



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

8th Meeting, 2015 (Session 4)

Tuesday 10 March 2015

The Committee will meet at 10.30 am in the David Livingstone Room (CR6).

1. **Human Trafficking and Exploitation (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Dr Maria O'Neill, Senior Lecturer, Dundee Business School - Law Division, University of Abertay;

Dr Paul Rigby, Lecturer Social Work, University of Stirling;

and then from—

Lorraine Cook, Migration, Population and Diversity Team, Convention of Scottish Local Authorities;

Katie Cosgrove, Gender based violence programme, NHS Health Scotland.

2. **Subordinate legislation:** The Committee will take evidence on the Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015 [draft] from—

Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Hazel Dalgard, Bill Manager, and Alastair Smith, Directorate for Legal Services, Scottish Government.

3. **Subordinate legislation:** Paul Wheelhouse (Minister for Community Safety and Legal Affairs) to move—

S4M-12522—That the Justice Committee recommends that the Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015 [draft] be approved.

4. **Subordinate legislation:** The Committee will take evidence on the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2015 [draft] from—

Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Catriona Mackenzie, Legal Aid Policy Manager, and Alastair Smith, Directorate for Legal Services, Scottish Government.

5. **Subordinate legislation:** Paul Wheelhouse (Minister for Community Safety and Legal Affairs) to move—

S4M-12524—That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2015 [draft] be approved.

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Clerk to the Justice Committee  
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The Scottish Parliament  
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The papers for this meeting are as follows—

**Agenda item 1**

Paper by the clerk	J/S4/15/8/1
Private paper	J/S4/15/8/2 (P)

[Human Trafficking and Exploitation \(Scotland\) Bill, accompanying documents and SPICe briefing](#)

[Written submissions received on the Bill](#)

**Agenda items 2 and 3**

Paper by the clerk	J/S4/15/8/3
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[Courts Reform \(Scotland\) Act 2014 \(Consequential Provisions\) Order 2015](#)

**Agenda item 4 and 5**

Paper by the clerk	J/S4/15/8/4
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[Advice and Assistance \(Assistance by Way of Representation\) \(Scotland\) Amendment \(No. 2\) Regulations 2015](#)

## Justice Committee

8<sup>th</sup> Meeting, 2015 (Session 4), Tuesday 10 March 2015

### Human Trafficking and Exploitation (Scotland) Bill

#### Note by the clerk

#### Background

1. The Committee will continue taking evidence at Stage 1 of the Human Trafficking and Exploitation (Scotland) Bill at its meeting on 10 March.<sup>1</sup> Further evidence sessions on the Bill are scheduled for 17, 24 and 31 March.

#### The Bill

2. The Bill was introduced in the Parliament on 11 December 2014. The Justice Committee was designated as lead committee for Stage 1 consideration of the Bill on 6 January 2015. The Policy Memorandum states that “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”.<sup>2</sup> The Bill would:

- create a single offence of human trafficking for all forms of exploitation for adults and children;
- strengthen the current slavery, servitude and forced labour offence by allowing 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 family relationships. The maximum penalty would be increased from 14 years to life imprisonment;
- establish statutory aggravations (a) to any criminal offence where it can be proved that the offence had a connection with a human trafficking background, and (b) 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;
- place a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences;
- place a duty on Scottish Ministers to secure the provision of relevant immediate support and recovery services for adult victims<sup>3</sup> of trafficking;
- categorise all trafficking and exploitation offences as lifestyle offences in order to automatically trigger the confiscation procedures in the Proceeds of Crime Act 2002;

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<sup>1</sup> The Committee held its first evidence session on the Bill on 3 March, hearing from support bodies, faith groups and children’s organisations. The Official Report of that meeting is available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9812&mode=pdf>

<sup>2</sup> Policy Memorandum, paragraph 16.

<sup>3</sup> The Policy Memorandum explains that the provisions relating to support for victims are explicitly aimed at providing a statutory basis for the support and assistance of adult victims of trafficking 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 1995, the Children’s Hearings (Scotland) Act 2011, and the Children and Young People (Scotland) Act 2014.

- create trafficking and exploitation prevention orders and risk orders;
- place a duty on the Scottish Ministers to prepare, publish and regularly review and update a trafficking and exploitation strategy to be laid before the Parliament; and
- place a duty on public bodies to provide anonymised data about potential human trafficking and exploitation victims to Police Scotland.

3. The Committee issued a call for written evidence on 13 January, which closed on 24 February. Written submissions<sup>4</sup> received from the witnesses attending on 10 March and others are available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/86699.asp>  
[X](#)

4. Further background information has been provided by two witnesses for 10 March meeting. Dr Maria O'Neill, of the University of Abertay, has provided a copy of a paper she has produced entitled 'Trafficking in Human Beings: an EU and UK legal challenge', which is attached at Annexe A<sup>5</sup>. Dr Paul Rigby from the University of Stirling, has provided a copy of a submission to the Home Office review of the National Referral Mechanism as an alternative process for child trafficking in Scotland, which is attached at Annexe B.

### **Next steps**

5. The Committee will take evidence from Dr Maria O'Neill, Dr Paul Rigby, COSLA and NHS Health Scotland at its meeting on 10 March.

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<sup>4</sup> A pack of written submissions has been circulated to each member with their meeting papers.

<sup>5</sup> Dr O'Neill has highlighted particular issues of relevance for members in bold.

## Paper from Dr Maria O'Neill on Trafficking in Human Beings: an EU and UK legal challenge

The parallel developments at both the EU and UK level addressing the issue of Trafficking in Human Beings are promising to rapidly change the legal landscape and practice environment when addressing the issue of human trafficking. Taking a legal perspective this paper will critically analyse the policy and legal developments at both levels of governance, in light of the Area of Freedom Security and Justice's status as an area of shared competence, and subject to the principle of subsidiarity. The issue of whether the UK proposals meet the UK's legal obligations under the EU legal framework will also be examined. The additional issue of the UK's devolved legal jurisdiction and police framework in light of these developments will also be critically analysed.

### 1. Introduction

The issue of human trafficking is a multi-faceted problem which arises from a number of challenges facing the world today, and exacerbated by increasing globalisation and mobility. The issue of human trafficking law is almost as diverse. Issues arise in distinguishing human trafficking from human smuggling, and in addressing the various typologies of human trafficking, which can range from forced labour to forced prostitution, from child begging to the forced removal of human organs. In addition to the principal laws in the area, there are supplementary laws dealing with issues as varied as child sexual exploitation, gangmaster licencing, and criminal use of the internet. There are a number of drivers for human trafficking laws, ranging from the UN's classification of human trafficking as a form of organised crime, being proscribed by the second protocol attached to the United Nations Convention against Transnational Organized Crime, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. At a continent of Europe level there is also the Council of Europe Convention on Action against Trafficking in Human Beings,<sup>6</sup> which entered into force on the 1<sup>st</sup> February 2008. Case law has emanated from human rights courts, such as the European Court of Human Rights (ECtHR), domestic courts, and international criminal courts, in the context of human trafficking, with the latter addressing the use of human trafficking as a crime against humanity.<sup>7</sup> This paper will be much more focused however, taking just one strand of this complex debate, and will focus on the UK's legislative response to the EU's recent 2011 Directive on preventing and combating trafficking in human beings and protecting its victims,<sup>8</sup> and the measures that the UK has taken to implement this directive. The UK, unlike most of the other EU member states is not a unitary legal jurisdiction. While not strictly federal, as understood in the context of say the USA or Canada, independent legal jurisdictions continue to exist within the UK since its formation. In addition recent devolution of powers to sub-national parliaments or assemblies adds complexity to the UK's regulatory and law enforcement picture. The legal jurisdictions of England and Wales have long been merged, however the Welsh Assembly has made its own mark in the area of human trafficking, to include the appointment of the Welsh Government's anti-trafficking co-ordinator in 2011. Northern Ireland has been a separate legal and policing jurisdiction, operating as a unit since the departure of the Republic of Ireland, with the Northern

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<sup>6</sup> CETS no. 97.

<sup>7</sup> Rome Statute, Article 7.1.c as defined by Article 7.2.c.

<sup>8</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1.

Ireland assembly recently enacting its own laws in this area. Scotland is an even more distinct legal jurisdiction from that of England & Wales, coming from a pre-codified civilian jurisdictional background with many distinguishing features from the common law jurisdiction of England and Wales. Policing structures and accountability are also different, having more of a distinct flavour than might be anticipated. Chief Constables in both Scotland and Northern Ireland are answerable to the devolved parliaments in Stormont and Holyrood, rather than to Westminster. In addition, there continues to be a rebalancing of power amongst the “home countries” of the UK post the Scottish Independence Referendum, an issues which will continue to evolve over the next number of years.

## 2. New EU directive in THB

The UK has entered a new phase of legal relationship with the EU under the post-Lisbon Treaty legal framework in the context of the Area of Freedom Security and Justice (AFSJ). This arose from concern in the UK (and separately, Ireland and Denmark) about the erosion of national sovereignty in an area close to the core of national identity, and the increasing role of the now renamed Court of Justice of the European Union (CJEU). This needs to be understood in the context of the upgrade in legal status of the AFSJ post-Lisbon. AFAJ law is now classified as being of shared competence (between the individual member states and the EU), all be it with treaty based red lines in the areas of national security<sup>9</sup> and internal security of individual member states,<sup>10</sup> over which the EU, as a supranational entity, is not permitted to cross. In addition the EU’s Charter of Fundamental Rights, which has been developing a quasi-constitutional status within the EU’s legal framework, has moved from an area of soft law to hard law. The EU has also been given authority to accede in its own right to the European Convention on Human Rights (ECHR), a process which has recently received a set back by the CJEU’s ruling in *Opinion 2/13* of the 18<sup>th</sup> December 2014. These developments are felt at the UK legislative and executive level to shift the balance of power from the UK parliament, which is considered to be sovereign under UK law, to the court structures, whether that be the EU, and through it to the ECtHR, with even to the UK courts being accused of acting in collusion with the supranational and international courts. This is less of an issue in the Republic of Ireland where the Irish Constitution, as interpreted by the Supreme Court of Ireland, and regularly amended by the people by way of referenda, is supreme under the traditional tri-partite division of power.<sup>11</sup>

The approach that the UK negotiated with the EU for the AFSJ post-Lisbon, and which is written into the post-Lisbon legal framework by way of protocols attached to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), is that the UK has a right to remain out of all post-Lisbon AFSJ measures unless it expressly opts back in again.<sup>12</sup> (The same approach has been negotiated by the Republic of Ireland (same protocol) and Denmark.<sup>13</sup>) Uniquely for the UK, the UK has also negotiated an opt out of all pre-Lisbon AFSJ measures, which had to be done in bloc, with a view to opting back in to a selection of measures, to be

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<sup>9</sup> Article 73 TFEU.

<sup>10</sup> Article 72 TFEU.

