

# Refugee Children's Consortium

## Modern Slavery Bill Report Stage Briefing – House of Lords Clause 45: A strengthened statutory defence 23<sup>rd</sup> and 25<sup>th</sup> February 2015

### Introduction

International obligations and standards require governments to ensure that child victims of trafficking are not prosecuted, detained or punished for any crimes they have committed as a direct consequence of their trafficking or slavery.

The Refugee Children's Consortium (RCC) welcomes the amendment brought forward by the Minister removing the reference to the child having no realistic alternative to committing the offence. We strongly support the Government's position to remove compulsion from the Bill for Children. However, we believe that by retaining the Reasonable Person test the Modern Slavery Bill still does not provide sufficient protection for child victims because it still requires the child to defend their actions to access the statutory defence. **The RCC is therefore calling for a further amendment to strengthen the statutory defence to ensure it works effectively for children.**

To access the protection from the defence children should not be subject to the additional "reasonable person" test provided for in Clause 45 (1) (c), where they have already been recognised as a victim of trafficking, slavery or exploitation.

### Amendment

*As an amendment to Amendment by the Lord Bates:*

Clause 45:

Page 35, Line 26, leave out paragraph (c) tabled by Baroness Kennedy of Cradley.

### Purpose of amendment

To ensure children do not have to meet the reasonable person test before being able to access the protection of the statutory defence.

### Briefing

#### ***Why children need a strong statutory defence***

Across the UK, children are still being charged, detained, prosecuted and punished for offences that are a direct result of their trafficking or exploitation. Prosecuting a trafficked child in this way is a violation of the child's most basic rights. It risks doing further harm to an already traumatised child through exposure to the uncertainties and challenges of criminal proceedings, denying the child access to justice and the right to protection against repeated victimisation.

Research conducted by the Anti-Trafficking Monitoring Group found that, despite guidance issued by the Crown Prosecution Service on the non-prosecution of victims, child victims of trafficking are still being detained and prosecuted for crimes that are integral to their exploitation.<sup>1</sup> Moreover, The Children's Society and Refugee Council found examples of trafficked children being criminalised for activities such as documentation offences and criminal acts directly resulting from their exploitation.<sup>2</sup> Recent Freedom of Information request data found that 308 children had been arrested for offences relating to the cultivation of cannabis since 2011, 245 of whom were from Vietnam. Cannabis cultivation in the UK is an established activity that traffickers engage children in, particularly from Vietnam.<sup>3</sup>

We welcome the Government's addition of a statutory defence for children. A further strengthened statutory defence will act as an important safety net to help protect the most vulnerable children from further harm and traumatising after their trafficking and slavery has ended, enabling children

<sup>1</sup> ATMG (2013), *In the Dock: Examining the UK Criminal Justice response to trafficking*

<sup>2</sup> The Children's Society and the Refugee Council (2013), *Still At Risk*

<sup>3</sup> RACE in Europe (2014), *Trafficking for forced criminal activities and begging in Europe*, pp18-19

to seek justice and appropriate support, and bringing UK legislation in line with its international obligations to protect children.

### **The Government amendment to Clause 45**

The defence in Clause 45(1) has three elements:

- (a) that a person is under the age of 18;
- (b) that the act is a direct consequence of the person being, or having been, a victim of slavery or relevant exploitation;
- (c) that a reasonable person in the same situation as the person with their relevant characteristics would do the same act.

The amendment tabled by the Minister for the Report Stage in the House of Lords rightly removes the need for a child victim of trafficking or slavery to prove they did not have a realistic alternative putting the onus on the prosecution to show that they acted unreasonably. The RCC strongly welcomes this development. However, trafficked children will still need to pass a “reasonable person test” in order to benefit from the defence, which essentially requires an adult juror to decide whether a similar child in similar circumstances would have acted in the same way.

The Government has asserted that the child victims should have effective protection against inappropriate criminalisation while “avoiding giving broad immunity from the criminal law”.

### **The reasonable person test requires children to prove compulsion**

Under international law<sup>4</sup>, which is legally binding for the UK, the presence of any “means” – including ‘unreasonable circumstance’ – are irrelevant when defining a child as a victim of trafficking. These legal aspects should not then become relevant or necessary in determining whether a trafficked or enslaved child is entitled to access the defence provided for in Clause 45. **A child should never have to prove that they have behaved reasonably to achieve legal protection in the way an adult may.** This is an important distinction in international law recognising that trafficked children are in a position of particular vulnerability to trafficking and slavery, above and beyond that of adult victims.

The Government has rightly acknowledged that children cannot consent in relation to trafficking and that “... *it is always right that a slavery or trafficking victim aged under 18 is absolved of responsibility for criminal conduct, even where they did not feel they had to commit the crime...*”<sup>5</sup>, where those crimes are a direct result of their trafficking, slavery or exploitation (notwithstanding the exceptions set out in Schedule 3).

