



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Delegated Powers and Law Reform Committee**

**13th Report, 2015 (Session 4)**

### **Human Trafficking and Exploitation (Scotland) Bill at stage 1**

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## **Delegated Powers and Law Reform Committee**

### **Remit and membership**

#### **Remit:**

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
  - (a) any—
    - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
    - (ii) [deleted]
    - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
  - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
  - (c) general questions relating to powers to make subordinate legislation;
  - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
  - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
  - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
  - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
  - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

#### **Membership:**

Nigel Don (Convener)  
John Mason (Deputy Convener)  
Margaret McCulloch  
John Scott  
Stewart Stevenson

**Committee Clerking Team:**

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## Delegated Powers and Law Reform Committee

### 13th Report, 2015 (Session 4)

#### Human Trafficking and Exploitation (Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 27 January and 17 February, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Human Trafficking and Exploitation (Scotland) Bill (“the Bill”)<sup>1</sup>. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

#### OVERVIEW OF BILL

2. The Human Trafficking and Exploitation (Scotland) Bill (“the Bill”) was introduced on 11 December 2014 by the Cabinet Secretary for Justice. The Justice Committee is the lead committee for the Bill.

3. The Bill consolidates and adds to the existing criminal law relating to human trafficking. It is in 6 parts. Part 1 concerns offences. It creates a new statutory offence of human trafficking, punishable where prosecuted on indictment by life imprisonment. Section 4 of the Bill creates an offence of slavery, servitude and forced or compulsory labour and it provides for the aggravation of other offences by their having a connection with human trafficking activity.

4. Part 2 of the Bill concerns the protection of victims. It requires the Lord Advocate to make and publish guidelines about the prosecution of a person who has done an act constituting an offence but who appears to be a victim of the offence of human trafficking or an offence under section 4 of the Bill and who has been compelled to do that act. Part 2 also places a duty on the Scottish Ministers to secure support and assistance for a person who appears to be the victim of an offence of human trafficking.

5. Part 3 makes provision in connection with the confiscation of property. It grants power to police constables to detain vehicles, ships or aircraft in particular circumstances, and it confers power on the court to order the forfeiture of vehicles, ships and aircraft in circumstances where a person has been convicted of the offence of human trafficking.

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<sup>1</sup> Human Trafficking and Exploitation (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4\\_Bills/Human%20Trafficking%20Bill/b57s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Human%20Trafficking%20Bill/b57s4-introd.pdf)

6. Part 4 of the Bill creates two new types of civil order: the Trafficking and Exploitation Prevention Order (“TEPO”) and the Trafficking and Exploitation Risk Order (“TERO”). TEPOs and TEROs are court orders containing prohibitions or requirements to be complied with by the person who is the subject of the order. A TEPO may be made in circumstances where a person has been convicted of a relevant trafficking or exploitation offence (defined in section 12), either on sentencing for that offence, or by way of separate application to the court by the chief constable. A TERO may be made on application to the court by the chief constable. Before making either type of order the court is required to be satisfied that the person has acted in a way which means that there is a risk that the person may commit a relevant trafficking or exploitation offence. A court may make a TEPO or a TERO only if it is satisfied that each prohibition or requirement in the order is necessary for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm that may result if that person did commit such an offence.

7. Part 5 of the Bill concerns strategy and reporting. Section 31 requires the Scottish Ministers to prepare a trafficking and exploitation strategy, to set out such actions, arrangements and outcomes as the Ministers consider appropriate in relation to the conduct which constitutes an offence under the Bill. The Scottish Ministers are required to review the strategy at 3-yearly intervals and to consult such persons as they consider likely to have an interest in the strategy. The strategy must be laid before the Scottish Parliament.

8. Part 6 of the Bill makes provision in respect of subordinate legislation, ancillary provision and commencement.

#### DELEGATED POWERS PROVISIONS

9. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)<sup>2</sup>. The Committee first considered the Bill at its meeting on 27 January 2015. At that meeting, the Committee agreed that it did not need to draw the attention of the Parliament to the following powers:

- Section 6(7) – Power to modify who is a public official and the definition of an international organisation for the purposes of section 6
- Section 7(1) – Duty to issue guidelines on prosecution of victims of offences
- Section 12(2) – Power to amend list of relevant trafficking and exploitation offences for the purposes of Part 4
- Section 29(1) – Power to amend list of orders under section 28(2)

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<sup>2</sup> Human Trafficking and Exploitation (Scotland) Bill Delegated Powers Memorandum available here: [http://www.scottish.parliament.uk/S4/Bills/Human\\_Trafficking\\_and\\_Exploitation\\_Bill\\_-\\_DPM.pdf](http://www.scottish.parliament.uk/S4/Bills/Human_Trafficking_and_Exploitation_Bill_-_DPM.pdf)

- Section 31(1) – Duty to prepare trafficking and exploitation strategy
- Section 33(2) – Power to specify Scottish public authorities for the purposes of subsection (1)
- Section 34(3) – Power to specify a Scottish public authority and content of notification
- Section 41 – Commencement

10. At the same meeting, the Committee agreed to write to the Scottish Government to raise questions on the powers in section 8(2)(b)(i) (duty to secure support and assistance) and section 38 (ancillary provision). The correspondence is reproduced at the **Annex**. In light of the responses received by the Scottish Government, the Committee agreed that it did not need to draw the attention of the Parliament to the power in section 38 (power to make ancillary provision).