<sup>11</sup> Under the English legal tradition sovereignty rested with the King/ Queen, and has been devolved to Parliament. In contrast under the Scottish legal tradition, sovereignty rests with the people of Scotland. There is less clarity on this point in Northern Ireland, as Ireland, and Northern Ireland in particular, (and unlike Scotland) underwent massive structural and social change at the time of the creation of the UK.

<sup>12</sup> Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom Security and Justice.

<sup>13</sup> Protocol (No 22) on the position of Denmark.

negotiated.<sup>14</sup> The UK has now exercised this option, deciding to opt back into 35 pre-Lisbon AFSJ measures.<sup>15</sup> The consequence of this change still has to be evaluated. Despite the concerns about national sovereignty, and the impact of EU AFSJ provisions on the internal balance of power in the UK, the reality of the perceived need to opt back into the 35 pre-Lisbon measures is interesting. Transnational crime and justice, and transnational counter-terrorism measures are difficult to ignore. Both the UK and the Republic of Ireland have (separately) been opting into most of the larger post-Lisbon measures, having to reconcile themselves to the consequential implications for national sovereignty. Denmark is increasingly being left behind in this process. The UK government initially intended on remaining out of the provisions of Directive 2011/36/EU,<sup>16</sup> the new Trafficking in Human Beings (THB) directive, and this is reflected in the text of the directive as passed. However under domestic political pressure it decided to opt back in again.<sup>17</sup> The consequence of this is that while the original implementation deadline for the directive, April 2013, might not be strictly enforced against the UK, there is a requirement on the UK to implement its provisions, and to do so effectively.

Directive 2011/36/EU is not the first attempt of the EU to legislate to combat trafficking in human beings, and the UK was fully compliant in implementing its previous efforts to legislate in this area.<sup>18</sup> The UK laws have also been strongly influenced by the Council of Europe's convention in this area, with the UK often arguing that it takes human trafficking seriously and is doing more than is actually required in this crime area. Relevant lobby groups within the UK would disagree with this argument, arguing that problems arise with both the laws themselves, and their implementation. This paper will focus on the actual legal frameworks, as these are under considerable change at the EU, UK and sub-national level within the UK.<sup>19</sup>

At the outset of the analysis of the UK provisions on THB, and its relationship in this area with the EU it is necessary to point out that the UK continues to maintain its Schengen-opt out position from the EU's visas, asylum, immigration and free movement of third country nationals<sup>20</sup> (the third UK opt out referred to in this paper),<sup>21</sup> unless it has specifically opted back into a particular measure. The UK's rights to opt back in to these measures are limited, under the *UK v Council* line of cases,<sup>22</sup> to "Schengen-related"

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<sup>14</sup> Protocol (No 36) on Transitional Provisions, Article 10.

<sup>15</sup> See House of Commons on-line library, In brief: the 2014 bloc opt-out and selective opt-back-ins, Standard note: SN/IA/6684, available at [www.parliament.uk/briefing-papers/SN06684.pdf](http://www.parliament.uk/briefing-papers/SN06684.pdf).

<sup>16</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1.

<sup>17</sup> Action – Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings – first implementation report/ update of information on Member States' external action, Brussels, 4 July 2011, 12401/11, at page 2, second paragraph.

<sup>18</sup> Specifically Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1.8.2002, which itself replaced Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63 of 04.03.1997.

<sup>19</sup> An initial examination of the EU legal provisions on human trafficking mapped against the earlier UK provisions was made in O'Neill, M.; The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective, *Journal of Contemporary European Research*, Vol. 7. Issue 4, pp. 452-467 (available on-line).

<sup>20</sup> Chapter 2 TFEU.

<sup>21</sup> Protocol (No 19) on the Schengen Acquis integrated into the Framework of the European Union, Article 5 – re UK and Ire opt back in again.

<sup>22</sup> Case C-77/05 *United Kingdom v. Council*, [2007] ECR page I-11459.

measures rather than “Schengen-integral measures”.<sup>23</sup> Therefore many of those THB related measures adopted by the EU under its visas, asylum and immigration provisions do not, normally, apply to the UK. There is a very high level of complexity in the current (pre-directive) UK laws and policing structures dealing with trafficking in human beings, to include the complexity that is added to the picture due to the role of the sub-national legislatures, and their separate policing structures.<sup>24</sup>

The EU’s legal framework in cross border law enforcement was originally designed by drug trafficking officers, with the drafting of the first two attempts to legislate for the enforcement of human trafficking law being based on the model used, and used successfully, for combatting drug trafficking. While human trafficking is also an organised crime, the drug trafficking approach when used for human trafficking did not work. The directive itself states that it takes “an integrated, holistic, and human rights approach”<sup>25</sup> to THB, in contrast to earlier provisions of the EU. In addition to the definition sections (now broader), there is a law enforcement section, (to be expected, but now broader), and there is (novel to EU law) an extensive victim section, with all of these sections bringing a new perspective to the approach to tackling THB across the EU.

UK Modern Slavery Bill (due to become Act 2015) has a varied application, reflecting the differences in the legal jurisdictions across the UK, and the devolved nature of policing and police accountability. It treats England and Wales as one jurisdiction, but for the most part does not apply to Scotland or Northern Ireland. Provisions which do apply across the UK under this bill are Part 4 Provisions on the Independent Anti-Slavery Commissioner, Part 6 Transparency in Supply Chains, and the Final Provisions in Part 7, all subject to the provision of section 57, subsection (s.) 4 (that an “amendment or repeal made by this Act has the same extent as the provision amended or repealed” acknowledging the sub-national jurisdiction may have similar but not the same provisions, and subsection (ss.) 5, which limits the effect of the amendment and repeals in Schedule 4 to England and Wales. Therefore it is left to the sub-national legislatures to take their own positions on the repeals in their own jurisdictions. For their part, the Northern Ireland Assembly has just passed the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (NI bill), with Scotland following with the Human Trafficking and Exploitation (Scotland) Bill.

### **Definition of the crime**

The EU definition of human trafficking used in the new directive is now broader than the one adopted under the earlier framework decision. It now expressly includes begging, and “the exploitation of criminal activities, or the removal or organs”.<sup>26</sup> Forced labour “illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings”,<sup>27</sup> and forced begging, are included within the ambit of this directive, with “no possible consent should be ever considered below the age of 18 years of age”.<sup>28</sup> For all of its constituent acts the age of a child is defined as someone under the age of 18. The directive goes on to say that when dealing with a person of indeterminate age, it is to be presumed that they are a child, until the contrary is

<sup>23</sup> AG Trstejak, paragraph 84 of opinion in Case C-77/05 *United Kingdom v. Council*, [2007] ECR page I-11459.

<sup>24</sup> For a full analysis of this situation, see further O’Neill, M. The EU Legal Framework on Trafficking in Human Beings: where to from here – the UK perspective, J CER Volume 7, Issue 4, pp. 453-457. (available online).

<sup>25</sup> Directive 2011/36/EU, at paragraph 7 of the preamble.

<sup>26</sup> Directive 2011/36/EU, at Article 2.3.

<sup>27</sup> Paragraph 11 of the Preamble to Directive 2011/36/EU.

<sup>28</sup> Article 2.6 of Directive 2011/36/EU

proven.<sup>29</sup> There is no reference in the directive to the “age of sexual majority” which is often lower than the age of 18, and something which did feature in the directive.<sup>30</sup> This is a significant change in focus, at least on this point, between the two EU documents. The directive, with twice as many articles as its predecessor, the framework decision, still does not encompass the allied crime areas of child sex tourism or on-line paedophilia activity. It does, however, have new provisions on the seizure and confiscation of assets<sup>31</sup> although in practice earlier provisions on money laundering<sup>32</sup> and the proceeds to crime<sup>33</sup> continue to be relied on.

The definition of human trafficking adopted by the UK government in the Modern Slavery Bill (UK MS bill)<sup>34</sup> is separated out from the definition of slavery, servitude and forced or compulsory labour,<sup>35</sup> with a further section setting out what is to be meant by exploitation under UK law.<sup>36</sup> Section 14 of the UK bill states that “a slavery or human trafficking offence” means an offence listed in Schedule 1, with Schedule 1 referring to trafficking for prostitution, trafficking for sexual exploitation, trafficking for exploitation, slavery, servitude and forced or compulsory labour. Exploitation is also defined in section 3 to cover slavery, servitude and forced or compulsory labour, sexual exploitation, removal of organs, securing services etc. by force, threats or deception, and securing services etc. from children and vulnerable persons. There is no express reference to forced adoption or forced marriage in the UK MS bill, however laws on forced marriage are already on the statute books of all three UK jurisdictions,<sup>37</sup> as are laws on adoption. Equally there is no reference to forced begging, however forced labour may well cover this, depending on how the UK provisions are interpreted in the courts. The NI Act definitions, in the main, appear to follow the drafting in the UK MS bill. There are some slight definition differences in how to determine whether someone is in a vulnerable situation, however this may turn out to be merely an issue with regard to the style of drafting once the relevant courts start to interpret the two acts.

The Scottish bill is drafted slightly differently from the other two bills, with human trafficking being dealt with in section 1, and the separate crimes of slavery, servitude and forced or compulsory labour being dealt with in section 4. While the issue of consent is discounted under the section 1 human trafficking offence, at s.1.2, it appears to be missing for the section 4 offence. While aiding and abetting etc. is not dealt with separately from the main offences, as is the case for the UK MS bill or the NI Act, aiding and abetting etc. for human trafficking do appear to be well covered in the Scottish laws.<sup>38</sup> However, the same cannot be said for the slavery, servitude and forced or compulsory labour provisions. Section 46 of the Criminal Justice and Licensing (Scotland) Act 2010 appears to survive the proposed Scottish bill, however this only proscribes the arrangement and facilitation of people trafficking. Another possibility is the Scottish doctrine of “art and part”. **A Scottish law expert will have to examine this**

<sup>29</sup> Directive 2011/36/EU, Article 13.2.

<sup>30</sup> Article 3.2.b Council Framework Decision 2002/629/JHA.

<sup>31</sup> Directive 2011/36/EU, Article 7.

<sup>32</sup> Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O J L 182, 1.

<sup>33</sup> Council Framework Decision 2005/212/JHA of 24th February 2005 on Confiscation of Crime- Related Proceeds, Instrumentalities and Property, O J L 68, 49.

<sup>34</sup> Section 2 of the (UK) Modern Slavery Bill.

<sup>35</sup> Section 1 of the (UK) Modern Slavery Bill.

<sup>36</sup> Section 3 of the (UK) Modern Slavery Bill.

<sup>37</sup> Scotland has legislated for civil remedies in the context of a forced marriage, and has made breach of a force marriage protection order a criminal offence under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011. A similar approach has been taken in England & Wales and Northern Ireland under the Force Marriage (Civil Protection) Act 2007, England & Wales, and Northern Ireland.

