

HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Human Trafficking and Exploitation (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 11 December 2014. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 57–EN.

BACKGROUND

2. The trafficking of human beings for exploitation is a serious, complex and multifaceted crime. It is an international and cross-border crime, although trafficking can also occur within Scotland and within the UK. It involves the transport of both children and adults for a variety of exploitative purposes. Prosecutors from across the UK and Ireland have acknowledged that investigating and prosecuting this crime raises unique challenges, but is a key priority. Trafficking for the purposes of exploitation is a violation of individuals’ rights. Once identified, victims of trafficking need time for recovery and reflection following their trafficking experience and have the right to expect appropriate standards of immediate support and assistance based on an assessment of their individual needs.

3. Preventing and tackling this crime in Scotland is a joint responsibility of the Scottish Government, the UK Government, the police, prosecutors, local authorities, support agencies and others. Working in partnership with relevant agencies on an international and UK level, the Scottish Government aims to make Scotland a hostile place for traffickers and to better identify and support potential and confirmed victims.

4. The Scottish Parliament has played an important role in raising awareness and understanding of this crime. The Equal Opportunities Committee published the report of its inquiry into migration and trafficking on 14 December 2010.¹ The report identified a number of key findings and recommendations on trafficking. The Committee concluded that—

¹ <http://archive.scottish.parliament.uk/s3/committees/equal/inquiries/migration/migration.htm#top>

- the definition of human trafficking within the Council of Europe Convention on Action against Trafficking in Human Beings² (COE Convention), building on the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (UN Palermo Protocol)³, offered front-line services the best means of understanding the issues associated with this crime;
- the Scottish Government should have a clear strategic role in the development of UK-wide and Scottish anti-trafficking policy;
- there should be better information sharing at both UK and Scottish levels to help inform policy and operational activity;
- public awareness should be raised of all forms of trafficking, not just trafficking for the purpose of sexual exploitation;
- there should be a separation between the process for characterising human trafficking and the immigration and asylum process;
- there should be sharing of best practice in relation to child trafficking;
- front-line staff should be properly trained to identify possible victims;
- support agencies should work with the police and prosecutors so that the victims of trafficking are provided with the best possible support.

5. Subsequent reports and documents, including inquiries by the Equality and Human Rights Commission (EHRC)⁴ and Scottish Commissioner for Children and Young People⁵, and Jenny Marra MSP's consultation⁶ on a proposal for a member's Bill on human trafficking, have built on the understanding and analysis of human trafficking in Scotland.

6. The Scottish Government, working with other relevant agencies, has taken forward a range of actions in response to the Equal Opportunities Committee inquiry and subsequent reports to strengthen Scotland's approach to combating human trafficking. At UK-level, the Scottish Government has participated actively in the Interdepartmental Ministerial Group (IDMG) on Human Trafficking and also in responding to UK Government reviews of the National Referral Mechanism for identifying and supporting victims of human trafficking.

7. In 2011 the first successful prosecutions in Scotland for a specific human trafficking offence were achieved. Following its establishment in April 2013, Police Scotland created a dedicated National Human Trafficking Unit to enhance the police response to human trafficking, through awareness raising, intelligence gathering, training and providing divisions with advice and specialist knowledge. The Crown Office and Procurator Fiscal Service (COPFS) has appointed dedicated expert fiscals to prosecute human trafficking offences.

² <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>

³ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf

⁴ <http://www.equalityhumanrights.com/publication/inquiry-human-trafficking-scotland>

⁵ http://www.sccyp.org.uk/uploaded_docs/policy/sccyp%20child%20trafficking%20report.pdf

⁶ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/67134.aspx>

8. The Scottish Government has continued to provide direct grant funding to the Trafficking Awareness Raising Alliance (TARA) and Migrant Help to support victims and encourage improved training among frontline professionals. Awareness raising and training material has been shared with frontline staff, for example within the police and National Health Service. Specialist guidance has been published to help local agencies identify and respond to the specific needs of child victims of trafficking as part of wider child protection measures.

9. In October 2012, the Cabinet Secretary for Justice hosted the first Scottish human trafficking summit, bringing together law enforcement agencies, local government and relevant public, private and third sector organisations, as well as contacts from England and Wales, Northern Ireland and the Republic of Ireland to review progress and identify further actions to strengthen the response to trafficking in Scotland. All organisations which attended the summit agreed on the need to demonstrate leadership by taking forward a continuing multi-agency approach to the issue.

10. A series of twelve actions were agreed covering further awareness raising and training of frontline staff, improved data collection and sharing, victim care and support for both adults and children and enforcement. Progress on these actions has been taken forward and reviewed by the multi-agency Anti-Trafficking Progress Group.

11. On 17 October 2014, at a meeting hosted by the Lord Advocate, Frank Mulholland QC, the heads of prosecution services for Scotland, England and Wales, Northern Ireland and the Republic of Ireland agreed a joint communique committing to working together as prosecutors to disrupt the trade in human beings. COPFS welcomed Scottish Government proposals for a dedicated Scottish Human Trafficking and Exploitation Bill to help strengthen and clarify the criminal law in Scotland against human trafficking, building on international good practice standards and ensuring the rights of victims to access support and assistance.

Legislative background

12. The UK is bound by the COE Convention which involves signing up to a set of minimum standards on the identification, protection and support of trafficking victims. The COE Convention is a comprehensive treaty mainly focused on the protection of victims of trafficking and the safeguarding of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The COE Convention applies to all methods of trafficking, whether national or transnational, whether or not related to organised crime, whoever the victim, women, men or children and whatever the form of exploitation, sexual exploitation, forced labour or services, etc..

13. The setting up of an independent monitoring mechanism through the Group of Experts on Action against Trafficking in Human Beings (GRETA), guaranteeing Parties' compliance with its provisions, was also provided for by the COE Convention.

14. The UK Government as the Member State has also opted into the EU Directive on Human Trafficking⁷ (EU Directive). The EU Directive builds on the COE Convention and

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

covers action in different areas such as criminal law provisions, prosecution of offenders, victims' support and victims' rights in criminal proceedings. The EU Directive replaces the 2002 Framework Decision on Trafficking, which originally established the rules under which Member States had to legislate for human trafficking.

15. A number of domestic measures have been introduced in Scotland which relate to human trafficking. These are—

- Section 22 of the Criminal Justice (Scotland) Act 2003⁸ (“the 2003 Act”) created an offence of engaging in trafficking people into, within or out of the UK for the purpose of exploitation by way of control over an individual for prostitution or involvement in the making or production of obscene or indecent material, with a maximum penalty of 14 years.
- Sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004⁹ (“the 2004 Act”) created offences of trafficking people into, within or out of the UK for the purpose of exploitation. For the purposes of the offence, a person is exploited if the person is—
 - the victim of behaviour contravening Article 4 of the European Convention on Human Rights (ECHR)¹⁰ (slavery or forced labour);
 - encouraged, required or expected to do something which would mean an offence is committed concerning organ removal;
 - subjected to force, threats or deception designed to induce the person to provide services or benefits or enable another person to acquire benefits; or
 - requested or induced to do something, having been chosen on the grounds of being ill, disabled, young or related to a person, in circumstances where a person without the illness, disability, youth or family relationship would be likely to refuse or resist.

The maximum penalty for the offence is 14 years.