However, the retention of the reasonable person test in reference to children still requires a juror to decide whether a reasonable child with relevant characteristics would have acted in the same way – and as such, **inadvertently retains the need for a child defendant and victim to prove compulsion in their actions in order to access the protection of the statutory defence.** Given the inherent restrictions of the defence in that it applies only to offences committed as a direct result of trafficking, slavery or servitude, is it really necessary to ask a child victim to then pass an additional test of reasonableness? **This still retains a very high threshold for protection for a traumatised and vulnerable child.**

Recent interpretation of the non-punishment principle for victims of trafficking by the Organization for Security and Co-operation in Europe (of which the UK is a key member), underlines with clarity the inappropriate nature of subjecting children to a reasonable person test. The OSCE Recommendations state that:

“...in cases involving children, the need for a broad application of compulsion needs to be understood in light of the child’s vulnerability on account of their age alone, and of the irrelevance of consent in the legal definition of child trafficking...where a child is exploited and/or trafficked, and is used by a trafficker for an illegal purpose, or the child commits a criminal act related to their trafficked status, *the application of the non-punishment provision is crucial, not only from a child safeguarding perspective, but also to prevent the risk of secondary traumatization to the child at the hands of the State [our emphasis]*”.<sup>6</sup>

<sup>4</sup> UN Trafficking Protocol, the Council of Europe Trafficking Convention and the EU Trafficking Directive

<sup>5</sup> Karen Bradley Minister for Modern Slavery, Committee Stage Thursday 11<sup>th</sup> Sept, Afternoon session, Column 368 <http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/140911/pm/140911s01.htm>

<sup>6</sup> OSCE (2013), *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with*

Emphasising the importance of ensuring the irrelevance of consent in relation to children, a recent report by the UN Office on Drugs and Crime noted that in the UK some element of consent was present in most court cases and, where consent is perceived to have been given, cases may not succeed and the image of an “undeserving victim” is often created.<sup>7</sup>

### **The reasonable person test undermines existing case law.**

The removal of the reasonable person test is inconsistent with the Court of Appeal’s in *R v L and others*<sup>8</sup> where the Court gave clear guidance for the future treatment of potential trafficking victims. A victim of trafficking may have been compelled to commit crimes connected with their trafficking and should not be prosecuted for those crimes. The statutory defence will not help trafficking victims who commit crimes unconnected with their trafficking situation.

The Human Trafficking Bill in Northern Ireland provides a statutory defence for children without a reasonable person test. The recent legislation in Northern Ireland on Human Trafficking provides a better safety net and protection for children than the Modern Slavery Bill. This inconsistency is confusing and unfair. Trafficked children in Northern Ireland will receive better care and provisions than trafficked children in England and Wales. We believe legislation across the United Kingdom should be consistent and trafficked children should benefit from a consistent child rights approach from Government wherever they are and have equal access to those rights.

### **Other practical considerations**

In practice the operation of the reasonable person test is unworkable if the purpose of the Bill is to secure more convictions for traffickers. Each time the defence is raised expert evidence to help the jury understand the issues will have to be adduced and even then a jury will still have to put themselves into the shoes of that child and ask themselves if they would have acted in the same way in the circumstances if they were that child. The current level of convictions demonstrates that juries struggle to understand the complexities of trafficking.

If children are unable to pass the reasonable person test and this child was then convicted, this conviction would prevent a child from later testifying against the trafficker as they would have ‘bad character’ which the CPS have to take into account when deciding the merits of a prosecution and a trafficker’s lawyer would be allowed to raise the credibility of the child in a trial if it went ahead.

Furthermore a defence lawyer would have to adduce expert evidence each time the defence was raised to help a jury understand the complexities around trafficking and with the significant cuts to legal aid this may not happen in each case.

**The Modern Slavery Bill offers the opportunity to create a rights-based piece of legislation that puts the needs and rights of trafficking and slavery victims first. Ensuring a statutory defence that is accessible to children and does not require them to meet unnecessary tests to benefit from its protection is a key element of achieving this in practice, and we urge Parliamentarians to support this amendment.**

### **Case Study – Lam**

Lam was 16 years-old when he came to the UK alone in 2009. His family ran into debt and the loan sharks put them in contact with agents who said they could arrange the journey for Lam to go to the UK. The agents arranged false travel documents for him and he left Vietnam with a group of other people going abroad to work. When Lam got to the UK he was put into what turned out to be a cannabis farm, and told to “take care of plants”. After five weeks the police raided the house and arrested Lam. He was charged with drug offences and was sentenced in court to 18 months custodial sentence in a Young Offender Institution.

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regard to victims of trafficking, paragraph 42

<sup>7</sup> UNODC (2014), *Issue Paper: The role of consent in the Trafficking in Persons Protocol*

<sup>8</sup> [2013] EWCA Crim 991

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