<sup>38</sup> Scotland s.3.4. and s.12.1.k.

issue, and the Scottish legislature will have to assure themselves that aiding and abetting of all aspects of the new crimes are effectively covered in the Scottish jurisdiction.

While both the Northern Ireland (for THB offence only)<sup>39</sup> and Scottish provisions<sup>40</sup> deal with crimes committed by or on behalf of bodies corporate in the same way as crime committed by individuals, the UK MS bill supposes that bodies corporate will be either involved in the shipping business,<sup>41</sup> or be involved in supply chains,<sup>42</sup> which presupposes that bodies corporate are essentially operating in the legitimate business world, rather than companies which are wholly or predominantly operating in the criminal world, or involved in these activities outwith legitimate supply chains. In Scotland s.40 of the Criminal Justice and Licensing (Scotland) Act 2010 appears to survive the new Scottish bill. This has a focus on protecting children, providing for “certain sexual offences by non-natural persons”, such as bodies corporate. Equally section 99 of the Criminal Justice and Licensing (Scotland) Act 2010 appears to survive the new bill, which provides for the closure of premises associated with human exploitation etc. It refers to section 40A, which in its turn refers to section 47 of the same act, which is to be repealed. It will be necessary to ensure all of the provisions are aligned to cover the new, broader, definition of human trafficking in Scotland, and that there are effective measures to deal with non-natural persons, (i.e. companies) who are caught up in all forms of the new offences. Additionally, there would appear to be gaps in both the NI Act and UK MS bill in this area.

### Establishment of Jurisdiction

Under the EU directive provisions on jurisdiction have been expanded, with reliance still being made on pre-existing EU provisions on conflicts of jurisdiction.<sup>43</sup> The new provisions,<sup>44</sup> in addition to redrafting much of the older provisions,<sup>45</sup> requires that where a member state establishes jurisdiction on a basis other than the place where the offence was committed, that the “acts are a criminal offence at the place where they were performed”,<sup>46</sup> in addition the “prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed”.<sup>47</sup> It is worth noting however that under the directive jurisdiction, as standard, is to be established where “the offender is one of their nationals”.<sup>48</sup> There is no caveat that the related offence is to occur within the EU.

The establishment of jurisdiction in both the UK and NI provisions may raise further questions. The UK bill refers to “a person” under section 1, the slavery, servitude and forced or compulsory labour provisions. However, under the section 2 human trafficking

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<sup>39</sup> NI Act, S.2.8.c re Human trafficking, only, with no reference to bodies corporate involved in slavery, servitude and forced or compulsory labour.

<sup>40</sup> Scotland bill, s.2.2.c re Human Trafficking, with a catch all provision re bodies corporate or other commercial entities in s.35 of the Scotland Bill.

<sup>41</sup> S.39.2.c of UK Modern Slavery Bill.

<sup>42</sup> S.52 of the UK Modern Slavery Bill.

<sup>43</sup> Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings, OJ L 328, p. 42.

<sup>44</sup> Article 10 of Directive 2011/36/EU.

<sup>45</sup> Article 6 of Council Framework Decision 2002/629/JHA.

<sup>46</sup> Article 10.3.a of Directive 2011/36/EU.

<sup>47</sup> Article 10.3.B of Directive 2011/36/EU.

<sup>48</sup> Article 10.1.b of Directive 2011/36/EU.

provisions, it speaks about UK nationals and non-UK nationals as criminals. It does not refer to the location or nationality of the victims, or criminality on the basis of where the crime is committed. With regard to trafficking, while “travel” in NI, Scotland and the UK law also includes travelling within any country, a UK national is liable regardless of “where the arranging or facilitating takes place” or “where the travel takes place”. However a non-UK national, even if within the UK when the offence takes place, is only liable if any part of the arranging or facilitating takes place in the United Kingdom, or “the travel consists of arrival in or entry into, departure from, or travel within the United Kingdom”. In contrast the NI Act and Scottish bill provide that the laws are to be applied where the criminal is a “UK national”, “a person who at the time of the offence was habitually resident in Northern Ireland,” or, as discussed above, “a body incorporated under the law of a part of the United Kingdom”. **They do not refer to individuals who may be temporarily present in Northern Ireland or Scotland, and also engaged in trafficking. An examination of the existing legal frameworks is necessary to ensure that such situations are effectively covered, one way or another, in each of the three jurisdictions.** There may well be conflict of laws issues between the UK, NI and/ or Scotland, but these can be resolved. More important though is that there should be no gaps in the legal framework.

### The penalties

The minimum penalty provisions under the EU directive for THB have been made clearer for the standard offence, now to be “at least five years of imprisonment”<sup>49</sup> whereas previously it was to be “effective, proportionate and dissuasive”, as was to be extraditable.<sup>50</sup> The aggravated offence under the directive is now to be a maximum of 10 years imprisonment,<sup>51</sup> up from its previous 8 years.<sup>52</sup> As previously, the aggravated offence will occur where the victim is particularly vulnerable, or is a child, is committed within the context of an organised crime gang as defined by Council Framework Decision 2008/841/JHA,<sup>53</sup> or either “deliberately or by gross negligence endangered the life of the victim”. It is also aggravated if it “was committed by use of serious violence or has caused particularly serious harm to the victim”.<sup>54</sup> In establishing what is a particularly vulnerable person, which would lead to a more severe penalty, issues such as “gender, pregnancy, state of health and disability” need to be taken into account.<sup>55</sup> Also relevant would be the use of “serious violence such as torture, forced drug/ medication use, rape or other serious forms of psychological, physical or sexual violence” on the victim.<sup>56</sup> Added to this provision, the directive states that aggravation will also occur where the offence “was committed by public officials in the performance of their duties”.<sup>57</sup> The indictment, aiding, abetting and attempt offences<sup>58</sup> are now to also be subject to surrender<sup>59</sup> under the European Arrest Warrant.<sup>60</sup>

The penalties adopted by the UK government in the Modern Slavery Bill, are set out in section 5, and are split between the main offences of either THB or slavery, servitude

<sup>49</sup> Article 4.1 of the Directive 32011/36/EU.

<sup>50</sup> Article 3 of Council Framework Decision 2002/629/JHA.

<sup>51</sup> Article 4.2 of Directive 2011/36/EU.

<sup>52</sup> Article 3.1 of Council Framework Decision 2002/629/JHA.

<sup>53</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300, p. 42.

<sup>54</sup> Article 4 of Directive 2011/36/EU.

<sup>55</sup> Paragraph 12 of Directive 2011/36/EU.

<sup>56</sup> Paragraph 12 of Directive 2011/36/EU.

<sup>57</sup> Article 4.3 of Directive 2011/36/EU.

<sup>58</sup> Article 3 of Directive 2011/36/EU.

<sup>59</sup> Article 4.4 of Directive 2011/36/EU.

<sup>60</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, p.1.

and forced or compulsory labour, and offences undertaken with the intention of committing one of the main offences, such as “aiding, abetting, counselling or procuring” (section 4 of the UK MS bill). In the UK it is possible to be convicted either on indictment, or if the prosecutors decide to opt for the quicker, and cheaper route, on summary conviction. In some circumstances the accused will be given a choice as to where the trial is to take place. On indictment, the punishment is to be “imprisonment for life”.<sup>61</sup> On summary conviction the punishment is “for a term not exceeding 12 months or a fine or both”,<sup>62</sup> which is the usual approach to a conviction following the summary proceeding. For the predicate offences listed in section 4, aiding, abetting, etc. the penalty is “on conviction on indictment, to imprisonment for a term not exceeding 10 years,” with the summary conviction being again “imprisonment for a term not exceeding 12 months, or a fine or both”.<sup>63</sup>

In contrast, in the NI Act the section 1 offence of slavery, servitude and forced or compulsory labour, or the section 2 human trafficking offence, can only lead to conviction on indictment, and imprisonment for life.<sup>64</sup> The NI section 4 offences of “offence[s] to commit a section 1 or 2 offence,” such as aiding, abetting etc. do have the option of a summary conviction leading to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum, but it also has conviction on indictment leading to imprisonment leading to a term not exceeding 10 years. However if the offence is committed by kidnapping or forced imprisonment then the section 4 offence can lead to imprisonment for life. Scotland, for the section 1 human trafficking offence and the section 4 slavery, servitude and forced or compulsory labour offence has both the summary and indictment option for conviction, with a summary conviction leading to 12 months imprisonment or a fine not exceeding the statutory maximum, or both, with conviction for indictment leading to imprisonment for life, or a fine, or both.

**There are no provisions on aggravated offences in the UK Modern Slavery bill. The NI Act does have a section devoted to aggravating factors, section 6, which is broader than, but covers all of the aggravating factors set out in the directive (Article 4), except that of membership of an organised criminal group. Under the Scottish provisions there is a section which deals with aggravation generally, section 5, but does not specify what the aggravated factors should be and a further section, section 6 which deals with aggravation when the crime is committed by a public official in the course of exercising his public position. On the issue of penalties then all UK jurisdictions are diverging from the provisions of the directive, and from each other.**

### **Other related offences**

The UK Modern Slavery Bill in addition to the main offences and the supplementary offences of aiding, abetting, etc. provides for the whole of the UK, including Scotland and Northern Ireland, transparency in supply chains, section 52. It also has, for the England and Wales jurisdiction, provisions on how the law is to work, which includes the introduction of slavery and trafficking prevention orders, which are covered in detail in sections 14 to 29, breach of which will lead to a further offence under section 30, leading to penalties under conviction under indictment of five years imprisonment, and under summary conviction to a term not exceeding six months, or a fine not exceeding £5,000, or both. The NI Act also legislates for an offence of paying for sexual services,<sup>65</sup>

<sup>61</sup> Section 2.1.a of the Modern Slavery bill.

<sup>62</sup> Section 5.1.b. of the Modern Slavery bill.

<sup>63</sup> Section 5.2 of the Modern Slavery bill.

<sup>64</sup> S.1.6 and s.2.6 of the NI Act.

<sup>65</sup> These provisions are legislated for elsewhere for Scotland and for England and Wales.

at section 15, and the offence of forced marriage, section 16, (already legislated for in all three jurisdictions, as discussed above). Slavery and trafficking prevention orders are also provided for under the NI Act in section 11, the details of which are set out in Schedule 3 to the NI Act, breach of which would lead,<sup>66</sup> to conviction on indictment to imprisonment for up to 5 years, and on summary conviction to up to six months imprisonment, a fine not exceeding the statutory maximum, or both. Trafficking and exploitation prevention orders are also dealt with at length in the Scotland bill,<sup>67</sup> breach of which will lead,<sup>68</sup> on conviction on indictment, to at least 5 year's imprisonment, or if on summary conviction to imprisonment for up to 12 months, or a fine not exceeding the statutory minimum, or both.