### **Recommendation**

11. The Committee comments on the remaining power in the Bill as follows:

#### **Section 8(2)(b)(i) – power to specify period of provision of assistance to adult victims**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative</b>

#### *Provision*

12. Section 8 of the Bill requires the Scottish Ministers to secure for an adult, during the “relevant period” such support and assistance as they consider necessary given the adult’s needs. The duty applies in circumstances where there are reasonable grounds to believe that that person is a victim of an offence of human trafficking. Support and assistance may be provided in connection with accommodation, day to day living, medical advice and treatment, language translation or interpretation, counselling, legal advice, information about other available services and repatriation.

13. Section 8(2) defines the “relevant period” for the purpose of the obligation in section 8(1). It provides that the relevant period begins on the date it is determined that there are reasonable grounds to believe that the adult is a victim of the offence of human trafficking. The relevant period ends either on a date specified in regulations made by the Scottish Ministers or the date on which there is a conclusive determination that the adult is not a victim of the offence of human trafficking (whichever is earlier). Section 8(2)(b)(i) of the Bill therefore confers a delegated power upon the Scottish Ministers to specify the end date of the period during which they are obliged to provide support and assistance in accordance with the duty imposed by section 8(1). The power is subject to the negative procedure.

#### *Comment*

14. The Committee sought further justification of the choice of negative procedure for this power on the basis that its exercise will have a direct impact on the scope and application of the duty to secure support and assistance placed on the Scottish Ministers by virtue of section 8(1) of the Bill, which is highly relevant to those persons who may receive such support and assistance. In particular, the Committee asked why the negative procedure was considered appropriate as opposed to the affirmative procedure, which would give the Parliament a greater role in approving the setting of an end date to the period during which support and assistance is to be provided.

15. In response to the Committee's question, the Scottish Government explained that the Bill seeks to put on a statutory footing existing arrangements relating to the provision of support and assistance to victims of human trafficking. The obligation to provide support and assistance derives from the Council of Europe Convention on Action against Trafficking in Human Beings, which requires a minimum reflection and recovery period during which support and assistance must be provided to victims. The recommended minimum period under the Convention is 30 days. The Scottish Government currently adheres to a period of 45 days set by the UK Government on an administrative basis.

16. The Scottish Government also argues that the establishment of the first and subsequent periods in regulations made under section 8(2)(b)(i) will be influenced by UK Government practice. The negative procedure is considered to strike an appropriate balance between the interests of the Parliament in overseeing the arrangements that are made and the need for Ministers to be able to determine the appropriate scope of its mandatory duty to victims. Negative procedure will also enable quick and flexible responses to changes to the period which occur at a UK or an international level.

17. The Committee does not consider the fact that these arrangements are currently made on an administrative basis is determinative of the level of scrutiny that should apply when they are placed on a statutory footing. The inclusion of the duty to secure support and assistance on the face of the Bill gives the Parliament a direct interest in the duty to provide support and assistance, and the proposed delegation to Ministers of the power to determine an end date for the period of assistance invites consideration from first principles of what the Parliament considers is the appropriate procedure to be adopted, regardless of the previous status of the duty.

18. The Committee reiterates its view of the significance of this power and the fact that the period during which support and assistance is to be provided to an adult is a key aspect of the duty itself and is highly relevant to the manner in which that duty will operate in practice. Use of this power will determine how long individuals who are believed to have been victims of a serious criminal offence will be entitled to governmental support and assistance. The Committee considers that these matters must be taken into account alongside the arguments made about the need for flexibility and a mechanism that will allow the period to be changed at short notice.

19. The Committee further considers that if, as the Scottish Government indicates, the period for assistance is to be subject to frequent change (whether

such change has the effect of increasing or decreasing the period for support), it is important for Parliament to have the more active role of approving the proposals that the affirmative procedure provides, having regard to the significance of the power, and the possible consequences for individuals of what its exercise permits.

