

SPICe Briefing

Human Trafficking and Exploitation (Scotland) Bill

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The Human Trafficking and Exploitation (Scotland) Bill was introduced in the Parliament on 11 December 2014 by the Cabinet Secretary for Justice, Michael Matheson MSP. The Bill is to be considered by the Justice Committee as lead committee.

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

This briefing provides information on human trafficking; the current legislative background in Scotland; and also examines key provisions within the Bill.



CONTENTS

EXECUTIVE SUMMARY.....	3
INTRODUCTION.....	4
HUMAN TRAFFICKING	5
<i>Vulnerability.....</i>	<i>5</i>
<i>Extent and purpose of human trafficking in Scotland</i>	<i>6</i>
<i>Convictions.....</i>	<i>7</i>
<i>Human trafficking and gender.....</i>	<i>8</i>
<i>Means of control.....</i>	<i>8</i>
<i>Traffickers</i>	<i>8</i>
<i>Children</i>	<i>9</i>
CURRENT LEGISLATIVE FRAMEWORK.....	10
CONSULTATION BY JENNY MARRA MSP	11
THE BILL.....	12
<i>Creation of a single offence.....</i>	<i>13</i>
<i>Application of the offence in the UK and elsewhere</i>	<i>14</i>
<i>Exploitation for the purposes of the offence of human trafficking</i>	<i>15</i>
<i>Slavery, servitude and forced or compulsory labour</i>	<i>15</i>
<i>Statutory aggravations of human trafficking</i>	<i>16</i>
<i>Protection of victims.....</i>	<i>17</i>
<i>Support and assistance.....</i>	<i>18</i>
<i>Trafficking and exploitation prevention and risk orders.....</i>	<i>19</i>
<i>Strategy and reporting.....</i>	<i>21</i>
SOURCES.....	22

EXECUTIVE SUMMARY

- It is acknowledged that human trafficking is, by its very nature, a hidden crime which makes it extremely difficult to measure the true extent of trafficking and to positively identify victims. Victims of trafficking may already be extremely vulnerable people which make them easy targets for traffickers. In many cases, victims are concealed by physical isolation or language or cultural barriers. In many cases victims cannot, and perhaps more understandably, dare not make themselves known to the authorities or agencies which provide support to victims for a real fear of retaliation either against themselves or their families
- There are a number of ways in which victims of human trafficking are controlled both by those who traffic them and by the people for whom they end up working. Deception is perhaps the most common way for traffickers to gain initial control over their victims and victims can be deceived about the reasons they are being brought to the country in terms of being offered a job which doesn't actually exist or which is substantially different from that which is promised. Once control over a victim has been established, it is maintained in a number of ways including cultivating psychological dependency, grooming, and threats to victims themselves or to their families back home.
- In September 2013, Jenny Marra MSP lodged a proposal for a Members' Bill in the Scottish Parliament which sought to require the creation of a Scottish anti-human trafficking strategy; provide for the special treatment of human-trafficking related crime within the criminal justice system; and provide for the support of survivors of human trafficking. On 17 March 2014, the then Cabinet Secretary for Justice Kenny MacAskill MSP, gave an indication under Standing Orders that the Scottish Government would introduce a Bill which would give effect to Ms Marra's final proposal
- The Bill will, amongst other things, create a single offence of human trafficking for all forms of exploitation for adults and children and increase the maximum penalty from 14 years to life imprisonment; place a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences; and place a duty on Scottish Ministers to secure the provision of relevant immediate support and recovery services for adult victims of trafficking

INTRODUCTION

The [Human Trafficking and Exploitation \(Scotland\) Bill](#) was, together with [explanatory notes](#) and a [policy memorandum](#), introduced in the Parliament on 11 December 2014 by the Cabinet Secretary for Justice, Michael Matheson MSP. The Bill will be considered by the Parliament's Justice Committee.

The policy memorandum to the Bill points out that the Scottish Parliament has previously played an important role in raising awareness of trafficking and exploitation. It points to the [Equal Opportunities Committee's report](#) of its inquiry into migration and trafficking which was published in 2010. The Equal Opportunities Committee recommended, amongst other things, that the definition of human trafficking within the [Council of Europe Convention on Action against Trafficking in Human Beings](#) ("the COE Convention") offered front-line services the best means of understanding the issues associated with the crime of human trafficking. The UK is bound by the COE Convention which involves signing up to a set of minimum standards on the identification, protection and support of trafficking victims.