- Section 46 of the Criminal Justice and Licensing (Scotland) Act 2010¹¹ (“the 2010 Act”) amended and extended the 2003 and 2004 Acts by extending the extraterritorial effect of trafficking offences in both Acts to ensure that the offence applies to anything done in or outwith the UK and creating a new offence of trafficking of persons into, within or out of a country other than the UK. These new offences apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies. The 2010 Act also expanded the definition of exploitation in the Act 2004 Act to include—
 - offences under human tissue legislation to apply to such conduct wherever it takes place,

⁸ <http://www.legislation.gov.uk/asp/2003/7>

⁹ <http://www.legislation.gov.uk/ukpga/2004/19>

¹⁰ http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹¹ <http://www.legislation.gov.uk/asp/2010/13>

- removing body parts (including blood) which would amount to an offence other than under human tissue legislation i.e. for purposes other than transplantation,
- cases where the role of the person being exploited is entirely passive and that person is being used to enable others to gain a benefit of any kind.
- Section 47 of the 2010 Act also created a standalone offence covering the exploitative behaviours of holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour, with a maximum penalty of 14 years.
- Section 99 of the 2010 Act also extended powers to police to close premises associated with human exploitation.

POLICY OBJECTIVES OF THE BILL

16. The overarching policy objectives of the Bill are to consolidate and strengthen the existing criminal law against human trafficking and the offence relating to slavery, servitude and forced or compulsory labour and enhance the status of and support for victims. The Bill will also place a duty on the Scottish Ministers to prepare and review periodically a trafficking and exploitation strategy and require specified public authorities to work with the Scottish Ministers to assist in the preparation and review of that strategy.

17. The overall aim of the Bill is to develop legislation that gives the police, prosecutors and other agencies the power to make Scotland a hostile environment for human traffickers and those who exploit individuals, and also helps to identify and support the needs of victims.

18. The policy aims of the Bill contribute to the following national outcomes—

- We live our lives safe from **crime**, disorder and danger;
- We have strong, resilient and supportive **communities** where people take responsibility for their own actions and how they affect others;
- Our **public services** are high quality, continually improving, efficient and responsive to local people's needs; and
- We have improved the life chances for **children, young people and families** at risk.

19. Specifically the Bill will include provision to—

- **clarify and strengthen the law against traffickers and those who exploit individuals** - creating a single offence of human trafficking for all types of exploitation for both adults and children; establishing statutory aggravators of human trafficking for other crimes; reframing the current standalone exploitation offence relating to slavery, servitude and forced or compulsory labour;
- **introduce new measures to disrupt and prevent trafficking and those who exploit others** – powers to issue two new types of preventive order and associated interim orders to assist in preventing trafficking and exploitation activity and the harm to potential victims; providing for the detention of property of a person arrested on suspicion of a human trafficking offence; placing a duty on public authorities to

provide anonymised data about potential human trafficking victims and exploitation to Police Scotland;

- **ensure the rights of trafficked victims to access support and assistance** - placing a duty on the Scottish Ministers to secure the provision of relevant immediate support and recovery services for adult victims of trafficking;
- **place a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficked and exploitation victims who have committed offences;**
- **ensure a strategic, cross-agency approach to tackling trafficking and exploitation** – placing a duty on Ministers to engage with relevant stakeholders to develop and publish a trafficking and exploitation strategy; placing a duty on specified public authorities to co-operate with the Scottish Ministers in preparing the strategy.

20. Human trafficking is, by its nature, a hidden crime and its drivers are complex and international. The Bill's provisions outlined above are an important step in ensuring a strategic Scottish response to this issue; clarifying the criminal law to assist law enforcement agencies in bringing traffickers to justice and enhancing the rights of victims to immediate support and time for recovery.

21. In taking forward these provisions, amongst other matters, the Bill gives effect to the three high level proposals set out by Jenny Marra MSP in her consultation for a draft Scottish Human Trafficking Member's Bill within the Scottish Parliament. The Bill also draws on experience and issues raised during the consultation and on-going progress through the UK Parliament of the UK Government's Modern Slavery Bill,¹² and the progress through the Northern Ireland Assembly of the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill,¹³ sponsored by Lord Morrow of Clogher Valley MLA.

22. Legislation is, however, only part of the answer. Therefore, the Bill will commit the Scottish Ministers to publish and update regularly a trafficking and exploitation strategy. That strategy will set out a vision and key objectives for a multi-agency approach to raising awareness of trafficking and making Scotland a hostile environment for traffickers and those who exploit others, benefitting potential adult and child victims.

23. The majority of provisions within the Bill have equal application to adult and child victims of trafficking, including the development of the trafficking and exploitation strategy. However, it should be noted that those provisions relating to support for victims are explicitly aimed at providing a statutory basis for the support and assistance of adult victims of trafficking. This is because the necessary support for children who may be victims of trafficking is already enshrined in legislation which provides for all vulnerable children: the Children (Scotland) Act 1995¹⁴ ("the 1995 Act"), the Children's Hearings (Scotland) Act 2011¹⁵ ("the 2011 Act") and the

¹² <http://services.parliament.uk/bills/2014-15/modernslavery.html>

¹³ <http://www.niassembly.gov.uk/Assembly-Business/Legislation/Current-Non-Executive-Bill-Proposals/Human-Trafficking-and-Exploitation-Further-Provisions-and-Support-for-Victims-Bill/>

¹⁴ <http://www.legislation.gov.uk/ukpga/1995/36>

¹⁵ <http://www.legislation.gov.uk/asp/2011/1>

Children and Young People (Scotland) Act 2014 (“the CYPA”)¹⁶. The CYPA is being brought into force in stages, with key elements likely to commence in 2016. Children who may be victims of trafficking may have other complex needs in addition to those relating directly to having been trafficked. The view of relevant public, professional and third sector agencies is that it is critical that the situation of child victims of trafficking be assessed in the round and in the context of both the Scottish Government’s child-centred approach set out in *Getting It Right for Every Child*¹⁷ and the wider child protection system. It is, therefore, intended that enhancing support for child victims be addressed within the context of the trafficking and exploitation strategy mentioned above rather than explicitly in this legislation.

SPECIFIC PROPOSALS

Creation of single offence of human trafficking for all forms of exploitation for adults and children

Current position

24. The requirement for human trafficking activity to be criminalised is set out in a number of international instruments, including the UN’s Palermo Protocol and, building on this, the COE Convention and EU Directive. International law envisages that human trafficking involves three essential elements—

- the “**act**”, i.e. the recruitment, transportation, transfer, harbouring or reception of individuals;
- the “**means**”, i.e. the use of coercion, including threats, deception, fraud, abuse of power and vulnerability, etc.
- the “**purpose**”, i.e. any form of exploitation, including sexual exploitation, forced labour, begging, slavery, servitude, etc.

25. For child victims to be trafficked, the “means” are not required; a child is deemed to have been trafficked if the first and third elements are present. The consent of an adult victim to be moved is not relevant if the “means”, such as threats or deception, have been used.

26. Various reports have claimed that the current piecemeal legislative framework is acting as a barrier to successful prosecutions and have called for a statutory definition of what human trafficking is and clearer, simpler offences relating to human trafficking and where necessary, consolidating the legislation by bringing it all together in one Act.

Proposed approach

27. The Bill will create a single offence of human trafficking dealing with all relevant forms of exploitation. Having a single offence should assist in clarifying the law and in detecting and prosecuting trafficking offences.

¹⁶ <http://www.legislation.gov.uk/asp/2014/8/enacted>

¹⁷ <http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/publications/practice-guide>

28. The single offence will criminalise any person who arranges or facilitates the travel of another person for the purposes of that other person's exploitation. Travel for these purposes may be travel to, from or within the United Kingdom or travel which is arranged or facilitated in the UK. In the case of UK nationals and habitual residents of Scotland who arrange or facilitate travel for exploitation, the offence is committed even if none of the arranging, facilitating or the travel itself occurs within the UK.

