

Refugee Children's Consortium

Modern Slavery Bill Report Stage Briefing – House of Lords Clause 48: Legal Powers for Child Trafficking Advocates 23rd and 25th February 2015

Introduction

We warmly welcome Lord Bates' amendments to clause 48 which gives child trafficking advocates legal powers and aligns England with the provisions recently enacted in Northern Ireland to ensure the UK is united in its commitment to protect trafficked children affected by horrific crime. The RCC has long campaigned for advocates to have legal powers. Without them, we believe they would be unable to effectively promote and defend the child's best interests and truly protect trafficked children. We are thankful for work done on this issue by Lord McColl, Baroness Butler-Sloss and Baroness Royall and supported their amendment which has now been withdrawn. The RCC urges peers to support these amendments tabled by Lord Bates, Home Office (see end of briefing).

Clause 48 is still an enabling clause dependent and the Government has stated that its implementation is dependent on the outcome of the child trafficking advocate trials which finish in September 2015; we urge future governments to implement this clause in full. We are also concerned that the wording of the amendment (page 37, line 25) could tie the appointment of an advocate to a reasonable grounds National Referral Mechanism (NRM) decision and would like to seek assurance from the Minister that this is not the case.

Purpose of amendments

Amendments tabled by the government would ensure that advocates have the legal authority to act for the child in cases where they lack the legal capacity to do so. This would enable them to instruct legal representatives on their behalf and represent the child's best interests. It would also give advocates the powers to ensure public authorities must recognise, and pay due regard to, the functions of the advocate. It brings the UK in line with its obligations under the Council of Europe Convention and EU Anti-Trafficking Directive and reflects the wording of the Human Trafficking & Exploitation (Criminal Justice & Support for Victims) Act 2015 in Northern Ireland.¹

Briefing

We believe that unless advocates are given legal powers, they will not be able to effectively represent and champion the child's best interests and truly protect trafficked children. They will lack the ability to step in at the times when they are most needed – to hold authorities to account and to instruct legal representatives on behalf of a child and represent their best interests. The UN Committee on the Rights of the Child as recently as July 2014 recommended that the UK Government "*prioritize the appointment of a competent and statutory guardian...to safeguard the best interests of the child...and that [a child victim is] entitled to access, free of charge, a qualified legal representative*".² Recent guidance by the European Union also states that guardian/advocates should exercise legal responsibility for the well-being of the child and complement the limited legal capacity of the child.³

Legal authority to act in a trafficked child's best interests

As shown by the case study below, an advocate who can instruct a legal representative to act in the child's best interests is needed because trafficked children often do not disclose that they have been trafficked because they have been manipulated by their trafficker; are afraid of what the trafficker will do to their family; or have not understood or psychologically accepted that they have been trafficked. This may particularly be the case if they have been trafficked by a family member.

¹ Section 21, Human Trafficking & Exploitation (Criminal Justice & Support for Victims) Act (Northern Ireland) 2015
<http://www.legislation.gov.uk/nia/2015/2/contents/enacted>

² UN Committee on the Rights of the Child (2014), Concluding observations on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography: United Kingdom of Great Britain and Northern Ireland, paragraph 39c

³ Fundamental Rights Agency of the European Union (2014) Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking

This means if the victim of trafficking were to instruct a legal representative, this could be contrary to their best interests, safety and protection and might protect their trafficker. A child does not acquire legal capacity to bring a legal action or sign a contract until he or she is 18 and also does not have the legal capacity to instruct a legal representative to act on his or her behalf except in very limited circumstances.⁴ Where a trafficked child is accommodated by a local authority, his or her social worker does not have the legal authority to instruct a legal representative on his or her behalf and rarely even accompany them to court.

Children going through care proceedings in the family courts are offered a 'guardian ad litem' to act on their behalf and represent their best interests. However, unaccompanied migrant and trafficked children who are instead accommodated under Section 20 of the Children Act 1989 are not offered anyone to assist and represent them in their best interests in immigration or criminal proceedings. Instead they are expected to have the same level of understanding and ability as an adult. This is despite the fact that many of the same child protection and risk of injury issues arise as well as serious consequences if the judgement does not go in the child's favour, particularly in criminal proceedings.

