up to 6 months imprisonment.⁵² However, the Committee also called upon the State to study the effects of the amendment 'on the type and extent of prostitution and trafficking, as well as on social perceptions on prostitution and on the purchase of sex services, as well as on women who engage in prostitution'.⁵³

47. The ECtHR has established that private sexual activity between consenting adults is protected by the right to private and family life under Article 8 of the ECHR.⁵⁴ This aspect of Article 8 may be deemed to include an adult who offers him or herself for sexual services in exchange for payment. However, the right to private and family life can be restricted where it is deemed 'necessary in a democratic society'. Interference with the right will be considered 'necessary in a democratic society' if it is for a legitimate aim which answers a pressing social need and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are relevant and sufficient.⁵⁵
48. **The Commission advises therefore that the criminalisation of payment for the sexual services of an adult is neither required nor prohibited by the international human rights treaties.**
49. **The Commission further advises that if a decision is taken to introduce clause 6(1) of the Bill, an obligation to monitor and evaluate the Bill's effects should remain within the legislation.**

Paying for the sexual services of a child (clause 6)

50. Clause 6 of the Bill does not extend to paying for the sexual services of a person below 18 years.
51. The UNCRC, Article 32 recognises,

[t]he right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

⁵² Concluding Observations of the Committee on the Elimination of Discrimination Against Women, UN Doc. CEDAW/C/NOR/CO/8 (23 March 2012), para 25.

⁵³ Ibid., para 26.

⁵⁴ See for example, *Max Mosley v United Kingdom*, ECtHR Application no. 48009/08 (10 May 2011).

⁵⁵ See for example, *S. and Marper v United Kingdom*, ECHR Applications nos. 30562/04 and 30566/04, (4 December 2008), para 101.

In this regard, Article 32 requires Government to provide for: a minimum age or ages for admission to employment; and appropriate penalties or other sanctions to ensure the effective enforcement of this standard.

52. The UNCRC Optional Protocol on Child Prostitution recognises such work to include child prostitution and taken together, Articles 1, 2(b) and 3(1)(b) require the prohibition of child prostitution under the criminal law, including 'obtaining' or 'procuring' a child for prostitution. Similarly, the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, stipulates in Article 19 that the conduct of 'having recourse to child prostitution' should be criminalised.
53. In July 2013, the UN CEDAW Committee directly considered the legislation in Northern Ireland concerning paying for the sexual services of a child, and urged the Government to:

revise its legislation by shifting the burden of proof from the prosecution to the purchaser of sexual services. The Committee recommends that once the prosecution proves that the child was over 13 and under 18, and the accused purchased sexual services from the child, the purchaser should be required to establish that the purchaser did not reasonably believe that the child was under 18 years.⁵⁶

54. The ECHR, Article 6(2) states that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law'. According to the ECtHR in *Salabiaku v France*,

Article 6 para. 2 ... does not ... regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take account the importance of what is at stake and maintain the rights of the defence.⁵⁷

55. This principle however, has not been interpreted by the court as establishing substantive rules of criminal liability. For example, in *G. v. the United Kingdom*, the ECtHR stated,

The contracting States remain free to apply the criminal law to any act which is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. It is not the Court's role under Article 6 §§ 1 or 2 to dictate the content of domestic

⁵⁶ CEDAW Committee, 'Concluding Observations on the seventh periodic report of the UK' (26 July 2013), paras 40-41.

⁵⁷ *Salabiaku v France*, ECtHR, Application no. 10519/83 (7 October 1988), para 28.

criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused.⁵⁸

56. Finally, the ECtHR has on occasion stated that the remit of the rights protected under the ECHR are positively influenced by the related UN instruments. In this regard, the ECtHR has referenced the UNCRC, Article 32.⁵⁹
57. The age of consent in NI for sexual activity is 16 years old.⁶⁰ However, in the context of paying for the sexual services of a child, the Sexual Offences (Northern Ireland) Order 2008 acknowledges a child to be anyone under the age of 18 years old.
58. In the absence of exploitation, the Sexual Offences (Northern Ireland) Order 2008, Article 37, makes it an offence in NI: to intentionally pay for the sexual services of a child under 13 years old; and, to intentionally pay for the sexual services of a child under 18 years old where the purchaser did not reasonably believe the child to be 18 years or over. In the latter context, 'it will be for the prosecution to prove [beyond reasonable doubt] that [the purchaser] does not reasonably believe that [the child] is 18 or over'.⁶¹ There are no publicly available statistics concerning the number of prosecutions under Article 37.
59. In England and Wales, the equivalent provision is the Sexual Offences Act 2003, Section 47 and in Scotland, the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, Section 9. In a recent State Report to the UN Committee on the Rights of the Child, the detail of the proceedings under these provisions was given as follows:

Number of defendants proceeded against at magistrates' courts and found guilty at all courts for selected offences, England & Wales, 2004-2009

	2004 Proceeded against (found guilty)	2005 Proceeded against (found guilty)	2006 Proceeded against (found guilty)	2007 Proceeded against (found guilty)	2008 Proceeded against (found guilty)	2009 Proceeded against (found guilty)
Sec 47 Paying for sex with a child	3 (-)	3 (-)	2 (2)	7 (3)	3 (3)	3 (5)

⁵⁸ *G v the United Kingdom*, ECtHR, Application no. 37334/08 (30 August 2011), para 27.

⁵⁹ *Siliadin v France*, ECtHR, Application No. 73316/01 (26 July 2005), paras 87-89.

⁶⁰ See Sexual Offences (Northern Ireland) Order, Article 16.

⁶¹ Ibid., Article 37, Explanatory Memorandum. This defence is also available under the Sexual Offences (Northern Ireland) Order 2008 for other sexual offences committed against children of 13 years and over, such as the offences of inciting a child to be involved in prostitution or pornography, controlling the activities of a child relating to prostitution or pornography, and arranging or facilitating a child's involvement in prostitution or pornography. See Sexual Offences (Northern Ireland) Order 2008, Articles 38 - 40.

Persons proceeded against in Scottish courts for crimes against children¹ by crime type, 2005-06 to 2009-10

Procurement of sexual services from children under 18	2005-6	2006-7	2007-8	2008-9	2009-10
Proceeded against	0	0	0	1	0
Not guilty	0	0	0	0	0
Charge proved	0	0	0	1	0

60. In the same report, the UK Government stated that the prosecution could provide among others, the following types of evidence to prove that the defendant did not reasonably believe the child was over 18 years: (1) that the defendant had been told the age of the victim; (2) the circumstances in which the defendant knew the victim, including the length of time; and (3) the physical appearance of the victim.⁶²
61. **The Commission notes that the Bill, if implemented in its current format, will make it easier to prosecute the offence of paying for sex with an adult than to prosecute the offence of paying for sex with a child over 13 years.**
62. **The Commission advises the Committee that if clause 4 of the Bill is enacted, it should be extended to include paying for the sexual services of a child.**
63. **The Bill should introduce an amendment to the Sexual Offences (NI) Order 2008, Article 37 to ensure that paying for the sexual services of all children is adequately criminalised and the development of the child is safeguarded.**

Non prosecution of victims of trafficking in human beings (clause 8)

64. Clause 8 of the Bill requires that there will be no prosecution of a victim of THB where he or she had committed a criminal act as a direct consequence of the trafficking.
65. The Commission notes that the CoE Trafficking Convention, Article 26 requires that:

[e]ach party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties

⁶² UN Doc. CRC/C/OPSC/GBR/1 (14 November 2012), para 31.

on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

66. The Group of Experts on Action against Trafficking in Human Beings ('GRETA') responsible for monitoring the CoE Trafficking Convention, urged the British authorities to 'step up' their efforts to adopt a victim-centred approach when implementing Article 26 of the Convention by:

- Encouraging prosecution services to consider THB as a serious violation of human rights when assessing the public interest of prosecuting identified victims of trafficking;
- Ensuring that CPS, COFPS and ACPO guidance are fully applied in order to prevent imposing penalties on identified victims of trafficking for their involvement in unlawful activities to the extent that they were compelled to do so;
- Ensuring that, while the identification procedure is ongoing, potential victims of trafficking are not punished for immigration-related offences.⁶³

67. The UN Recommended Principles similarly address this issue stating that:

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.⁶⁴

68. The Commission further notes that the ECtHR has explained that Article 4 ECHR 'entails a procedural obligation to investigat[e] situations of potential trafficking'. Noting that the 'requirement to investigate does not depend on a complaint from the victim or next-of-kin; once the matter has come to the attention of the authorities they must act on their own motion'.⁶⁵ In light of this, the Commission notes the primary duty to identify whether a suspected perpetrator of a crime is also a victim of THB.