29. The Bill defines these elements of travel and exploitation broadly to aim to deal with the full range of circumstances in which trafficking or intended trafficking can arise. Under the proposed approach it is not necessary to prove that the exploitation took place, only that the person knew or should have known that the intended purpose was exploitation. The Bill will allow for the prosecution not only of those criminals who undertake the exploitation, but also those who commission or facilitate trafficking of a person with a view to their exploitation by a third party.

30. Exploitation for the purposes of the offence includes control over a person's prostitution and other forms of sexual exploitation, slavery, servitude and forced or compulsory labour, conduct related to forced organ donation and the provision of any other services or benefits through the use of force, threats, deception or abuse of a victim's vulnerability.

31. The current maximum penalty for conviction for a human trafficking offence on indictment is 14 years. The Bill will increase the maximum penalty for the single trafficking offence to life imprisonment.

Alternative approach

32. One alternative would be to make no legislative change. Doing nothing would not achieve the policy objective of simplifying and consolidating existing trafficking legislation under one Act. This alternative approach would fall short of providing a common focal point for police and prosecutors in relation to human trafficking offences and would not help to remove the barriers to prosecution which hamper successful prosecutions for human trafficking offences.

33. Another alternative would be to replicate more precisely the international definitions of trafficking in the new offence. It is clear, however, that the conduct covered by these international definitions is narrower than that covered by existing Scottish offences. Adopting this approach might in effect decriminalise some trafficking-related conduct which is currently criminal. Moreover, consultation with COPFS during the development of these provisions revealed that adding the extra evidential burdens with strict adherence to international norms would present significant challenges to the successful prosecution of trafficking offences in Scotland and make these harder to prosecute in comparison with other UK jurisdictions. There was a risk, therefore, that convictions for trafficking could reduce under that approach. The Scottish Ministers do not view this as an acceptable outcome from this Bill.

34. A further alternative would be to introduce a specific statutory "definition" of human trafficking. Various independent inquiries have called for such a definition to be introduced. The purpose of calls for a definition appears to be to clarify for victims, stakeholders and the wider public exactly what constitutes the act of human trafficking. The definition of what constitutes a particular form of criminal conduct would delineate the elements of the offence. The Scottish

Government's view is that this would be best achieved not by a definition but by a clearly drawn criminal offence, labelled as the offence of "human trafficking". The Bill will, therefore, address this in the description of the single offence.

35. One specific issue considered was the notion of establishing a separate offence for the trafficking of children. In his scoping study into the nature and extent of child trafficking in Scotland, "*Scotland: A Safe Place for Child Traffickers*",¹⁸ Scotland's Commissioner for Children and Young People called on the Scottish Government to monitor the effectiveness of existing legislative provisions with reference to the prosecution of child trafficking and to ensure that child trafficking in Scotland "does not go unpunished". The Scottish Government has considered carefully this option and whether there would be benefits in having a separate child trafficking offence. The Scottish Ministers agree the need for focused awareness raising and training to help better identify potential child victims of trafficking and to ensure relevant support and protection for child victims, both generally and specifically within any criminal justice process. However, there is no clear basis or benefit in having a separate child trafficking offence. Ministers' preference is for a single unified offence, in line with established international norms, covering trafficking of all victims for all potential forms of exploitation.

Revised slavery, servitude and forced labour offence

Current position

36. Section 47 of the 2010 Act currently criminalises holding a person in slavery or servitude or requiring a person to perform compulsory or forced labour.

37. The offence was introduced in response to the case of *Siliadin v France*¹⁹. In that case, the European Court of Human Rights held that there had been a violation of Article 4 of the European Convention on Human Rights (ECHR) which covers the exploitative behaviours of slavery, servitude and forced or compulsory labour.

Proposed approach

38. The Bill will repeal section 47 and replace it with strengthened provisions. The offence will be revised and strengthened to allow the court to consider, in assessing whether a person has been a victim of an offence, the victim's characteristics such as age, physical or mental illness, disability or, where relevant, family relationships. The maximum penalty for the offence will be increased from 14 years for the current offence to life imprisonment for a conviction on indictment.

Alternative approach

39. The alternative approach would be to make no legislative change. The existing criminal offence, as provided for in the 2010 Act, would still allow for prosecution of individuals who hold a person in slavery or servitude or require a person to perform compulsory or forced labour. However, doing nothing would mean that the offence would not be revised to include consideration of the victim's characteristics, nor would the maximum penalty for the offence be

¹⁸ http://www.sccyp.org.uk/uploaded_docs/policy/sccyp%20child%20trafficking%20report.pdf

¹⁹ [http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdfBack\[1\]](http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdfBack[1])

increased. Only a revised and strengthened slavery, servitude and forced labour offence, as proposed in the Bill, would achieve the Scottish Government's policy objective.

Establish statutory aggravations of human trafficking

Current position

40. It is recognised that there may be cases involving other offences, for example producing false documents, immigration offences, brothel keeping, drugs offences etc., where there is insufficient evidence to raise proceedings under the human trafficking offence, but where there is evidence that the offence has been committed against a background of human trafficking.

41. At present, there is no mechanism for recording where human trafficking forms the backdrop to the principal offence in a particular case. Where there is insufficient evidence to raise proceedings for a specific human trafficking offence (either in relation to section 22 of the 2003 Act or section 4 of the 2004 Act), there is no way of leading evidence to demonstrate to the court that the principal offence was committed against a background of trafficking.

42. The EHRC published the report of its Inquiry into Human Trafficking in Scotland in November 2011.²⁰ Among other recommendations, the EHRC recommended that a trafficking background should be made a statutory aggravation in the sentencing of those convicted of related criminal offences. The EHRC's recommendations were arrived at following a consultation process with organisations having an interest in tackling trafficking or supporting victims.

43. Provisions in line with this approach are already included within the Criminal Justice (Scotland) Bill,²¹ currently before the Parliament. It is proposed that these measures are included within this Bill and are removed from the Criminal Justice (Scotland) Bill at Stage 2 in the parliamentary process.

Proposed approach

44. The Bill proposes a statutory aggravation to any criminal offence where it can be proved that the offence had a connection with a human trafficking background. The underlying purpose or motivation of committing, or conspiring to commit, any offence should be considered to be more serious when it takes place against a human trafficking background.

45. To meet obligations under Article 4.3 of the EU Directive, the Scottish Government proposes to apply a statutory aggravation where a human trafficking offence has been committed by a public official while acting, or purporting to act, in the course of the official's duties. The Bill will, therefore, require the courts to take into account any link between an offence and human trafficking activity, and when dealing with a human trafficking offence, to take into account the fact that the person who committed it did so by abusing his or her position as a public official.

²⁰ [http://www.equalityhumanrights.com/sites/default/files/documents/Scotland/Human Trafficking in Scotland / inquiry into human trafficking in scotland-full-report pdf .pdf](http://www.equalityhumanrights.com/sites/default/files/documents/Scotland/Human_Trafficking_in_Scotland_inquiry_into_human_trafficking_in_scotland-full-report_pdf.pdf)

²¹ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx>

Alternative approach

46. One alternative approach would be to make no legislative change. Doing nothing would fail to recognise the strong evidence base of cases where there was insufficient evidence to raise proceedings under the human trafficking offence, but where there is evidence that the offence has been committed against a background of human trafficking.

47. Moreover, in relation to the public official aggravation, doing nothing would mean that the Scottish Government would fail to meet its obligations under Article 4.3 of the EU Directive. Doing nothing would, therefore, fail to achieve the Scottish Government's policy objective.