This means that lawyers who represent these children either act without any instructions and take their own decision, which is beyond their professional obligations, or must follow instructions from a child who does not have legal capacity and is in need of substantial and ongoing support (which is often unavailable to them).

Case Study – Lee* Barnardo's

Lee was brought into the UK from China when he was 14. When he arrived, he was told to work in a cannabis farm to pay off the debt of being brought into the country and was later arrested for his involvement in this.

Although children's social care had concerns that he had been sexually exploited, Lee himself did not accept that he was a victim of trafficking and his case was not referred to the NRM. He was subsequently charged and pleaded guilty for his involvement in the cannabis farm.

Lee later came to the attention of our practitioners. We referred his case to the NRM and he received a positive conclusive grounds decision, indicating that he had been a victim of trafficking when he was found guilty for his involvement in the cannabis farm.

An advocate with the power to instruct legal representatives in the best interests of the child would be able to intervene in situations where the child does not accept they have been trafficked, thereby preventing them from being found guilty of crimes they have committed as a result of their exploitation.

**Not his real name*

Powers to ensure local authorities act in the child's best interest

Our experience and research commissioned by the Home Office and conducted by the Refugee Council and The Children's Society found that local authorities often fail to understand, prioritise and adequately respond to trafficked children's needs.⁵ This all too often results in these vulnerable children falling through the gaps and being housed in inappropriate unsafe accommodation such as bed and breakfasts and receiving inadequate adult and financial support.

Unfortunately we find that all too often the only way to force local authorities to act is litigation or the threat of this. A legal advocate with powers to ensure the local authority acts is therefore vital to ensure they are correctly assessed and get the services they are entitled to. Evidence from the evaluation of the Scottish guardianship pilot found that because guardians did not have legal powers and were not on the same statutory footing as local authority staff, they sometimes

⁴ For example a 14 – 17 year old who is deemed to be 'Gillick competent': <http://www.nspcc.org.uk/preventing-abuse/child-protection-system/legal-definition-child-rights-law/gillick-competency-fraser-guidelines/>

⁵ Franklin, A. and Doyle, L. (2013) *Still at Risk: A review of support for trafficked children*. The Refugee Council and The Children's Society: <http://www.childrenssociety.org.uk/what-we-do/policy-and-lobbying/young-refugees-and-migrants/trafficking-and-exploitation>

struggled to ensure local authorities provided trafficked children with the correct services. *“And because...the Service had no statutory footing, the Guardians found themselves having to negotiate (and sometimes re-negotiate) their position in order to assist the young people with whom they worked.”*⁶

Giving the advocate legal powers to instruct legal representatives would not conflict with the local authority who remains responsible for the welfare and safeguarding of the child. Lord Bates’ amendment puts child trafficking advocates on an equal footing to the local authority and states that local authorities must “recognise and pay due regard to the functions of child trafficking advocates and provide the advocate with access to such information relating to the child as will enable the advocate to carry out those functions effectively (so far as the authority may do so without contravening a restriction on disclosure of the information).”⁷ This mirrors the wording of the Northern Ireland Assembly’s new Human Trafficking & Exploitation Act 2015.

We also urge the government to ensure that the accompanying guidance on advocates is in line with the European Union guidance on advocates/guardians which is best practice.⁸ As part of this the legal term ‘due regard’ in the amendment should be explained in practical terms in the guidance. A lack of clarity about the role of advocates would only lead to tension and miscommunication between local authorities and advocates. If this is set out clearly from the outset in guidance, it could avoid potential conflict.

Extension to under-21s

One area where we believe the amendment could be improved is for the advocates to support all children up to the age of 21 as is the case in the Northern Ireland Assembly Act. Turning 18 is crucial turning point for many trafficked young people as their immigration status will often change affecting the welfare services they are entitled to. Extending the provision of the advocates to support all children up to the age of 21 would ensure that this vital stage of transition to adulthood allowed child trafficking victims to continue to be supported throughout their rehabilitation and in the long term into adulthood.