**20. The Committee accordingly draws the power in section 8(2)(b)(ii) of the Bill to the attention of the Parliament on the basis that it considers this power to be more appropriate for exercise by way of the affirmative, rather than the negative, procedure.**

## **ANNEX**

### **Correspondence with the Scottish Government**

On 27 January 2015, the Committee wrote to the Scottish Government as follows:

#### **Section 8(2)(b)(i) – power to specify period of provision of assistance to adult victims**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** negative

1. The power in section 8(2)(b)(i) of the Bill enables the Scottish Ministers to prescribe in regulations an end date to the “relevant period” during which they are required to secure support and assistance for an adult whom they have reasonable grounds to believe is a victim of the offence of human trafficking.

- **The Committee asks the Scottish Government to explain further why, given the significance of the provision, it is considered appropriate that it should be subject to the negative procedure?**

#### **Section 38 – power to make ancillary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** affirmative where amending primary legislation; otherwise negative

2. Section 38(1) of the Bill confers power to make such incidental, supplementary, consequential, transitional, transitory or saving provision, as the Ministers consider necessary or expedient for the purposes of, or in connection with, any provision made by *or under* the Act. The words ‘or under’ appear to expand the scope of the ancillary powers so as to enable the making of free-standing ancillary provision for the purposes of or in connection with provision made in subordinate legislation made under the Act.

- **The Committee asks the Scottish Government to explain why this form of wording has been chosen for this Bill and what its effect is considered to be?**

On 3 February 2015, the Scottish Government responded as follows:

1. Thank you for your letter of 27 January 2015 setting out the questions raised by the Delegated Powers and Law Reform Committee. Our response is set out below.

**Section 8(2)(b)(i) – power to specify period of provision of assistance to adult victims**

- **The Committee asks the Scottish Government to explain further why, given the significance of the provision, it is considered appropriate that it should be subject to the negative procedure?**

2. The Council of Europe Convention on Action against Trafficking in Human Beings (“the Convention”) places a number of obligations on signatory states to put in place measures to combat human trafficking, including a minimum reflection and recovery period during which support and assistance must be provided to victims. The UK Government, as signatory state, ratified the Convention in 2007, and has been bound by its terms since April 2009. The UK Government implemented, on an administrative basis, a minimum 45 day reflection and recovery period for victims of trafficking and an associated one year renewable temporary residence permit. This goes further than the minimum recommended in the Convention of a 30 day period for reflection and recovery and a six month temporary residence permit.

3. The Bill seeks to put on a statutory footing a period during which provision of support and assistance to victims is to be mandatory. Scottish Ministers currently adhere to the period determined on an administrative basis by the UK Government as signatories to the Convention and is further subject to the constraints in the Convention. The establishment of the first and any subsequent periods under section 8(2)(b)(i) will likewise be influenced by practice at UK level (to ensure that victims in Scotland are not disadvantaged) and by minimum international standards. The Scottish Government considers that in formalising this process it is appropriate to specify the period of mandatory support in secondary legislation. It further considers that the level of scrutiny afforded by the negative procedure strikes the correct balance between Parliamentary oversight of the period chosen and the need to permit the Scottish Government to determine the appropriate scope of its mandatory duty to victims. This approach also permits quick and flexible responses to any possible changes in the obligations imposed at an international level or practice at a UK level. It is not envisaged that the specified period would decrease but will in fact increase. Further, it should be noted that the establishment of a period under section 8(2)(b)(i) is not wholly determinative of the question of whether support and assistance may be provided to prospective victims. Section 8(3) of the Bill also contains provisions for Scottish Ministers to have discretion to provide support and assistance out with the specified period.

**Section 38 – power to make ancillary provision**

- **The Committee asks the Scottish Government to explain why this form of wording has been chosen for this Bill and what its effect is considered to be?**

4. **When exercising its powers to make regulations under the Bill, the Scottish Ministers may make ancillary provision as part of those regulations (section 37(1)). The standalone ancillary power (section 38) allows ancillary provision at a later date. As the Committee notes, the wording for this ancillary provision includes the wording “any provision made by or under**

**this Act". That wording is similar to wording used in recent Bills for Acts. For example, the Housing (Scotland) Act 2014, the Procurement Reform (Scotland) Act 2014 and the Bankruptcy and Debt Advice (Scotland) Act 2014.**

**5. This form of wording gives the flexibility to make necessary ancillary provision separate from the principal regulations. While it is likely that the principal regulations would utilise section 37(1) and include any necessary ancillary power within the regulations, something further may be identified at a later date. This flexibility is still limited by the test of the regulations being required to be necessary or expedient for the purposes of, or in connection with the regulations.**

6. This flexibility was considered appropriate for this Bill, given the powers sought under the Bill might give rise to the need for ancillary provision. For example, regulations could be made to change the offences relevant for trafficking and exploitation prevention and risk orders (section 12(2)) or to the types of UK orders which may be recognised and enforced in Scotland (section 29(1)).

7. I hope the above is helpful and if you require any further information please let me know

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