### **The law enforcement provisions**

Under the EU directive new provisions on investigation and prosecution<sup>69</sup> provide that member states should ensure that THB law enforcement units have "effective investigation tools", to include "those which are used in organised crime or other serious crime cases".<sup>70</sup> This would presumably include the whole range of EU tools such as cross border covert surveillance, joint investigation teams, controlled deliveries, etc.<sup>71</sup> The bringing into the THB investigation of "serious and organised crime" policing is clearly provided for.<sup>72</sup> In addition, in the case of child victims, the directive requires that domestic laws should ensure that it is possible to take a prosecution "for a sufficient period of time after the victim has reached the age of majority."<sup>73</sup> The need for special investigation and criminal procedures in the case of a child victim is also covered.<sup>74</sup> The EU directive also provides for the avoidance of secondary victimisation due to the investigation or prosecution process.<sup>75</sup> There are now new AFSJ provisions, replacing earlier PJCCM provisions on the standing of victims in criminal proceedings.<sup>76</sup>

This issue is addressed by the UK MS bill, section 46, which amends the Youth Justice and Criminal Evidence Act 1999 (which for the most part, extends to England and Wales only), to include special measures for witnesses who are victims of either human trafficking, or the slavery, servitude and forced or compulsory labour offences under that act. Of particular relevance is section 16 of the Youth Justice and Criminal Evidence Act 1999, which deals with (under) age and incapacity, with section 17, dealing with "Witnesses eligible for assistance on grounds of fear or distress about testifying." Similar provisions are made in the NI Act under section 24.3 which amends the Criminal Evidence (Northern Ireland) Order 1999 for slavery or human trafficking offences. In Northern Ireland the Justice Act (Northern Ireland) 2011 provides for special measures for child witnesses and for vulnerable witnesses in the case of sexual offences. **There would appear to be a gap with regard to witnesses in non-sexual related THB**

<sup>66</sup> Under section 16 of Schedule 3 of the NI Act.

<sup>67</sup> Sections 12 to 27 of the Scotland Bill.

<sup>68</sup> Section 28 of the Scotland Bill.

<sup>69</sup> Article 9 of Directive 2011/36/EU.

<sup>70</sup> Article 9.4 of Directive 2011/36/EU.

<sup>71</sup> A detailed analysis of these provisions at an EU level is provided in O'Neill, M.; EU Cross-Border Policing Provisions, the View from One of the Schengen Opt-out States, *European Journal of Crime, Criminal Law and Criminal Justice* 18 (2010) 73–89, and more recently in O'Neill, M.: "A Europe that protects: moving to the next stage of cross border law enforcement cooperation", *Police Journal*, Volume 84 Number 2 2011.

<sup>72</sup> paragraph 15 of the Preamble to Directive 2011/36/EU.

<sup>73</sup> Article 9.2 of Directive 2011/36/EU.

<sup>74</sup> Directive 2011/36/EU, Article 15.

<sup>75</sup> Article 12.4 of Directive 2011/36/EU.

<sup>76</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57. (UK, Ire in. Den out).

**cases in NI. Scotland has recently enacted the Victim and Witnesses (Scotland) Act 2014 which, while expressly referring to victims of trafficking for prostitution, and trafficking of people for exploitation under the Asylum and Immigration Act 2004, may well have left gaps through which other victims of trafficking might have fall. However there is also a “catch all” clause,<sup>77</sup> to include in the category of vulnerable witnesses those “considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.”**

Under the UK MS bill actions of the National Crime Agency (NCA) is acknowledged in section 15.1.c stating that its Director may make an application to the courts for either slavery and trafficking protection orders or risk orders, in addition immigration officers, or any chief officer of police, referring, *inter alia*, to the territorial police. The NCA director must notify the relevant territorial chief of police of such a development. Guidance still has to be issued, under section 33 of the UK MS bill to the chief officers of police, the Director of the NCA and to immigration officers as to how they are to exercise their powers under Part 2 of the MS bill, which covers the prevention orders. However, despite the focus on THB units in the directive, and while it is clear that while UK territorial police THB units may well be leading on anti-trafficking/ slavery cases, with or without the support of the NCA, just as the NCA may also be leading, depending on how the crime presents itself, all front line police staff, immigration staff and UK Borders Agency staff will need to be prepared to tackle this crime in practice.<sup>78</sup> There is a duty placed on public authorities in NI, under the NI Act, section 13, to notify the NCA of suspected victims of either their section 1 slavery, servitude and forced and compulsory labour offence, or their section 2 human trafficking offence. No further provisions are made in the NI Act as to how this crime is to be policed. The reference to the NCA in both the UK MS bill and the NI Act presupposes that the resources and tactics of the NCA can be deployed, where necessary to either slavery, servitude and forced or compulsory labour investigations, or human trafficking investigations, when necessary. This would be in line with the intentions in the EU directive that “effective investigation tools”, to include “those which are used in organised crime or other serious crime cases”<sup>79</sup> would be available for (relevant) investigations in all parts of the UK.

There is now a unitary policing structure in Scotland, Police Scotland, which incorporates the former Scottish Crime and Drug Enforcement Agency (SCDEA), which used to operate in Scotland much as the former Serious and Organise Crime Agency (SOCA) operated in England and Wales, and Northern Ireland. It is therefore not surprising that the successor to SOCA, the NCA, is not referred to in the Scottish bill, as Police Scotland has its own serious and organised crime resources. Presumably if a slavery or human trafficking situation developed in Scotland into a trans-jurisdictional serious or organised crime case, liaison with the NCA either south of the Scottish/ English border or with the NCA in NI, would happen in the usual way. The NCA is also either the lead agency or the first point of contact for incoming or outgoing transnational law enforcement operations through its multi-national/ international office. The UK wide Crime (International Co-operation) Act 2003 sets out many of the relevant provisions for transnational crime and justice cooperation. The Scotland bill does provide for the

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<sup>77</sup> Section 10.a, inserting a new subsection 1.d to the section 271 of the Criminal Procedure (Scotland) Act 1995.

<sup>78</sup> An analysis of the impact of Directive 2011/36/EU on frontline policing staff is made in O’Neill M.; Trafficking in Human Beings, An ongoing problem for the EU’s law enforcement community, SIAK-journal, International Edition 2013, pages 51-62.

<sup>79</sup> Article 9.4 of Directive 2011/36/EU.

enforcement of other UK orders.<sup>80</sup> The NI Act<sup>81</sup> also refers to relevant UK orders in the context of cross border enforcement, to include those of the England & Wales and Scotland. The UK MS bill<sup>82</sup> also refers to cross-border law enforcement, allowing for “relevant UK orders” to include NI or Scottish orders. Each piece of legislation seems to be waiting for the legislation of the other jurisdiction to be passed, before the domestic law of the sub-national jurisdiction reacts to accommodate it.

### The victim provisions

At the EU level there is a big change in the status of the victim, and consequent changes of the role of first responders, such as uniform police, when encountering a human trafficking situation. The directive also has new provisions on the non-prosecution or non-application of penalties to the victim “for their involvement in the criminal activities which they have been compelled to commit as a direct consequence” of the THB.<sup>83</sup> This provision is echoed in section 45 of the UK MS bill, if the offence is a “direct consequence” of either of the two main UK MS offences, section 1, slavery, servitude, compulsory or forced labour, or section 2, human trafficking offence.

While the provision of assistance to victims was provided for in the earlier EU framework decision<sup>84</sup> in one subsection of one article, it is now covered by six articles in the new directive, some of which are quite lengthy. Of these new provisions four articles are devoted to the protection of children and child victims.<sup>85</sup> Under the directive when dealing with persons of indeterminate age, it is to be presumed that they are a child, until the contrary is proven.<sup>86</sup> In addition the interests of the child are to “be a primary consideration” in any investigation involving children.<sup>87</sup> Access to education is also provided for, as is the need to appoint a legal guardian or representative if “the holders of parental responsibility” are “precluded from ensuring the child’s best interests and/or from representing the child” due to a conflict of interests.<sup>88</sup> The need for special investigation and criminal procedures in the case of a child victim is covered,<sup>89</sup> although it is highly probable that these provisions are already in place in most, if not all, EU jurisdictions. The issue of unaccompanied child victims is also addressed, involving the need to appoint a legal guardian in these cases, if necessary.<sup>90</sup> In the NI Act, section 22, provides a defence for slavery and trafficking victims if they were compelled to do something by virtue of either, the section 1, slavery, servitude and forced or compulsory labour offence, or the section 2, human trafficking offence. However this defence is not to apply if the “victim” is over the age of 21 and the offence is punishable on indictment with imprisonment for life or a term of at least 5 years. However some offences are covered by the “victim” defence, as listed in section 22.9, which may be amended later by the Department of Justice for NI. **It is not clear to this author why this approach has been adopted in Northern Ireland. Section 7 of the Scottish Act (taking a similar approach to NI) relies on the Lord Advocate to publish guidelines, at some time in the future about the prosecution of victims of human trafficking or the slavery, servitude, forced and compulsory labour offences. This appears to be**

<sup>80</sup> Section 29 of the Scotland bill.

<sup>81</sup> Schedule 3, section 17 of the NI Act.

<sup>82</sup> Section 31 of the UK MS bill.

<sup>83</sup> Article 8 of the Directive 2011/36/EU.

<sup>84</sup> Article 7.1 of Council Framework Decision 2002/629/JHA.

<sup>85</sup> Article 13 to 16 of Directive 2011/36/EU.

<sup>86</sup> Article 13.2 of Directive 2011/36/EU.

<sup>87</sup> Article 13.1 of Directive 2011/36/EU.

<sup>88</sup> Article 14.2 of Directive 2011/36/EU.

<sup>89</sup> Article 15 of Directive 2011/36/EU.

<sup>90</sup> Article 16 of Directive 2011/36/EU.

**clearly contrary to the provisions of the directive. Both Northern Ireland and Scotland appear to diverge from the requirements of the directive on this point.**

The UK MS bill section 50 provides that there is a presumption, in cases of doubt that a person is under the age of 18 years, until the contrary is proven. There are also provisions about special measures for witnesses in criminal proceedings;<sup>91</sup> civil legal aid for victims of slavery;<sup>92</sup> and child trafficking advocates.<sup>93</sup> Still to be issued by the Secretary of State, under section 49, are guidance about identifying and supporting victims. This is a clear gap in the UK MS bill, on an issue required by the directive. The Minister will need to issue a Statutory Instrument on this matter once the MS Act is passed in order to rectify this issue. There is separately a duty to notify the Secretary of State about suspected victims of slavery or human trafficking under section 51 of the UK MS bill. Under the NI Act section 25 defines that a child is a person under the age of 18, also providing at subsection 3 that in cases of doubt a person is to be treated as if they were a child.