Place a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences

Current position

48. Article 8 of the EU Directive, which came into effect on 6 April 2013 relates to the non-prosecution and non-application of penalties to the victims of human trafficking. Article 8 states—

“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”

49. Article 8 has been interpreted by some stakeholders as indicating that identified victims of human trafficking should be protected automatically from prosecution, although in practice the Article only requires that authorities should be “entitled” not to prosecute. It is accepted that there are circumstances where victims of human trafficking will be compelled to commit offences by others as part of their exploitation. Prosecutors in Scotland have the discretion not to prosecute in such circumstances.

50. Lord Advocate guidance has been developed and published to assist prosecutors in discharging their responsibilities where there are concerns that the subject of a potential prosecution is a victim of trafficking. The current guidance instructs that, where there is credible evidence that the accused person is a possible victim of human trafficking and that the specific offence was committed as a direct consequence of the person's trafficked status, there should be a presumption against prosecution. Any decision by a fiscal where it is considered in the public interest to act against this presumption must be referred for consideration by the Senior Advocate Depute with responsibility for human trafficking matters.

51. There have been repeated calls for specific Scottish legislation to prevent the criminalisation of trafficked victims since the EU Directive came into force. Such calls have acknowledged the need for independent prosecutors to take the final decision on whether to prosecute in each case, taking account of the specific circumstances and interests of justice.

Proposed approach

52. Section 48 of the Scotland Act 1998 protects the independence of the Lord Advocate in taking decisions about the prosecution of crime. However, to demonstrate clear compliance with Article 8 of the EU Directive, the Bill will place on a statutory basis a duty on the Lord Advocate to prepare and publish guidelines for prosecutors providing for consideration of the non-prosecution of credible or confirmed victims of trafficking and of the slavery, servitude and forced or compulsory labour offence. This approach demonstrates the existence of protective measures that are in place to avoid further victimisation of trafficked victims or those who have been victims of slavery, servitude or forced or compulsory labour and to encourage them to act as witnesses in criminal proceedings against traffickers and those who exploit others.

53. The EU Directive states that the necessary measures to protect trafficked victims from prosecution or punishment for criminal activities committed as a direct result of their trafficked status are to be determined in accordance with the basic principles of the legal systems of the relevant Member States. In addition, the guidance will cover those victims who have been exploited by slavery, servitude or forced or compulsory labour. The Bill will not provide blanket immunity from prosecution for these victims in all circumstances.

54. The content of the guidance will be a matter for the Lord Advocate.

Alternative approach

55. One alternative approach would be to make no legislative change. COPFS currently produces guidance for prosecutors providing for consideration of the non-prosecution of credible or confirmed victims of trafficking. But placing a statutory duty on the Lord Advocate to produce such guidelines further demonstrates compliance with Article 8 of the EU Directive in relation to trafficking victims and ensures that these guidelines will also now cover victims of the standalone exploitation offence.

56. Another alternative approach would be to introduce a statutory defence for a person who commits an offence as a consequence of their victim status if a reasonable person would have acted in the same way in similar circumstances. Doing this would place a burden on victims to prove their connection between their offending behaviour and trafficked status, which would run contrary to the Scottish Government's victim-centred approach to the issue.

Duty on Scottish Ministers to secure the provision of relevant immediate support and recovery services for the victims of trafficking

Current position

57. Human trafficking can have a significant physical, emotional and psychological impact on victims. Even once freed from the immediate trafficking circumstance, victims can remain highly vulnerable and are often disconnected from both family and support services. It is recognised that victims can require access to immediate support, such as medical attention, emergency accommodation and time for reflection and recovery for victims to make a decision as to what their next steps will be (e.g. repatriation, assisting law enforcement authorities with enquiries, etc.), as well as assistance in accessing longer-term support and services, such as benefits, permanent housing and relocation, etc..

58. Currently there is no statutory basis for potential adult victims of trafficking to access the support and assistance that they are entitled to under the terms of the COE Convention and EU Directive. Although the Scottish Government, in line with its obligations under the COE Convention and EU Directive, currently provides grant funding to support agencies to deliver this support and assistance this funding could be withdrawn at any time. There is benefit in placing on a statutory basis the entitlement of these services to victims.

59. Children are, of course, vulnerable to trafficking and, indeed, to other forms of abuse and neglect. It is accepted that their needs, and the appropriate means of meeting these, do not always match exactly with those of adult victims: children are children first. The provisions of the 1995 Act, the 2011 Act and the CYPA provide for the needs of vulnerable children in all circumstances to be assessed and addressed. Guidance for public authorities in identifying and meeting the needs of vulnerable children specifically references child trafficking, while recognising that vulnerable children may have additional needs that do not arise solely from their trafficked status. The existing children's legislation, therefore, provides for services to be provided to potentially trafficked children: this applies to children under the age of 18. It is, therefore, a priority to ensure that existing legislation with reference to children, including elements of the CYPA, when commenced, is applied appropriately. However, this is a matter for effective engagement and good practice rather than further legislation.

Proposed approach

60. The Bill will place on a statutory footing Ministers' duty to secure the provision of such services for those victims known to be 18 years or over. The types of services which will be provided, as a minimum, are also listed in the Bill, but the duty extends to the provision of any support and assistance Ministers consider necessary based on an assessment of the victim's needs. Mandatory support is to be provided from the time at which there are reasonable grounds to believe that an individual is a victim of the offence of human trafficking until either a conclusive determination is made as to an individual's victim status or the expiry of a period to be prescribed by Ministers in regulations, whichever comes first. Support is currently provided for a 45-day period, but this period is currently subject to review and may change. Ministers are also given discretion to provide support outside this mandatory period, which will permit the provision of support before a reasonable grounds decision is made and following the conclusion of the mandatory support period. Formalising details of the support and assistance available, to whom it is available and for what period will provide clarification for victims and first responders.

61. The provision of relevant immediate support and recovery services for the victims of trafficking will apply to adult victims of trafficking only. As noted above, child victims of human trafficking already have a statutory right to access specific support and services under existing children's legislation.

Alternative approach

62. One alternative approach would be to make no legislative change and support as currently provided to victims of trafficking would continue. Placing a duty on Ministers to secure the provision of such services will ensure the rights of victims to access the support and assistance that is available. Furthermore, the Bill will provide for an assessment of individual needs, which

will ensure that support provided is tailored to the victim's specific needs and requirements, ensuring that resources are used to the best effect.

63. Another alternative would be to create a specific public body to administer support and recovery services for victims of human trafficking and exploitation. There would be a significant cost involved in establishing such a body, cost which would be better used in ensuring that victims are able to access the range of existing expert support services tailored to their specific needs.

Confiscation of property of those arrested for trafficking offences

Current position

64. In Scotland there have been calls for asset recovery powers to be used widely in human trafficking and slavery operations. The EHRC for example, called for greater use of asset recovery powers²².

65. Powers currently exist under sections 25C and 25D of the Immigration Act 1971²³, as applied by section 5(4) of the 2004 Act, for the detention and forfeiture of vehicles, ships and aircraft used in the commission of certain trafficking offences. Those powers are little known and not widely used by police or prosecutors and do not apply to all forms of trafficking offences (e.g. trafficking for prostitution under section 22 of the 2003 Act).