69. The Commission recalls however, that 'judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.'⁶⁶ Further, international human rights standards require an effective remedy for

⁶³ GRETA Report on the UK (12 September 2012), para 336.

⁶⁴ UN Recommended Principles, para 7. See also Guidelines 2, 4, and 5.

⁶⁵ *Rantsev v. Cyprus and Russia* (2010) Application No. 25965/04, para 288.

⁶⁶ The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 United Nations General Assembly (1985) A/RES/40/34

individuals whose rights have been violated.⁶⁷ Any granting of immunity which would remove the access to justice and an effective remedy would run counter to these principles.

70. In 2013, the England & Wales Court of Appeal judgment in *L and Others v. R* demonstrated that despite guidance regarding protections for victims of trafficking, prosecutions of victims of trafficking, including children do occur in practice.⁶⁸
71. **The Commission advises that an individual's status as a victim of THB constitutes strong, persuasive value not to prosecute that individual for a crime committed as a direct consequence of their situation as a trafficked person.**

Child trafficking guardian (clause 12)

72. Clause 12 of the Bill seeks to establish a child trafficking guardian who will exercise parental responsibility over the child in certain circumstances, such as where a child is separated or unaccompanied.
73. The international standards require that particular attention be paid to unaccompanied child victims of THB.⁶⁹ In this regard, CoE Trafficking Convention, Article 10(4) and EU Directive, Article 16 require that a guardian is appointed to act in the best interests of unaccompanied child victims of THB.
74. The UNCRC similarly calls upon States to appoint a guardian or adviser for all unaccompanied or separated children.⁷⁰ Specifically, the guardian or adviser should,

have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.⁷¹

⁶⁷ UDHR, Article 8; ICCPR, Article 2; and ECHR, Article 13.

⁶⁸ [2013] EWCA Crim 991.

⁶⁹ EU Trafficking Directive, Article 23.

⁷⁰ CRC Committee, General Comment 6 'Treatment of unaccompanied and separated children outside their country of origin' (1 September 2005), para 33.

⁷¹ Ibid.

75. Furthermore, the UNCRC Committee calls for review mechanisms to be established to monitor the quality of guardianship in order to ensure the best interests of the child.⁷²
76. The Commission notes the joint guidance issued by the DHSSPS and the PSNI concerning the 'Working arrangements for the welfare and safeguarding of child victims of human trafficking' published in 2011 which states that child victim's of trafficking will be allocated a social worker who will liaise with the child regarding health, education and legal needs.⁷³
77. The Commission also notes that in 2012, GRETA stated that:
- There is no system of legal guardianship for trafficked children at the UK level. According to the Government, existing measures of having a State-allocated social worker and advocate are adequate. However, 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. 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.⁷⁴
78. In addition, in a 2008 report to the UNCRC Committee, the four UK Children's Commissioners called for a formal guardianship scheme for asylum seeking children, noting that 'many asylum seeking children are not allocated their own social worker'.⁷⁵
79. **The Commission advises the Committee that it should scrutinise the current social worker system for separated or unaccompanied child victims of THB against the international standards. This analysis should be with a view to establishing whether or not a separate system of legal guardianship is necessary for child victims of THB as called for within this Bill.**

⁷² Ibid., para 34.

⁷³ DHSSPS and PSNI, 'Working arrangements for the welfare and safeguarding of child victim's of human trafficking' (February 2011), p 11-13.

⁷⁴ GRETA Report on the UK (12 September 2012), para 245.

⁷⁵ UK Children's Commissioners Report to the UNCRC Committee (June 2008), para 157.