Under the directive assistance to a THB victim is to include “the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.”<sup>94</sup> Victims with special needs also need to be provided for, for example, those who are pregnant, have health issues, “a disability, a mental or psychological disorder [...] or a serious form of psychological, physical or sexual violence [which] they have suffered.”<sup>95</sup> As the UK has stated, this makes “mandatory some measures which are currently good practice”.<sup>96</sup> While these provisions still have to be enumerated by the Secretary of State under the MSB (section 49), the protection of victims is provided for in sections 18 to 21 of the NI Act. Section 18 of the NI Act lists the type of assistance and support anticipated pending determination by competent authority, to include safe accommodation, material assistance, health care services, information, translation and interpretation services, legal advice and assistance with repatriation. Section 19 of the NI Act also provides assistance and support for exiting prostitution. Guidance as to compensation for victims is provided for in section 20 of the NI Act, with section 21 providing for an independent guardian for child victims. **In the Scottish bill there is a definition of an adult as someone over the age of 18. There does not however appear to be any provisions presuming and individual is a child until the contrary can be proved. The Scotland bill provides for support and assistance for adult victims of human trafficking in section 8, referring expressly to accommodation, day to day living, medical advice and treatment, language translation and interpretation, counselling, legal advice, information and repatriation. Strangely it does not provide similar protection for either child victims of human trafficking or child or adult victims of slavery, servitude, forced or compulsory labour.**

The EU directive also provides that legal support, to include witness protection programmes, designed on the basis of “individual risk assessment” is separately provided for.<sup>97</sup> The NI Act is less explicit on this point, but does refer in s.18 to

<sup>91</sup> Section 46 of the Modern Slavery Bill.

<sup>92</sup> Section 47 of the Modern Slavery Bill.

<sup>93</sup> Section 48 of the Modern Slavery Bill.

<sup>94</sup> Article 11.5 of Directive 2011/36/EU.

<sup>95</sup> Article 11.7 of Directive 2011/36/EU.

<sup>96</sup> Action Oriented paper on strengthening the EU external dimension on action against trafficking in human beings – first implementation report/ update of information on Member States’ external action, Brussels 4 July 2011, 12401/11, p.112.

<sup>97</sup> Article 12 of Directive 2011/36/EU.

“assistance and support pending determination by a competent authority”. This protection is to be given where the victim is 18 or over, or of indeterminate age, in the context of human trafficking. The NI Act does not provide protection for anyone under the age of 18. Provisions on independent guardians for children are provided for in the NI Act, under section 21, but no express reference is made to the physical security of the child who has been a human trafficking victim along the line of a witness protection programme. Hopefully these two issues are covered elsewhere in the Northern Irish legal framework. **Witness protection or similar provisions do not appear to have been provided for in either the UK MS Bill or the Scotland Bill. However, pre-existing law on this topic is still on the statute books for all three jurisdictions under section 82 of the Serious Organised Crime and Police Act 2005, which provides for the usual witness protection schemes in the UK. It is to be presumed that this provision will also apply, where appropriate, to cases involving the human trafficking or slavery, servitude, and forced or compulsory labour crimes.**

The EU directive provides that if there are existing schemes for the compensation of “victims of violent crimes of intent” then THB victims should have access to such schemes.<sup>98</sup> In addition to the usual anti-money laundering and proceeds of crime provisions, the UK MSB provides for slavery and trafficking reparation orders,<sup>99</sup> whereby assets of the criminal will be used to pay compensation to the victim of either of the two main offences or the supplementary offences under the act. The NI Act has similar provisions in its section 10, referring to its Schedule 2. **There do not appear to be any reference to victim compensation or reparation orders in the Scottish bill. Earlier general provisions on criminal compensation are the Criminal Injuries Compensation Act 1995, which covers England & Wales, and Scotland, with NI operating on the basis of the Criminal Damage Compensation Northern Ireland Order 1977. It is not clear, however, that these provisions now extend to victims of human trafficking, as required by the EU directive, or victims of slavery, servitude and forced and compulsory labour.**

### **The UK MS Bill provisions for the whole of the UK**

The EU directive also addresses the issue of prevention, with member states required to “take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation” related to THB.<sup>100</sup> This should include, *inter alia*, internet campaigns, and the raising of awareness, “in cooperation with relevant civil society organisations and other stakeholders”. In addition the relevant professionals need to be trained, to include “front-line police officers”,<sup>101</sup> which would be a much broader group than specialists in THB units. The UK wide appointment of the Independent Anti-Slavery Commissioner (Part 4 of the UK MSB, building on earlier provisions in Wales) should address these issues. The Anti-Slavery Commissioner is, *inter alia*, tasked with marking official reports to any of the three relevant governmental bodies, “making recommendation to any public body,” which presumably would include the police services, and “providing information, education and training.”

The UK MSB, together with the two sub-national bills, shows some other examples of some innovative thinking, on behalf of all of the UK, with provisions which were not in the EU directive. All three jurisdictions developing prevention orders (slavery and trafficking prevention orders) in detail, something which seems to be in line with UK thinking in other areas of criminal and counter-terrorism law. In addition, for the whole of

<sup>98</sup> Article 17 of Directive 2011/36/EU.

<sup>99</sup> Sections 8, 9 and 10 of the UK Modern Slavery Bill.

<sup>100</sup> Article 18 of Directive 2011/36/EU.

<sup>101</sup> Article 18.3 of Directive 2011/36/EU.

the UK, the MSB have provisions in Part 6, Transparency in Supply Chains, and Maritime Enforcement, which is separately covered in section 35 to 39. How well the section 52 provisions on transparency in global supply chains work will be interesting to see in practice. A prior example of this can be seen in the US state of California's Transparency in Supply Chains Act 2010, which was also enacted with a view to combatting human trafficking. The Maritime enforcement provisions is provided for in different sections for all three UK jurisdictions in the MSB, along with provisions on hot pursuit of ships in UK territorial waters, with all transport issues and the use of defence assets being reserved to the UK government.<sup>102</sup>

## Conclusion

At the time of writing only the Northern Ireland proposals have become law. While the UK Modern Slavery bill is at a late stage of drafting, the Scottish bill is still being considered, and may well have new provisions added before being enacted. While the EU directive did require the UK to enact its provisions, it is clear that the challenge of addressing the issue of human trafficking has been fully taken on board by all three legislatures in the UK. Clearly the dominant thinking in the UK is that there is a need to address not just human trafficking, but also slavery, servitude and forced or compulsory labour. **Some of the directives requirements do not appear, at least on first reading of the texts of the three bills/acts, and may possibly be found, by specialists in the relevant fields, in other pieces of legislation already on the statute books, or in supporting case law. However, the fact that the provisions do not appear, or to be signposted in the new human trafficking legislation, is itself an issue.** This law is becoming increasingly challenging, and the need for law enforcement and support services to adjust to the change in emphasis, originally in the directive, and now in all three of the UK jurisdictions acts/ bills, will be great. One of the issues when examining law is how well the relevant law drafted. Then there is a need to examine how it is interpreted and implemented by the relevant courts, and thirdly, how well do these provisions actually work in practice. These latter two issues will have to be left to some future piece of research.

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<sup>102</sup> Scotland Act 1998, Schedule 5 Reserved Matters, Part I General Reservations, para 9, defence, and Part II Specific Reservations, Head E – Transport.

## **The Identification and Support of Child Victims of Trafficking in Scotland: A Child Protection Model, September 2014**

(Submitted to the National Referral Mechanism review as an alternative process possible for child trafficking in Scotland, produced by Dr Paul Rigby, University of Stirling; Kirsty Thomson, Legal Services Agency; Catriona Macsween, Scottish Guardianship Service, and Clare Tudor, Independent Consultant)

### **Introduction**

In February 2013 an earlier version of this paper was presented to a stakeholder group, proposing a child-rights approach to the identification and protection of child victims of trafficking in Scotland; an approach that sought to prioritise the protection of children being a higher policy and practice importance than immigration control.<sup>103</sup>

This updated paper, taking account of recent developments, proposes a model of child protection focused practice for child victims of trafficking in Scotland, underpinned by multiagency practice experience and research developed over the last 10 years. The proposal seeks to locate child trafficking practice firmly within existing devolved powers and legislation; any decisions regarding immigration control and residency remain firmly within the powers of the UK Government. This proposal does not necessitate any legislative changes and can be accommodated in existing child protection policy and practice in Scotland.

### **International, European and Domestic Responses**

The issue of trafficking has received considerable attention from politicians, policy-makers, academics and practitioners in the past 10-15 years, with significant efforts being made at various levels – international, European and domestic –to establish legal and policy frameworks capable of dealing with this complex and multi-faceted issue. While these efforts have resulted in the development of legal, policy and practical measures to identify and address the needs of victims of trafficking, they have so far fallen short of creating a system that recognises the particular vulnerability of child victims of trafficking and treating them as children first and foremost.

Recognising that child trafficking is child abuse and should be treated as such, this paper proposes a multi-agency, holistic, child-friendly, rights based approach to the identification and care of child victims of trafficking, in line with the original OSCE model of a National Referral Mechanism. The model is located within the area of child protection, led by child protection professionals, and following a GIRFEC child protection process and multi-agency response.

While defining and quantifying the phenomenon of human trafficking is a complex, and often controversial, task, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)<sup>104</sup> provided a definition which has been widely adopted internationally. There have been significant efforts to deal with human trafficking and ensure the protection of victims at EU level. Directive

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<sup>103</sup> McLeigh JD (2013) 'Protecting children in the context of international child migration' *Child Abuse and Neglect* 37, 1056-1068).

<sup>104</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 5 November 2000.

2011/36/EU transposed into UK law in April 2013 (EU Anti-trafficking Directive)<sup>105</sup> provides a definition directly applicable to UK responses:

1. The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age

The Directive obliges states to undertake measures to identify and provide assistance to victims, grant a recovery and reflection period of at least 30 days, issue residence permits if required, provide access to compensation and legal assistance, and observe guarantees in the context of return. While these rights are granted to all victims of trafficking, the particular vulnerability of children and the need to safeguard and promote their well-being is recognised through the introduction of child-specific provisions and explicit references to the best interest of the child. Urging Member States to adopt a child-rights approach, the Directive stipulates that the child's best interest should be the primary consideration and introduced additional provisions specifically directed at child victims of trafficking. These include the appointment of a guardian, an individual assessment of the special circumstances of each child with the obligation to take due account of the child's views, needs and concerns when providing support and assistance, as well as ensuring the protection of child victims of trafficking in criminal investigations.

Both the UK and Scottish government have taken important steps to tackle the issue of human trafficking and ensure they provide adequate protection to victims of trafficking, including identification and care. In line with the approach adopted at the international and European level, domestic policy documents have acknowledged the vulnerability of child victims of trafficking and emphasised the significant harm which exploitation causes them. The UK Government Human Trafficking Strategy, published in 2011<sup>106107</sup>, builds upon the initial experience of developing a formal mechanism for identifying victims – the National Referral Mechanism (NRM) – and includes a commitment to improve victim care arrangements. It has been supplemented by specific guidance on *Safeguarding Children Who May Have Been Trafficked* aimed at helping agencies that encounter, or have referred to them potential victims of child trafficking, to safeguard

<sup>105</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

<sup>106</sup> UK Government (2011) Human Trafficking: the Government's Strategy

and promote their welfare. Recognising the need for embedding the approach to child victims of trafficking within general child protection procedures, the guidance requires that all procedures developed for trafficked children should be consistent with the UK Government's statutory guidance on Working together to Safeguard Children.