Proposed approach

66. The Bill, therefore, includes provisions to consolidate the existing powers in the Immigration Act 1971 and applies them to the human trafficking offence. The powers will allow the police to detain, without the requirement for a warrant, vehicles, ships or aircraft owned or possessed by persons arrested on suspicion of a trafficking offence if there are reasonable grounds to believe that, on conviction of that person, the property could be subject to forfeiture. A separate power for courts to order forfeiture of such property when used in the commission of the human trafficking offence is also contained in the Bill. This measure is intended to disrupt and deter trafficking activity by preventing further criminality or disposal of assets. Consolidating existing powers in this Bill is intended to highlight their availability to police and prosecutors and in turn encourage their increased use. These powers do not affect any more general forfeiture powers under Scots law (e.g. under Part II of the Proceeds of Crime (Scotland) Act 1995).

Alternative approach

67. The alternative approach would be to make no legislative change. Doing nothing would mean that powers of detention and forfeiture in Scotland would not apply to all forms of exploitation criminalised by the new trafficking offence. Failing to strengthen provisions on detention and forfeiture would not achieve the policy aim.

²² [http://www.equalityhumanrights.com/sites/default/files/documents/Scotland/Human Trafficking in Scotland / inquiry into human trafficking in scotland-full-report .pdf](http://www.equalityhumanrights.com/sites/default/files/documents/Scotland/Human%20Trafficking%20in%20Scotland%20inquiry%20into%20human%20trafficking%20in%20scotland-full-report.pdf)

²³ <http://www.legislation.gov.uk/ukpga/1971/77>

Criminal lifestyle offence

Current position

68. The Proceeds of Crime Act 2002 (POCA)²⁴ contains, among other things, a regime for the confiscation of the proceeds of an offender's criminal activity.

69. Section 92 of that Act requires a court to make a confiscation order against an accused where certain conditions are satisfied. The accused must have been convicted (and a disposal ordered) or discharged absolutely and the prosecutor must have asked the court to consider making a confiscation order. The court must then assess whether the accused has what is called a "criminal lifestyle" and, if so, whether the accused has benefited from that general criminal conduct.

70. Section 142 of POCA sets out tests which, if satisfied, demonstrate that an accused has a criminal lifestyle. One of those provides that conviction of an offence specified in Schedule 4 to POCA in itself establishes that an accused has a criminal lifestyle.

71. The offences specified in Schedule 4 are not simply offences which are very serious, but offences which are commonly and demonstrably committed by career criminals who live their lives off the proceeds of their offending or use the proceeds of their offending to fund further criminal activity.

72. A number of human trafficking related offences²⁵ are already included as criminal lifestyle offences in Schedule 4 and can trigger a confiscation order to confiscate assets gained through criminal activity from offenders after conviction. However, the current offence of slavery, servitude and forced or compulsory labour as contained in section 47 of the 2010 Act is not included as a criminal lifestyle offence and would not, therefore, automatically trigger the provisions of POCA.

Proposed approach

73. The Bill will categorise all trafficking and exploitation offences as lifestyle offences in order to automatically trigger the confiscation procedures in POCA as this will help towards creating a hostile environment for traffickers to operate in.

Alternative approach

74. The only alternative would be to make no legislative change. Doing nothing would mean that some human trafficking related offences which are already classed as criminal lifestyle offences would remain. Human trafficking and exploitation in any form will not be tolerated in Scotland. Allowing confiscation of the proceeds of an offender's criminal activity for only

²⁴ <http://www.legislation.gov.uk/ukpga/2002/29>

²⁵ Section 25, 25A or 25B of the Immigration Act 1971 (c.77) (assisting unlawful immigration etc), Section 22 of the Criminal Justice (Scotland) Act 2003 and Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

certain types of activity would fail to deliver the policy aim of making Scotland a hostile environment to operate in for traffickers and those who exploit others.

Establish trafficking and exploitation prevention orders and risk orders

Current position

75. Human trafficking and exploitation are high-harm activities which affect the rights and freedoms of those who are victims of it. Although a suite of civil preventative orders²⁶ currently exists which may cover some of the activities carried out by those involved in human trafficking and exploitation, the variety and wide range of offending means that some human trafficking and exploitation offences would not reach the threshold law enforcement agencies would usually consider when making an application for existing measures e.g. the less organised end of labour exploitation.

76. The Scottish Government is seeking a Legislative Consent Motion to extend to Scotland serious crime prevention orders (SCPOs) via the UK Serious Crime Bill²⁷ which is before the UK Parliament and there may be potential for these orders to overlap. SCPOs also cannot be used to create travel restrictions. However, the existing serious crime prevention order is generally used in relation to organised criminality, and would not be used in some of the scenarios in human trafficking, primarily domestic servitude outside of organised crime.

Proposed approach

77. The Bill will, therefore, provide the courts with powers to issue two new types of preventive orders and associated interim orders to assist in preventing trafficking: trafficking and exploitation prevention orders (TEPOs) and trafficking and exploitation risk orders (TEROs).

78. Where an individual has been convicted of a trafficking or exploitation offence or an offence with a statutory trafficking aggravator, a TEPO may be imposed by a court where there is a risk that that individual may commit a further human trafficking offence and it is necessary to make the order to protect people from the physical or psychological harm which might occur if such an offence were committed. The TEPO will be time limited and will prevent the individual from engaging in activities described in the order. This might include the employment of staff, making travel arrangements for other people, travelling overseas, having contact with children, etc. Positive requirements such as the requirement to report to a police station at a prescribed time and place; require the individual to inform the police of a change of address, vehicle usage, mobile telephone number(s) etc. may also be imposed. The Bill will allow the court to impose an “interim TEPO” whilst it is considering the application for a full TEPO. The maximum penalty for breach of a TEPO will be up to five years in prison.

79. Where a person has not been convicted of a trafficking or exploitation offence, but a court considers that the person presents a significant risk of harm to others through the individual

²⁶ For example, sexual offences prevention orders (SOPOs) in the Sexual Offences Act 2003 (Section 112 of that Act modifies the provisions for sexual offences prevention orders for Scottish purposes) and the Risk of Sexual Harm Order (RSHO) provided for in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

²⁷ <http://services.parliament.uk/bills/2014-15/seriouscrime.html>

committing a trafficking or exploitation offence, the court can impose a TERO restricting specific activities or imposing requirements. Like a TEPO, the TERO will be time limited. The maximum penalty for breach of a TERO will be up to five years in prison. Interim TEROs will also be available while the court considers the main application.

80. These measures are intended to help prevent harm by disrupting and deterring trafficking and exploitation activity.

Alternative approach

81. The alternative approach would be to make no legislative change. Doing nothing would fail to provide law enforcement authorities and the courts with additional necessary tools to ensure prevention of further harm caused by trafficking and exploitation activity. Availability of these orders would encourage law enforcement authorities to take further preventative action they may not otherwise consider.

Trafficking and exploitation strategy

Current position

82. There have been calls in various independent reports²⁸ for the Scottish Ministers to take a clear strategic lead in co-ordinating the response in Scotland to human trafficking.

83. One outcome from the Summit hosted by the Scottish Government in October 2012 was that, whilst there was a need to review and strengthen the current legislation on human trafficking, many of the necessary actions did not require legislation. These include actions to promote better public awareness and understanding of human trafficking; the provision of training for frontline workers who might come into contact with potential victims of trafficking; improved data collection and intelligence sharing; etc..

84. Placing the strategy on a statutory basis will ensure that the Scottish Parliament has the opportunity to scrutinise formally the strategic, multi-agency approach to tackling and preventing human trafficking in Scotland and to ensuring effective support for victims and the progress made in implementing this strategy. The Bill does not seek to place new statutory burdens on individual organisations, but to ensure that all relevant agencies, from the public, private and third sector, law enforcement, Scottish Government and local authorities are fulfilling their existing functions in a manner that responds effectively to trafficking and exploitation and are contributing actively to this agenda.