Questions to the Minister:

- Will the Minister agree to clarify the term ‘due regard’ in the accompanying guidance on advocates to avoid any potential confusion on implementation?
- Will the Minister consider extending the provision of child trafficking advocates to under-21s as in Northern Ireland?
- Can the Minister confirm that the appointment of a child trafficking advocate will not be tied to the National Referral Mechanism (NRM) and a reasonable grounds decision?

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The Refugee Children’s Consortium (RCC) is a group of 50 NGOs. Members of the RCC are: Action for Children, Asphaleia Action, Asylum Aid, Association of Visitors to Immigration Detainees (AVID), Bail for Immigration Detainees, The British Association of Social Workers (BASW), Brighter Futures, British Association for Adoption and Fostering (BAAF), Catch22 National Care Advisory Service, Children and Families Across Borders (CFAB), Coram Children’s Legal Centre, Children England, Child Poverty Action Group (CPAG), Children’s Rights Alliance for England, The Children’s Society, DOST, ECPAT UK, Family Rights Group, The Fostering Network, Family Service Units (FSU), Freedom from Torture, Gatwick Detainees, Kent Refugee Action Network, Klevis Kola, The Immigration Law Practitioners’ Association (ILPA), Islington Law Centre, JCORE, Law Centres Network, Medical Justice, NCB, NSPCC, OMID International, Project 17, The Poppy Project, The Prince’s Trust, RAMFEL, Refugee Action, Refugee Council, Refugee Support Network, Royal College of Paediatrics and Child Health, Scottish Refugee Council, Student Action for Refugees (STAR), UNICEF UK, Voice, The Who Cares? Trust, and Welsh Refugee Council.

Barnardo’s, British Red Cross, Office of the Children’s Commissioner (England) & UNHCR all have observer status. <http://www.refugeechildrenconsortium.org.uk/>

The RCC is happy to have the support of The Anti-Trafficking Monitoring Group on this issue.

⁶ Crawley, H and Kohli, RKS, *‘She endures with me’ An evaluation of the Scottish Guardianship Service Pilot Final Report* <http://www.scottishrefugeecouncil.org.uk/guardianship>

⁷ Section 21, Human Trafficking & Exploitation (Criminal Justice & Support for Victims) Act (Northern Ireland) 2015 <http://www.legislation.gov.uk/nia/2015/2/contents/enacted>

⁸ Fundamental Rights Agency of the European Union (2014) Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking

Amendment

Independent advocates with legal authority to represent trafficked children in their best interests (tabled by Lord Bates)

Clause 48: Child trafficking advocates

Page 37, line 24, after “persons” insert “independent”

Page 37, line 25, leave out “is reason” and insert “are reasonable grounds”

Page 37, line 33, at end insert—

“() A person appointed as an independent child trafficking advocate for a child must promote the child’s well-being and act in the child’s best interests.

() The advocate may (where appropriate) assist the child to obtain legal or other advice, assistance and representation, including (where necessary) by appointing and instructing legal representatives to act on the child’s behalf.”

Page 37, line 34, leave out “may” and insert “must”

Page 37, line 34, after “about” insert “independent”

Page 37, line 35, leave out “may” and insert “the regulations must”

Page 37, line 37, leave out second “a” and insert “an independent”

Page 37, line 38, leave out second “a” and insert “an independent”

Page 37, line 39, at end insert—

“() requiring an independent child trafficking advocate to be appointed for a child as soon as reasonably practicable, where there are reasonable grounds to believe a child may be a victim of human trafficking;”

Page 37, line 40, after “of” insert “independent”

Page 37, line 41, leave out from “authorities” to end of line 42 and insert “which provide services or take decisions in relation to a child for whom an independent child trafficking advocate has been appointed to—

(i) recognise, and pay due regard to, the advocate’s functions, and

(ii) provide the advocate with access to such information relating to the child as will enable the advocate to carry out those functions effectively (so far as the authority may do so without contravening a restriction on disclosure of the information).”

Page 37, line 43, leave out subsection (5)