### **Child Trafficking in Scotland**

There is now a broad consensus that human trafficking is an issue in Scotland, although there is no reliable data to quantify the prevalence of the phenomenon. The Scottish Government have responded by holding a high level summit on human trafficking and developing a strategic action plan and sub-groups to develop understanding and responses; a cross party parliamentary group is also engaging with agencies across the country to begin identifying and implementing appropriate responses. A Human Trafficking Bill is also presently going through the parliamentary process.

With regard to children, the difficulties of obtaining reliable data are compounded by the existence of child-specific forms of exploitation such as illegal intercountry adoption. Based on a questionnaire, distributed to various professionals dealing with child victims of trafficking, the Scottish Commissioner for Children and Young People estimated that between 2009-2011 concerns about trafficking had arisen in relation to 83 children across Scotland<sup>108</sup>.

From September 2010 until September 2014, the Scottish Guardianship Service has dealt with 48 children for whom there were concerns about trafficking. Glasgow City Council's social work Child Protection Team have had over 200 referrals regarding concerns about trafficking over the last six years. Since 2012 there have been 60 child referrals to the Competent Authorities from Scotland, as recorded by the National Referral Mechanism official statistics.<sup>109</sup> Children referred to the NRM have been victims of various types of exploitation and abuse including sexual abuse, commercial sexual exploitation, domestic servitude, forced marriage, physical abuse, criminality, benefits fraud and female genital mutilation. Research in Glasgow has indicated that for nearly half of the children identified as trafficked there is evidence of multiple exploitative situations.<sup>110</sup>

### **Getting it right for every child - GIRFEC**

The Scottish government has demonstrated its commitment to developing policies promoting the well-being of all children in Scotland, based on the values and principles of *Getting it Right for Every Child (GIRFEC)*. Concerning trafficked children, it has published specific guidance on *Safeguarding Children in Scotland Who May Have Been Trafficked*,<sup>111</sup> which firmly places the primary responsibility for child trafficking victims within the child protection framework and delineates the responsibilities of various agencies. A subsequent document provides detailed guidance regarding the assessment of children suspected of having been trafficked.<sup>112</sup> The guidance states that it is the responsibility of everyone who works with, or is in contact with children, to

<sup>108</sup> SCCYP (2011) *Scotland: A Safe Place for Child Traffickers – A Scoping Study into the Nature and Extent of Child Trafficking in Scotland* Edinburgh, Scotland's Commissioner for Children and Young People / University of Highlands and Islands [www.sccyp.org.uk](http://www.sccyp.org.uk)

<sup>109</sup> [www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism](http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism) Prior to 2012 referrals were not routinely broken down into countries of the UK

<sup>110</sup> Rigby P, Murie S, Ball, M (2012) *Child Trafficking in Glasgow: The Journey so Far*. Glasgow Child Protection Committee [www.glasgow.gov.uk/CHttpHandler.ashx?id=14223&p=0](http://www.glasgow.gov.uk/CHttpHandler.ashx?id=14223&p=0)

<sup>111</sup> Scottish Government (2009) [www.scotland.gov.uk/Publications/2009/02/18092546/0](http://www.scotland.gov.uk/Publications/2009/02/18092546/0)

<sup>112</sup> Scottish Government (2013) *Inter-Agency Guidance for Child Trafficking* <http://www.scotland.gov.uk/Resource/0043/00437636.pdf>

work together to safeguard and promote the welfare and rights of all children, including trafficking victims. Due to the complex nature of trafficking and the multiple needs of child victims, which require coordinated responses from a number of agencies, the guidance urges local child protection committees to consider develop inter-agency protocols to guide actions of professionals when faced with concerns that a child may be a victim of trafficking.

The government has also supported the establishment of a Guardianship Service for all separated young children, including victims of trafficking. The Service has been shown to be effective in a number of areas that safeguard and promote the well-being of young people. Concerning trafficked children, guardians have been instrumental in identifying potential victims and facilitating disclosure.

The measures adopted by the Scottish Government have the potential to ensure that trafficked children in Scotland are safeguarded. However, while the Scottish Government has the protection framework and policy guidance in place, the shortcomings (detailed below) of the current NRM process through which child victims are identified may prevent the realisation of the potential of these measures. Without a child-rights based mechanism for the identification and care of child trafficking victims, led by child protection experts coordinating a multi-agency response, commitment to 'get it right for every child' may be compromised in respect of trafficked children.

National reports on human trafficking in Scotland<sup>113</sup> have recommended that the Scottish government should demonstrate leadership and be more proactive in developing a strategy to tackle human trafficking. With regard to children in particular, the Equal Opportunities Committee (2010) recommended the government consider restructuring the NRM process and giving services responsible for child protection the authority to identify victims of trafficking. It also recommended the establishment of an integrated approach to child trafficking in Scotland. The 2011 SCCYP report emphasises the need to review the application of NRM to children and urges the Scottish Government to act as a lead regarding the efforts of local authorities across Scotland to combat child trafficking.

Under the EU Anti-trafficking Directive Scotland is required to ensure compliance with international conventions regarding the situation of child victims of trafficking in order to ensure that the treatment of these children is in line with the obligations enshrined in the Directive. For those areas of devolved policy and law, mainly that of the protection and support of children, the Directive applies directly to Scotland, allowing individuals to bring up cases in Scottish courts relying directly on its provisions.

### **The existing NRM process, its shortcomings and impact on children**

Following the ratification of the Council of Europe Convention on Action Against Trafficking in Human Beings, a formal mechanism for identifying and protecting victims of trafficking including children - a National Referral Mechanism - was introduced in the UK in April 2009. Once there is a suspicion, based initially on certain indicators, that a child may be a victim of trafficking or a child discloses that they have been trafficked, designated agencies - First Responders<sup>114</sup> - may submit a referral to a Competent

<sup>113</sup> Scottish Parliament Equal Opportunities Committee (EOC) (2010) Inquiry into Migration and Trafficking; Equality and Human Rights Commission (EHRC) (2011) Inquiry into Human Trafficking in Scotland; (SCCYP) (2011)

<sup>114</sup> A list of all 'First Responders' can be found here: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>

Authority for assessment. The Competent Authority is either the UK Human Trafficking Centre or, in cases where there are immigration issues, UK Visas and Immigration.

Scottish guidance indicates that if an agency, a practitioner or a volunteer suspects a child may be a victim of trafficking they should make a referral to social work or the police, as per existing child protection guidance. The inter-agency guidance establishes the procedures to be followed in such cases and indicates a multi-agency child protection meeting is convened and a decision made whether to make a referral to the Competent Authority. The starting point for most professionals is usually the “risk indicator matrix” containing a number of indicators whose presence may indicate that a child is a potential victim of trafficking, supported if necessary by a comprehensive Child Trafficking Assessment (CTA), which will determine whether a NRM referral is required.

If a decision to refer the case to the NRM is made at the child protection meeting, a NRM report is submitted to the Competent Authority along with the completed indicator matrix. Within a relatively short period – usually five days - the Competent Authority issues a Reasonable Grounds decision as to whether the child may have been trafficked. The decision is based on a reasonable grounds test, which has a low threshold, *reasonable grounds to believe*<sup>115</sup>.

If the decision is positive, a 45-day recovery and reflection period is granted. This period is to allow the person to recover and escape the influence of traffickers and/or to take an informed decision regarding co-operation with the authorities (primarily law enforcement authorities). Where there are immigration issues, a potential victim cannot be removed from the UK. The period may be extended subject to the discretion of the Competent Authority. Following evidence gathering and further inquiries by the Competent Authority undertaken during the 45-day period, a Conclusive Grounds decision on whether the person is a victim of trafficking is issued. The standard of proof on which the decision is based is the one applied in civil cases, *the balance of probabilities*<sup>116</sup>.

A positive Conclusive Grounds decision may lead to the granting of a renewable one-year residence permit. This is in line with Home Office policy on discretionary leave. It can be on the basis of the personal circumstances of the victim, where a compensation claim against the trafficker has been lodged or if the victim agrees to cooperate with the police.

While the introduction of the NRM has been welcomed as a positive step towards ensuring professionals identify and protect victims of trafficking, its relevance and appropriateness to child victims has been questioned. Although the UK and Scottish Governments have recognised that all forms of child trafficking are abuse, and despite calls not to treat child trafficking as merely a sub-category of human trafficking, the NRM does not always reflect this.<sup>117</sup> Often, instead of treating them as children first and

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<sup>115</sup> The test that should be applied is whether the statement “I suspect but cannot prove” would be true and whether a reasonable person would be of the opinion that, having regard to the information in the mind of the decision maker, there were reasonable grounds to believe the individual concerned had been trafficked. (UKBA, “Guidance for Competent Authorities”).

<sup>116</sup> Balance of probabilities essentially means trafficking as defined by the Directive is more likely than not to have happened. Decision makers should be satisfied that on the evidence available, the event is more likely to have happened than not. This standard of proof does not require the decision maker to be certain that the event did occur (UKBA, “Guidance for Competent Authorities”).

<sup>117</sup> ECPAT (2010) *Child Trafficking in the UK: A Snapshot* London, End Child Prostitution and Trafficking UK [www.ecpat.org.uk](http://www.ecpat.org.uk); Wallace, MM., and Wylie, K. (2011) Child Trafficking: A Scottish Perspective *Commonwealth Judicial Journal* 19, 1, June.

foremost, the NRM deals with child victims of trafficking as ‘mini-adults’ as the system was designed for adults and geared towards their needs. Given the well-developed child protection framework, the international and domestic legal obligations to safeguard and promote the welfare of children and the Scottish Government’s commitment to ‘get it right for every child’, the compliance of the present NRM system with a child’s best interest and rights is debateable. This is especially so if the NRM fails to reflect the recognition of child trafficking as child abuse, and does not recognise the primacy of safeguarding children over any other concerns, including immigration.<sup>118</sup>

It has been stated that placing the responsibility for identifying child victims of trafficking with an agency whose primary function is border control creates a conflict of interest and leads to overly bureaucratic decision making with little regard for its impact on the child.<sup>119</sup> UKVI is under statutory obligation to safeguard and promote the welfare of children in discharging its duties under Section 55 of the Borders, Citizenship and Immigration Act 2009 and considerable efforts have been made to comply with this requirement. However, there can be no doubt those child protection authorities, whose primary duty is the protection of children and who have the experience, training and expertise required to identify and provide care to child victims of trafficking, are in a better position to ensure that both reasonable and conclusive grounds decisions, and subsequent interventions, are in the child’s best interest.