Proposed approach

85. The Bill will, therefore, place a duty on the Scottish Ministers to prepare, publish and regularly review and update a trafficking and exploitation strategy. The strategy and subsequent updates will require to be laid before the Parliament.

86. The Bill will require Ministers to engage with relevant stakeholders in the public, private and third sectors in developing and implementing the strategy. The Bill also places a duty on

²⁸ As set out in paragraphs 4 and 5 above.

relevant public authorities, to be named in regulations, to engage with the Scottish Ministers on the preparation and implementation of the strategy.

Alternative approach

87. The alternative approach would be to make no legislative change. Even without a statutory basis, the Scottish Government is committed to working with relevant bodies to prepare, publish and regularly review a trafficking and exploitation strategy. Placing the duty on a statutory footing will, therefore, put this commitment beyond doubt.

Duty on public bodies to provide anonymised information about potential victims

Background

88. There are very significant challenges in establishing credible information about levels of human trafficking and numbers of victims. Potential victims can be reluctant to engage with authorities, including law enforcement agencies. The complex, hidden nature of this crime makes it particularly difficult to quantify its impacts and scale accurately. A large proportion of cases are never recognised or reported, and do not appear in any statistics. As a result, estimates about the true scale of the problem vary widely.

89. In 2013, at UK level, 1,746 potential victims of human trafficking were referred to the National Referral Mechanism (NRM) while there were 99 potential victims referred from Scotland. The UK Human Trafficking Centre (UKHTC) (part of the National Crime Agency (NCA)) Strategic Assessment for 2013 estimated that there were up to 2,744 possible victims of human trafficking in the UK. Of these potential victims, 55 were reported from agencies in Scotland²⁹.

90. Currently, victims of human trafficking who are identified by a “first responder” are referred to the UKHTC and UK Visas and Immigration (UKVI), by filling out a NRM form. If the UKHTC or UKVI believes on the basis of the form that there are “reasonable grounds” to believe the person is a genuine victim of human trafficking, the person will get access to Government funded support. For children, this support is generally provided at a local level through multi-agency services, and in accordance with an assessment of the child’s needs.

91. However, this means that if the adult victim opts not to be referred (for example because the person does not want support), the case might not get referred to the UKHTC or UKVI at all, which means that knowledge and understanding of the scale and nature of trafficking (and related data) is incomplete. For child referrals consent of the child is not required.

Proposed approach

92. The Bill will place a duty on public authorities specified by regulations to provide anonymised data about potential human trafficking and exploitation victims to Police Scotland.

²⁹ <http://www.nationalcrimeagency.gov.uk/publications/399-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2013/file>

93. Although it will not be possible to confirm whether these individuals were or were not victims, the anonymised data will provide wider information about trafficking activity in Scotland not currently collected through the NRM or criminal justice processes. This will assist in providing intelligence to build a more accurate picture of the scale and extent of trafficking and slavery, servitude and forced or compulsory labour in Scotland and of the people, adults and children, most directly affected. It will also provide a clear basis for the requirement and provision of support services for these victims.

94. Non-public authorities, such as third sector organisations, will be asked to provide similar anonymised information about potential victims through a memorandum of understanding.

Alternative approach

95. The alternative approach would be to make no legislative change. Doing nothing would mean that data would still be collected under current arrangements and an incomplete understanding of the scale of human trafficking in Scotland would endure. The Bill will place a duty on specified public authorities to provide anonymised data about potential victims to Police Scotland. The anonymised data will provide wider information about trafficking activity in Scotland not currently collected through the NRM or criminal justice processes. This will assist in providing intelligence to build a more accurate picture of the scale and extent of trafficking and slavery, servitude and forced or compulsory labour in Scotland, thereby allowing law enforcement resources to be deployed effectively. It will also assist in achieving the policy aim by providing a clear basis for the requirement and provision of support services for victims of trafficking and exploitation.

FURTHER ALTERNATIVES

96. As part of the Scottish Government's consideration of the content of legislation on human trafficking and exploitation, a number of further policy alternatives have been considered.

Anti-trafficking commissioner

97. A number of stakeholders have called for the establishing of a Scottish Anti-trafficking commissioner to raise awareness and promote good practice in the identification and combating of human trafficking, exploitation and support for victims.

98. The UK Modern Slavery Bill contains provisions to create an Independent Anti-Slavery Commissioner. The functions of that Commissioner are to encourage good practice in the prevention, detection, investigation and prosecution of exploitation and trafficking offences and the identification of victims, including both adults and children. At introduction the remit of the Commissioner only extended to England and Wales. However, as human trafficking is a cross-border crime the Scottish Ministers believe that sharing of good practice and expertise will best be achieved by having a UK-wide Commissioner. Therefore the Scottish Government is seeking a Legislative Consent Motion to extend the remit and functions of the Independent Anti-Slavery Commissioner to Scotland. Northern Ireland has adopted a similar stance.

Specific duties on police and prosecutors to investigate and prosecute human trafficking

99. A number of stakeholders have called for the police and prosecutors to be under a specific statutory duty to have “*the necessary capacity and approach for the effective investigation and prosecution of human trafficking*”.³⁰ Police and prosecutors are already responsible for investigating and prosecuting crime. The Scottish Government’s view therefore, is that no further statutory measures are required. Any statutory intervention could indeed impact inappropriately on the operational independence of the police and COPFS.

Support for trafficking victims as witnesses within the criminal justice system

100. Victims of human trafficking can be particularly vulnerable. Effective support and reassurance can be essential to assist victims who are willing to participate within the criminal justice process. The UK Modern Slavery Bill includes provisions to provide victims of human trafficking with the automatic right to specific support and protection when acting as witnesses in criminal trials. Section 10 of the Victims and Witnesses (Scotland) Act 2014³¹ (“the 2014 Act”), once implemented, will provide victims of human trafficking in Scotland with the automatic right to access special support measures, such as screens in court or giving evidence by video link. The Scottish Government’s view, therefore, is that no further statutory measures are required.

Trafficking reparation orders

101. The UK Modern Slavery Bill includes provisions to allow for a court to impose a trafficking reparation order, requiring reparation payments to be provided to the victims of offences under that Bill, where a confiscation order is imposed against the person convicted of the crime. In Scotland, compensation orders are covered by sections 249 to 253 of the Criminal Procedure (Scotland) Act 1995. Section 24 of the 2014 Act – when brought into force – will amend section 249 of the Criminal Procedure (Scotland) Act 1995 to require a court to consider making a compensation order in any case where it would be competent for it to do so. This ensures that in all relevant circumstances a court in Scotland will consider imposing a compensation order, even if no confiscation order is imposed.

Legislation on supply chains

102. Legitimate businesses, in particular larger businesses, can play a valuable role in identifying and combating the exploitation of trafficked human beings within supply chains. A number of stakeholders, including the STUC, have called for specific provisions to require companies to report on their supply chains as part of their obligations to report on human rights within their annual company reports. Such provisions would relate to the reserved matter of “business associations” which reserves to the UK Parliament the “creation, operation, regulation and dissolution of types of business association”. On 13 October 2014, the UK Government confirmed that amendments would be made to the UK Modern Slavery Bill to require larger businesses to report each year on the actions they have taken to ensure that their supply chains are free of trafficking and exploitation. The Scottish Ministers support this measure, which has

³⁰ <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/67134.aspx>

³¹ <http://www.legislation.gov.uk/asp/2014/1>

now been included in the UK Bill and will extend to Scotland, subject to the approval of a Legislative Consent Motion by the Scottish Parliament.