There is evidence that local authorities in the UK do not always believe a referral to the NRM is in the child’s best interest and have decided not to refer cases due to concerns about its ability to adequately support and protect children.<sup>120</sup> The experience of practitioners also suggests that while a positive conclusive grounds decision is of little practical benefit to children in terms of an asylum claim, a negative one could have an adverse effect on the credibility of their claim<sup>121</sup>. An obvious solution to this would be the separation of decision-making on the issue of child trafficking / child abuse from that on asylum claims and immigration status, allowing the authorities who are best equipped for each task, local child protection systems and the Home Office, to deal with their own areas of practice respectively.

### **New Procedure for Identifying Child Victims of Trafficking in Scotland (Glasgow Model)**

To improve the current NRM process in Scotland with regard to children this section outlines a child-rights based, multi-agency approach to the identification of child victims of trafficking, led by local Child Protection Committees in line with national and local child protection guidance.

The new model (please read in conjunction with flow chart attached) envisages that the responsibility for both identification and care of trafficked children will lie with child protection authorities consistent with everyday child protection practice. Under the new procedure, as soon as there is a suspicion or disclosure that a child may have been a

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<sup>118</sup> As the EOC Report states: *One of the main general concerns of those who provided evidence on the NRM is that the process of identifying whether or not someone is a victim of trafficking is too heavily intertwined with the process of determining a person’s immigration status.*

<sup>119</sup> ECPAT (2010), EOC (2010); ATMG (2010) *Wrong Kind of Victim? One Year On: An Analysis of UK Measures to Protect Trafficked Persons* London, Anti-Trafficking Monitoring Group [www.antislavery.org](http://www.antislavery.org)

<sup>120</sup> ECPAT 2010; London SCB (2011c) *Final Monitoring Report Local Authority Pilots of the London Safeguarding Trafficked Children Guidance and Toolkit* London Safeguarding Children Board [www.londonscb.gov.uk/trafficking](http://www.londonscb.gov.uk/trafficking)

<sup>121</sup> Sometimes the decision is written by the same case owner (Chandran 2012: 34) and there are cases in which an asylum decision has been cut and pasted into the trafficking decision, or vice versa (EOC 2011)

victim of trafficking, a referral will be made to social work and police in line with local child protection procedures. There should be at least two nominated, specifically trained social work leads in each Child Protection Committee area – registered social workers at Senior Manager or Team Leader level, or the equivalent in Police Scotland - to oversee the process until such a time that all relevant professionals are appropriately trained.

An initial multi-agency child protection case discussion (meeting or virtual) will be convened as soon as possible if the initial screening by the leads (and in discussion with other agencies) considers the young person is a potential victim of trafficking. Contributions to the case discussion will be sought from police, social workers, residential workers, education, health and the third sector as per existing child protection guidance (and any other professionals who have contact with the young person, including UKVI if there are immigration issues).

The decision from this discussion is in effect the current “reasonable grounds” decision and will lead to a child protection case conference if there are concerns about trafficking. Therefore, the decision from this discussion would be ‘notified’ to UKVI if there are immigration issues, so ensuring that any potential child victim is not removed from the UK in line with the aim behind the recovery and reflection period (under child protection practice ‘recovery and reflection’ continues for as long as a child requires protection and support). In terms of present child protection practice in Scotland any co-operation, or not, with law enforcement agencies would be contingent on the circumstances of each case and decisions of the child (where appropriate) and will not impact on any support and protection plans.

Following a case discussion and recognition of a potential trafficking victim, a date should be set for a child protection case conference in line with local and national child protection guidance (this should be 21 calendar days from the initial referral). This initial child protection case conference should include all the relevant agencies working with the young person, including UKVI where there are immigration issues. The young person and / or carer need not attend the meeting (indeed it may not be appropriate at this stage if the young person does not know they are a victim of trafficking or there are concerns about the accompanying adults). However, the young person will be given an opportunity to pre-record a statement on video or other form of recording, or have their views heard at the conference via other means.

On the basis of all available evidence the initial child protection case conference will make a multi-agency decision as to whether the child has been trafficked (same status as current conclusive grounds decision). In the case of absence of overall consensus, there should be a majority decision, or the chair (usually social work) should have the defining responsibility to reach a decision. The conference meeting minutes will contain a clear decision outlining the reasons why there is a belief the child has, or has not been, trafficked. The decision would again be ‘notified’ to UKHTC (statistical purposes) and to the Home Office UKVI where there are immigration issues. The present child protection system allows for ongoing feedback and review of progress, with regular written reports to monitor developments.

The Home Office are responsible for immigration control and for claims related to international humanitarian protection and residency. This model does not propose to interfere with the powers or role of the Home Office in this regard. It would be envisaged that in most cases the Home Office will accept the above child protection decision. Unless there are compelling reasons not to (which should have been shared with the

multi-agency case conference) the Home Office will accept the multi-agency child protection decision and make any future immigration / humanitarian protection decisions taking into account whether or not the child has been identified as a victim of human trafficking. This is similar to how the Home Office currently operate in respect of decisions on the age of individuals where local authorities carry out the age assessment.

In recognition of the difficulties faced in assessing and identifying trafficked children, especially those who have arrived in the country as non UK nationals, if a conclusive decision cannot be made at the initial case conference the decision can be postponed for further assessment and information gathering for six weeks. During the six-week period, a child protection core group, overseen by the trafficking lead (nominated child protection team manager / senior social work manager or Police Officer), should collect the relevant information liaising with a variety of sources (eg NGOs; housing authorities; international aid agencies; Home Office; UKHTC; Red Cross). A reconvened case conference will include all the practitioners invited to the initial one and any other professional or support worker who has become involved with the young person.

The above noted process as well as identifying whether a child is a victim of human trafficking or not has the dual purpose of assessing each child's particular needs and ensuring access to safe accommodation, education, health, appropriate legal assistance etc in line with international and domestic standards, and similar to other child protection / safeguarding cases.

As with any child protection case, decisions made at the child protection case conference can be challenged by the young person (or relevant adult) through internal review processes; any agency can also register dissent to the decision. If any internal challenge fails, the young person in conjunction with his/her legal representative may investigate whether a Judicial Review may have any merit as with any other decision of a local authority in this regard. However, this would arguably be very difficult if the process laid out above was fully adhered to and the decision had been made in a holistic manner by a multi-agency decision making body in line with article 10 of the Council of Europe Convention.

### **Children's Hearing System**

After decision by a child protection case conference, and in line with existing child protection provisions, the case will be referred to the Children's Reporter if it is considered that compulsory measures of care are required. Such a referral, and acceptance of grounds, would give a legal footing to all trafficking cases, especially for conditions of residence if the child is looked after and accommodated by the local authority. Subject to a decision by the Children's Panel a supervision requirement, with a condition of residence, may be imposed, providing additional legal safeguards. Due to the risks associated with child trafficking a referral to the Children's Hearing System should be the default practice.

Currently, the Children's Hearing System would generally not be able to deal with those young people aged above 16 and not previously known; the majority of trafficking victims identified to date in Scotland appear to be between 16-17 years old. In order to meet the requirements of the EU Anti-trafficking Directive, there should be a legal provision enabling the referral of child victims of trafficking above 16 years old to the Children's Panel. As with any other Children's Hearing the grounds of referral can be challenged by an appeal to the Sheriff Court, another advantage of the proposed system for dealing with child victims of trafficking.

**Benefits of the Proposed Model**

There are a number of features of the proposed model that overcome the shortcomings of the current NRM model. Adopting it would reflect a child-rights approach to child trafficking, enhance the quality of decisions and ensure the primacy of a child's best interest, with direct input from the children. Most members of the multi-agency meeting making decisions will also have met, or be working with, the child and will continue to work with them following any decision, therefore the process will not be a paper based exercise and should improve decision making. As with any child welfare and protection cases the decisions will form part of a longer term child's plan and will ensure continuity of care and benefits to the child's wellbeing. There will also be less red tape and delays in decision making for the child as the local child protection agencies will have more control over when they can make a decision and this can be communicated immediately to the child

A multi-agency decision-making procedure led by child protection professionals will ensure that Scotland develops practice in line with international obligations, and directly answers the recommendations of leading anti-trafficking experts. It improves the co-ordinated identification, protection and support of child victims of trafficking, where those making decisions will be those professionals working with the child. Rather than relying on a limited number of First Responders, the new system would enable everyone, including members of the public, to bring a case for consideration by child protection authorities, as per any other child protection concerns.

The proposed system will be GIRFEC compliant and child centred, not least because it avoids potentially traumatic, multiple trafficking interviews, and as it is needs focussed it allows for a non-time limited recovery and reflection safeguarding period. It ensures the child's needs are met on the basis of risk and need, and offers sufficient time to find a durable solution based on those needs, rather than any asylum/immigration issues. Needs will be determined for each child, giving due consideration to his or her views, in line with the requirements of Article 12 UNCRC.

While concerns have been expressed by the UK Government regarding immigration being a reserved matter, this model does not encroach on their prerogatives re immigration / asylum issues. No changes are needed to primary UK legislation as decisions made in Scotland relate purely to devolved powers, to determine if a child has been exploited / abused through trafficking, and to identify subsequent support needs. Local authorities, under the Children Scotland Act (1995) and in line with Article 4 of the European Convention of Human Rights and the EU Anti-trafficking Directive, should already be identifying child victims of human trafficking and ensuring that their basic protection needs are met. These duties exist regardless of any decision from the UKVI under present NRM protocols.

UKVI would only need to look at the immigration matters of a case rather than making the trafficking decision resulting in case owners spending less time on a case, saving time and money for UKVI. There will also be a reduction in delays in decision making, potentially reducing additional stresses for children, if UKVI can focus on immigration issues and child protection services can focus on protection and needs.

The model set out in this paper clarifies the policy and practice position and provides a framework under which obligations can be met. It places the child protection interest as the primary decision-making principle and permits Scotland to develop a mechanism that protects children who have been trafficked, achieving the best possible policy and practice outcomes for children within the devolved powers on child protection. The

Home Office has already recognised that local authorities have acquired considerable expertise in working with children and they normally accept their findings on age assessment<sup>122</sup>. Child protection professionals making decisions about whether a child has been exploited would constitute recognition of their expertise in child related matters and would allow the Home Office and UKVI to focus on their core activities.

A major problem for child victims of trafficking is the discrepancy in the definition of a child under Scottish, international, and EU law. In Scotland, a child is usually defined as someone below the age of 16, while international and EU trafficking legislation defines a child as a person below 18 years of age. This has particular implications regarding the difficulty in referring children above age 16 to the Children's Hearing system, who were previously not known. Currently, many trafficked children arriving in Scotland would find it difficult to receive additional compulsory measure of supervision under the Children's Hearing legislation. This is an area that requires immediate attention.