103. The Scottish Government will engage with businesses of all sizes in Scotland, as part of the development and implementation of the trafficking and exploitation strategy, to consider what further actions might be taken by business to help identify and combat trafficking alongside the UK legislative measures on supply chains.

Establish a Scottish National Referral Mechanism

104. The NRM is the UK-wide process for identifying victims of human trafficking and ensuring they receive access to appropriate support and assistance. The UKHTC collects information about the scale and nature of trafficking via the NRM. The NRM has been subject to repeated criticism about the assessment process and sharing of information.³² Stakeholders have called for the establishment of a Scottish NRM.³³

105. The UK Home Office undertook a review of the NRM from April to November 2014. The review was asked to examine and make recommendations to the Home Secretary on six key areas: (i) identification of victims; (ii) how they access support; (iii) the level of support that victims receive; (iv) decision making; (v) governance of the NRM and (vi) collection and sharing of data. The Scottish Government, local government, Police Scotland, COPFS and relevant stakeholder organisations in Scotland were consulted during the review process. The report of the review was published by the Home Office in November 2014.³⁴ The review report makes a number of significant recommendations about the operation of the NRM across the UK. The Home Secretary has accepted, in principle, the report recommendations, but further discussions as to implementation are required. It has not been possible, therefore, to reflect the final outcome of the review at this time. The Scottish Ministers will consider the outcome of the review and any implications and opportunities for the better identification and support of victims in Scotland as the Bill progresses.

Child trafficking advocates

106. The UK Modern Slavery Bill provides for UK Ministers to make arrangements to enable persons, to be called child trafficking advocates, to be available to represent and support children who there is reason to believe may be victims of human trafficking. In Scotland, children who have been trafficked receive support from local authority professionals and, from August 2016, every child will have a named person under the provisions of the CYPA. At this time, it does not seem appropriate to create an additional role within the landscape to advocate for trafficked children.

³² For example the Anti Trafficking Monitoring Group Report
http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf

³³ For example
http://www.equalityhumanrights.com/sites/default/files/documents/Scotland/Human_Trafficking_in_Scotland/_inquiry_into_human_trafficking_in_scotland-full-report_pdf_.pdf

³⁴ <https://nrm.homeoffice.gov.uk/>

CONSULTATION

107. The issue of human trafficking has been the subject of a number of reports, inquiries and consultations over recent years which have examined the response to human trafficking within Scotland or across the UK. In view of this, the Scottish Government did not undertake another specific consultation but instead has drawn on the analysis and recommendations within these reports to inform the preparation of this Bill and the parallel draft Scottish Human Trafficking and Exploitation Strategy. These reports include—

- The Scottish Parliament's Equal Opportunities Committee's Report into Migration and Trafficking (2010);³⁵
- Equality and Human Rights Commission Report on Inquiry into Human Trafficking in Scotland (2011);³⁶
- Scotland's Commissioner for Children and Young People Study into the Nature and Extent of Child Trafficking in Scotland (2011);³⁷
- Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) Report (2012);³⁸
- UK Anti-trafficking Monitoring Group Report (2013);³⁹
- Jenny Marra MSP consultation on Proposal for a Human Trafficking (Scotland) Bill (2013);⁴⁰
- UK Parliament's Joint Committee Report on the Draft UK Modern Slavery Bill (2014).⁴¹

108. The Scottish Ministers acknowledge and are grateful for the work of all those involved in the preparation of the above reports, which have raised significantly the awareness and understanding of the nature of human trafficking in Scotland and areas for improved activity in response to this crime and the needs of its victims. These various reports have highlighted a number of consistent themes and proposed actions necessary to strengthen the response to human trafficking. These include the need for—

- comprehensive and focused human trafficking legislation, including a single human trafficking offence, for all forms of exploitation, based on international good practice;
- clear strategic leadership and multi-agency partnership working to ensure a collaborative response to human trafficking for all forms of exploitation;

³⁵ <http://archive.scottish.parliament.uk/s3/committees/equal/inquiries/migration/migration.htm#top>

³⁶ <http://www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/human-rights-scotland/inquiry-human-trafficking-scotland>

³⁷ http://www.sccyp.org.uk/uploaded_docs/policy/sccyp%20child%20trafficking%20report.pdf

³⁸ http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2012_6_FGR_GBR_en.pdf

³⁹ http://www.antislavery.org/english/what_we_do/programme_and_advocacy_work/trafficking/anti_trafficking_monitoring_group.aspx

⁴⁰ <http://www.jennymarra.com/human-trafficking-bill/4579313773>

⁴¹ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-modern-slavery-bill/written-evidence/>

- actions to help prevent trafficking happening or to disrupt the actions of those involved in trafficking;
- more training of front-line staff and others to better identify potential signs of trafficking and to respond to the needs of victims;
- wider awareness raising amongst the public and businesses to help acknowledge and recognise trafficking;
- improved collection and sharing of data and other information about the extent of trafficking;
- co-ordinated support and time for recovery for the victims of trafficking;
- targeted identification and support for the child victims of trafficking.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

109. An Equality Impact Assessment (EQIA) has been carried out and the results will be published on the Scottish Government website at:
<http://www.scotland.gov.uk/Publications/Recent>.

110. In relation to the provisions contained within the Bill, the Scottish Government considers that these do not discriminate on the basis of the protected characteristics namely age, maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation. Indeed, some of the proposals are intended to ensure that the particular circumstances of individuals may be taken into account (e.g. the slavery, servitude and forced or compulsory labour offence which requires that the court, in assessing whether a person has been the victim of the offence, is to have regard to any of the alleged victim's characteristics that make them more vulnerable than other people). Such characteristics could include those originating from a protected characteristic.

Human rights

Part 1 – Offences

111. The European Court of Human Rights has noted that trafficking in human beings, by its very nature and the aim of exploitation, is based on the exercise of powers attaching to the right of ownership; treats human beings as commodities to be bought and sold and put to forced labour; implies close surveillance of the activities of victims, whose movements are often circumscribed; and involves the use of violence and threats against victims. Accordingly the Court has held that trafficking itself is prohibited by Article 4 (prohibition of slavery and forced or compulsory labour) of the ECHR.

112. Against that background, the Scottish Government considers that the provisions in Part 1 which further strengthen and expand the tools available to the police and prosecutors for disrupting and prosecuting the conduct which is contrary to Article 4 of the ECHR in particular

will affect positively the human rights of individuals who are at risk of being victims of such conduct.

Part 3 – Confiscation of property

113. Part 3 of the Bill consolidates existing provision for the detention and forfeiture of ships, vehicles and aircraft used in the commission of trafficking offences. It also amends the POCA to include the offences in section 1 and 4 of the Bill in the list of lifestyle offences for the purposes of confiscation under that Act.

114. Any regime for the confiscation of an individual's property engages consideration of Article 1 of Protocol 1 to the ECHR which restricts the circumstances in which an individual's property may be appropriated by the state. In short, such appropriation is permitted only where (1) in pursuit of a legitimate aim or public interest (2) proportionate in order to achieve that aim or interest and (3) in accordance with law. While it is clear that these powers do, and will continue to, impact on the rights of the owners of confiscated property, the Scottish Government is satisfied that they are justified.

115. It is considered that there is a legitimate public interest behind both the detention and forfeiture powers here. In respect of the former, the power will allow for the preservation of evidence, may prevent the commission of further crimes and ensure that property used in the commission of offences (and thus liable to forfeiture) cannot be disposed of. In respect of the latter, similar legitimate aims exist, with the addition of an element of punishment directed at proven offenders.