### **Identifying and rolling out best practice - The Glasgow Model**

The majority of trafficked children identified to date in Scotland presented in the Glasgow area. Nearly ten years of experience has been gained in working with trafficked children in the city and a key component of best practice development has been a commitment by various professionals and agencies to work together in the best interests of children and young people. New and established services have learned as they work together with young people and in some instances young trafficked people have informed the creation of the services that are responsible for protecting them.

Glasgow Child Protection Committee has commissioned research in the form of cold case reviews and empirical research<sup>123</sup> that has provided an evidence base for responses and now for this proposed national model.

The Scottish Guardianship Service<sup>124</sup> was launched as a pilot project and became fully operational in September 2010. The service is designed to support all separated young people through the complex myriad of immigration, socio-welfare and legal processes they are faced with on first arrival in Scotland by allocating a Guardian to each young person. Approximately 32% of their current cases are young people who have indicators suggesting they may be the victims of trafficking. It was envisaged that the combination of an entirely independent advocacy worker who is a consistent support to the young person and works intensively with them from first point of arrival to integration or removal may engender trust and encourage quicker disclosure. There are two outcomes for the project relating to the young persons' better experience of the asylum and immigration processes, systemic improvement and improvement in decision making. An independent evaluation monitored and evaluated the service, reporting success is achieving, or moving towards these outcomes progress one each outcome.<sup>125</sup>

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<sup>122</sup> UKBA's guidance on age assessment states that: "in cases where the local authority's assessment is the only source of information about the applicant's age – their assessment will normally be accepted as decisive evidence". Only in certain circumstances are case workers expected to discuss the findings with the local authority or challenge their assessment (e.g. unclear or unsupported findings or assessment not based on Merton principles). See "Assessing Age", p. 10-11.

<sup>123</sup> Rigby, P. (2009) *Child Trafficking in Glasgow: Report of a Case File Analysis of Unaccompanied Asylum Seeking Children* – Glasgow Child Protection Committee [www.glasgowchildprotection.org.uk](http://www.glasgowchildprotection.org.uk); Rigby 2010; Rigby et al 2012

<sup>124</sup> <http://www.aberlour.org.uk/scottishguardianshipservice.aspx>

<sup>125</sup> <http://www.scottishrefugeecouncil.org.uk/guardianship>

The service has developed relationships with, and straddles both the child protection and asylum sectors and collaborates with several key agencies. Part of their remit is ensuring appropriate information flows and that the young people understand what is happening at each stage and that their voice is heard in all the processes. This is particularly relevant in trafficking related cases where more professionals become involved with young people and they are currently dual processed through both the trafficking identification and asylum system.

The combination of these services and commitment of professionals therein have led to the “*Glasgow Model*” in its widest form developing into a best practice model. Policy leads across the UK, and indeed in Europe, have been interested in the model, as it is one of the few based on empirical research. This has included ongoing monitoring and evaluating of services, continued profiling of young trafficked people, and policy, practice and research professionals working collaboratively across agencies, with dedicated police and social work staff leading in policy and practice advice.

### **Training and awareness raising**

Identification, in addition to the provision of support and protection to child trafficking victims, will require a broad training and awareness raising programme. It is essential that front line service personnel are trained by expert practitioners who can provide detailed case studies and insightful examples from direct experience of working with trafficked children and research within child protection and asylum systems. Training will be provided by professionals immersed in child trafficking practice within a Scottish system, who are also able to locate a child’s experience within the global and local contexts which contribute to the exploitation and abuse of a particularly vulnerable group of children.

Awareness raising is also crucial, although this will be provided on a larger scale, using creative methods such as social media, advertisements in public places, on public transport and crucially in schools. Police Scotland have been instrumental in developing awareness raising campaigns and publicity across the country.

### **The future**

There is little doubt that the implementation of the NRM in the UK as a national policy response to the EU Anti-trafficking directive exhibits some serious shortcomings in relation to the recognition of the specific vulnerabilities, needs and best interests of children. Scotland has contributed much good practice and models of care, supported by a robust evidence base, in relation to the identification of children who have been trafficked. The proposed model builds on this and details a child centred solution that is located within the existing child protection process. Adopting a model that does not view children as ‘mini-adults’ in an adult focused NRM process, will ensure that children who may have been trafficked receive the same care and attention as any abused or exploited child.

**Justice Committee**

**8<sup>th</sup> Meeting, 2015 (Session 4), Tuesday 10 March 2015**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following affirmative instrument:

**Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015  
[draft]**

**Introduction**

2. This instrument was made under the powers conferred by section 137 of the Courts Reform (Scotland) Act 2014 and all other enabling powers. The instrument makes consequential amendments to other legislation to take account of changes made by the 2014 Act. It also makes amendments in consequence of the creation by the Act of the office of summary sheriff.

3. This Order comes into force on 1 April 2015.

4. Further details on the purpose of the instrument can be found in the policy note (see below) to this paper and an electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/sdsi/2015/9780111026625/contents>

**Consultation**

5. According to the policy note, no formal consultation has taken place on the Order as it is being made as a consequence of the 2014 Act which has already been the subject of separate consultation exercises.

**Delegated Powers and Law Reform Committee consideration**

6. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 3 March 2015 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

**Justice Committee consideration**

7. The Justice Committee is required to report to the Parliament on the instrument by 30 March 2015.

8. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Minister for Community Safety and Legal Affairs has lodged motion S4M-12522 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 10 March to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to this motion,

and then to report to the Parliament by 30 March 2015. Thereafter, the Parliament will be invited to approve the instrument.

**9. The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.**

**Policy Note: Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2015 [draft]**

The above instrument is made in exercise of the powers conferred by section 137 of the Courts Reform (Scotland) Act 2014 (“the Act”).

**Policy objectives of the 2014 Act**

The Act delivers an enabling framework to reform the civil courts both structurally and functionally in line with many of the recommendations of the Scottish Civil Courts Review. Reform of the civil courts forms part of the Scottish Government and multi-agency programme, ‘Making Justice Work’.

The policy objectives relating to the Act are fully described in the Policy Memorandum which accompanied the Bill. The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum.

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx>

**Policy objectives of this instrument**

The Act repeals and re-enacts provisions of the Courts of Law Fees (Scotland) Act 1895; the Sheriff Courts (Scotland) Acts 1907 and 1971; and the Court of Session Act 1988. This Order makes consequential amendments to other enactments to take account of these changes. It also makes amendments in consequence of the creation by the Act of the office of summary sheriff.

**Commencement**

The order is scheduled to come into force on 1 April 2015 to coincide with the commencement of provisions in the Courts Reform (Scotland) Act 2014 (Commencement No.2, Transitional and Saving Provisions) Order 2015.

**Consultation**

No formal consultation has taken place on the Order as it is being made as a consequence of the 2014 Act which has already been the subject of separate consultation exercises.

The consultations can be viewed on the Scottish Government website at [www.scotland.gov.uk/Publications/2013/02/5302](http://www.scotland.gov.uk/Publications/2013/02/5302) and [www.scotland.gov.uk/Publications/2013/05/6753](http://www.scotland.gov.uk/Publications/2013/05/6753)

Analyses of responses can be found at [www.scotland.gov.uk/Publications/2013/09/8038](http://www.scotland.gov.uk/Publications/2013/09/8038) and [www.scotland.gov.uk/Publications/2013/05/6753](http://www.scotland.gov.uk/Publications/2013/05/6753)

## **Impact Assessments**

An equality impact assessment and a Business and Regulatory Impact Assessment have already been completed on the Courts Reform (Scotland) Bill – see links below.

<http://www.scotland.gov.uk/Publications/2014/03/9822>

<http://www.scotland.gov.uk/Publications/2014/03/9314>

Cameron Stewart  
Learning and Justice Directorate

## Justice Committee

8<sup>th</sup> Meeting, 2015 (Session 4), Tuesday 10 March 2015

### Subordinate legislation

#### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

**Advice and Assistance (Assistance by Way of Representation) (Scotland)  
Amendment (No. 2) Regulations 2015 [draft]**

#### Introduction

2. This instrument was made under the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986 and all other enabling powers. The purpose of the instrument is to amend the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to make Assistance by Way of Representation (ABWOR) available for proceedings under the Counter-Terrorism and Security Act 2015. The proceedings for which ABWOR is made available are proceedings relating to the review of decisions relating to temporary exclusion orders (under section 11 of the 2015 Act) and proceedings relating to an application by a senior police officer under paragraph 8 of Schedule 1 to the 2015 Act for an extension of the 14-day period during which a travel document may be retained.

3. Further details on the purpose of the instrument can be found in the policy note (see below) to this paper and an electronic copy of the instrument is available at: <http://www.legislation.gov.uk/sdsi/2015/9780111026540/contents>

#### Consultation

4. According to the policy note, there was limited time for consultation due to the speed of the 2015 Act's passage through the UK Parliament. The Scottish Legal Aid Board was consulted in drafting the provisions and the Law Society of Scotland was notified that the draft instrument would be laid and of its policy objectives.

#### Delegated Powers and Law Reform Committee consideration

5. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 3 March 2015 and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

#### Justice Committee consideration

6. The Justice Committee is required to report to the Parliament on the instrument by 30 March 2015.

7. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Minister for Community Safety and Legal Affairs has lodged motion

S4M-12524 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 10 March to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to this motion, and then to report to the Parliament by 30 March 2015. Thereafter, the Parliament will be invited to approve the instrument.

**8. The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.**

**Policy Note: Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2015 [draft]**

The above instrument was made in exercise of the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

**Policy Objectives**

The Counter-Terrorism and Security Act 2015, which received Royal Assent on 12 February 2015, aims to stop people travelling overseas to fight for terrorist organisations or to engage in terrorism-related activity and subsequently returning to the UK; and to deal with those already in the UK who pose a risk to the public. The Act introduces provisions for:

- the retention of travel documents for an initial period of 14 days, extendable to 30 days (provisions in force from 13 February 2015) ;
- and temporary exclusion orders, which prevent the individual from returning to the UK unless their return is either in accordance with a "permit to return" issued by the Secretary of State or they are deported to the UK by the state they are in (provisions in force from 12 February 2015).

The instrument amends regulation 3 of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to make assistance by way of representation (ABWOR) available for the retention of travel documents extendable to 30 days and temporary exclusion order review proceedings.

**Consultation**

There was limited time for consultation due to the speed of the Act's passage through Parliament. The Scottish Legal Aid Board was consulted in drafting the provisions and the Law Society of Scotland was notified that the draft instrument would be laid and of its policy objectives.

**Impact Assessments**

An equality impact assessment for this policy was undertaken and is attached. There are no equality impact issues.

**Financial Effects**

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that it will allow legal firms and sole

practitioners to provide timeous publicly-funded legal assistance to their clients. The Scottish Legal Aid Board estimates the provisions in the instrument will result in a cost of less than £10,000 per annum to the legal aid fund.

Scottish Government  
Justice Directorate  
16 February 2015