116. In terms of proportionality, it is clear that states have a wide margin of appreciation when enacting laws depriving a person of property, particularly where a deprivation is penal in nature. That said, the Scottish Government considered there to be a rational connection in general terms between the aims mentioned above and the measures proposed to achieve those aims and adequate safeguards to ensure that detention or forfeiture are proportionate responses in individual cases.

117. The proportionality of detention of property in any given case can be tested and assessed by virtue of the right to apply to the court for release of detained property, a right which extends to any person (including the accused) with a relevant interest in the detained property. Domestic case law highlights the importance of such a judicial mechanism for assessing proportionality,⁴² particularly since seizure can be effected without a warrant.

118. In relation to forfeiture orders, the power to make such an order is discretionary and again interested parties are to be entitled to make representations. It will be a matter for the court to assess whether forfeiture is proportionate in individual cases.

119. The Scottish Government's view is that these measures are lawful, both in terms of being prescribed by law and in terms of the quality of that law (including its foreseeability and the existence of safeguards to ensure that the exercise of the powers concerned is not arbitrary).

⁴² *Anwar v Cassidy* [2013] HCJAC 134.

120. The amendments to the POCA in section 11 add the offences under sections 1 and 4 of the Bill to the list of lifestyle offences in Schedule 4 to that Act. The result is that a conviction of one of these offences requires the court to assume that certain of the offender's property has been obtained as a consequence of that person's criminal conduct and permits the court to make an order for the confiscation of that property. This procedure engages Article 6 of the Convention which guarantee's the individual's right to be presumed innocent and requires the prosecution to prove the accusations it makes against an accused. Adding to the list of offences which triggers that procedure will have an effect on the Article 6 rights of individuals convicted of those offences. But the procedure itself has been held by the European Court of Human Rights to be compatible with Article 6 (*Phillips v United Kingdom*, application no. 41087/98).

121. The only question when adding new lifestyle offences which automatically trigger the operation of that scheme is, therefore, whether there is a sufficiently strong and justifiable public interest in utilising that scheme in relation to the particular offence. That entails consideration of both the seriousness of the offence and the relevance of the criminal lifestyle assumptions to that type of offending. New lifestyle offences should, in particular, be of a type commonly committed (1) for financial gain and (2) by habitual offenders.

122. The offences of slavery and human trafficking are commonly committed by organised crime groups and are part of a core of self-sustaining criminal activity in which these groups engage. As such, evidence from law enforcement agencies suggests that offenders involved in human trafficking are commonly involved in other forms of serious criminal activity. Exploitation and trafficking offences are invariably committed with a view to significant financial gain which is then utilised to fund the commission of these further offences (and the commission of other offences may in turn be aimed at funding trafficking activity). Even when not committed by organised crime groups in the sense commonly understood by law enforcement agencies, commission of exploitation and trafficking offences is likely to amount to serious organised crime for the purposes of the offences in sections 28 to 31 of the 2010 Act.

123. Accordingly, the Scottish Government is satisfied that any interference with Article 6 of the ECHR occasioned by listing these offences in Schedule 4 to POCA can be justified.

Part 4 – Trafficking and exploitation prevention and risk orders

124. Part 4 of the Bill establishes the framework for TEPOs and TEROs. These are orders which are available at sentencing where a person is convicted of a relevant offence and on civil application where a person was previously convicted of such an offence or (in the case of TEROs) is considered by virtue of the person's conduct to pose a risk of committing such an offence. The orders allow for prohibitions and requirements to be imposed on individuals subject to them.

125. It is clear that the prohibitions and requirements in TEPOs have the potential to interfere with an individual's right to private life under Article 8 of the Convention. Prohibitions can include, for example, restrictions on foreign travel or could include restrictions as to residence in a particular area, the establishment of relationships with other people or business activities. That said, the Scottish Government is of the view that the interference with Article 8 rights which may be occasioned by TEPOs and TEROs can be justified as being (1) in pursuit of legitimate aims and (2) necessary in a democratic society in pursuit of those aims.

126. TEPOs and TEROs are capable of being made where a person demonstrates a risk of committing a human trafficking or exploitation offence and the order is necessary to protect people from the harm which might occur were such an offence committed. The legitimate aims are, therefore, the prevention of crime and protection of others from harm. The power to make the orders is a discretionary one for the courts. In relation to both orders, that discretion, as already noted, may only be exercised where the court considers the prohibitions or requirements in the order to be necessary to prevent harm to others should the subject of the order commit a trafficking or exploitation offence. It is, therefore, for the court to assess the proportionality of the order in every case. This test provides a sufficient safeguard to ensure that orders should not be made unless necessary in a democratic society.

127. As well as the initial test for making orders, the Bill provides mechanisms for the review of orders throughout their duration. In particular, the subject of the order may apply for variation or discharge should that person consider that the order (or any prohibition or requirement within it) is no longer justified. A right of appeal is also conferred in relation to the initial order or to its variation on the application of some person other than the subject of the order.

128. Proceedings for the making of a TEPO against a person involve the determination of that person's civil rights. The right to a fair trial under Article 6 of the Convention is, therefore, engaged. Again, the Scottish Government is satisfied that the scheme put in place by the Bill entails no contravention of that Article. In particular, the procedures by which TEPOs and TEROs can be made allow for representations to be made by the person who is to be subject to the order.

129. Finally, TEPOs can be made with regard to criminal convictions occurring before the Bill is passed. There may, therefore, be a question as to whether the Article 7 prohibition on retrospective penalties is engaged. That would, however, require the conclusion that a TEPO is a "penalty" and in the Scottish Government's view that conclusion cannot be maintained. Although TEPOs on sentencing in particular can be made directly following a conviction, TEPOs can also be made where there is no conviction (e.g. where there is a finding that an individual is not guilty of a relevant offence by reason of a mental disorder). They can also be made in civil proceedings. More significantly, the policy rationale for TEPOs is not a punitive one. The orders are directed at prevention and protection from harm and can only be made for those purposes. A TEPO could not be made for purely punitive reasons. The fact that the orders may have a punitive *effect* is not sufficient to infer a punitive purpose (*Gough v Chief Constable of Derbyshire Constabulary* [2002] QB 459). For these reasons, the Scottish Government is satisfied that TEPOs do not constitute a penalty for the purposes of Article 7 and that Article is, therefore, not engaged in this context.

Island communities

130. Human trafficking can arise in urban, rural and island communities, for example in connection with the fishing industry. The Scottish Government is satisfied that the Bill has no differential impact upon island or rural communities.

Local government

131. The Scottish Government is satisfied that the Bill has no significant effect on local government. Local authority staff and other front-line public sector staff have an important role in helping to identify and report potential trafficking situations. Local authorities are already responsible for providing support and services for the child victims of human trafficking.

Sustainable development

132. The Scottish Government is satisfied that the Bill has no negative effect on sustainable development. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

Business and Regulatory Impact Assessment

133. A partial Business and Regulatory Impact Assessment (BRIA) was carried out and revealed no need for a full BRIA. The illegal exploitation of workers in forced labour and criminal activity undermines the interests of legitimate businesses and the Scottish Government is satisfied that the Bill has no significant effect on businesses and other non-public bodies.

This document relates to the Human Trafficking and Exploitation (Scotland) Bill (SP Bill 57) as introduced in the Scottish Parliament on 11 December 2014

HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) BILL

POLICY MEMORANDUM

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.uk

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
Group Scotland.

ISBN 978-1-78534-570-8