The COE defines human trafficking as:

"Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The COE Convention takes the view that there are three essential elements of human trafficking: action, means and purpose and that trafficking is a combination of these constituents, not the constituents taken in isolation. For example, "harbouring" of persons (action) involving the "threat or use of force" (means) for "forced labour" (purpose) is conduct that is to be treated as trafficking in human beings¹. Similarly, "recruitment" of persons (action) by "deceit" (means) for "exploitation" of prostitution (purpose).

The policy memorandum states that a number of reports and documents have all built upon the understanding and analysis of human trafficking in Scotland including: the [Inquiry into Human Trafficking in Scotland](#) by the Equality and Human Rights Commission (EHRC); [Scotland: A safe place for child traffickers?](#) Scottish Commissioner for Children and Young People; and Jenny Marra MSP's [consultation on a proposal for a members' Bill](#) on human trafficking.

The Scottish Government has stated that, in response to the Equal Opportunities Committee's inquiry and subsequent reports, a range of actions have been taken to strengthen Scotland's approach to combatting human trafficking. The policy memorandum provides detail but those actions include:

- at the UK level, the Scottish Government continues to take an active part in the Interdepartmental Ministerial Group on Human Trafficking
- continued provision by the Scottish Government of direct grant funding to the Trafficking Awareness Raising Alliance (TARA) and Migrant Help to support victims and improve training among frontline professionals

¹ Paragraph 75: [Explanatory Report of the CoE Trafficking Convention 2005](#).

- hosting of the first Scottish human trafficking summit in October 2012 which brought together agencies with a clear or statutory role in tackling trafficking or supporting victims such as law enforcement, local government and relevant public, private and third sector organisations who agreed on the need to demonstrate leadership by taking forward a continuing multi-agency approach to the issue
- following its establishment in April 2013, the creation by Police Scotland of a dedicated National Human Trafficking Unit to enhance the police response to human trafficking
- the Crown Office and Procurator Fiscal Service has appointed a National Lead Prosecutor for Human Trafficking and Exploitation, as well as a number of Federation Lead Prosecutors for Human Trafficking and Exploitation - these prosecutors will ensure that a consistent and robust approach is taken to the prosecution of these types of cases

HUMAN TRAFFICKING

Human trafficking is by its very nature, a largely hidden crime. There are a number of reasons for this. Victims of human trafficking are by and large, already extremely vulnerable people which make them easy targets for traffickers. In many cases, victims are concealed by physical isolation or language or cultural barriers. They may also be operating under a false identity. In many cases they cannot, and perhaps more understandably, dare not make themselves known to the authorities or agencies which provide support to victims for a real fear of retaliation either against themselves or their families in their home country, or because they have been told or come to believe that they themselves are illegal immigrants. Such factors make it extremely difficult to estimate the actual number of individuals who may be victims. Those factors will also have implications in terms of identifying potential victims of trafficking and detecting where trafficking occurs and bringing to justice those who have been involved in its commission.

Vulnerability

Victims are frequently lured by traffickers with the false promise of a stable job or education or a loving relationship. While the majority of victims share the trait of vulnerability, victims come from a vast range of diverse ethnic and socio-economic backgrounds.

In their evidence to the inquiry into human trafficking in Scotland carried out by the EHRC, the two leading agencies supporting victims of human trafficking in Scotland, [Migrant Help](#) and the [Trafficking Awareness-Raising Alliance](#) (TARA), confirmed the importance of vulnerability with regard to victims. These agencies maintained that vulnerability based on poverty, identity-based discrimination, or psychological factors – such as low self-esteem or learned behaviours of compliance – was pivotal in allowing traffickers to exert and sustain control over victims.

“In general [victims] are often selected as ‘prey’ because they are already in a marginalised or vulnerable part of their original community. Examples are those in poverty ... those from a particular ethnic or cultural subset ... those who are already badly treated ... those with substance misuse issues ... those with learning disabilities or mental health issues ... those with low self-esteem ... [and] those females from countries where women are traditionally, culturally and institutionally abused.”²

The Inquiry stated that it was clear from the evidence which it had received that such vulnerability was not a temporary phenomenon important only when initial control was established over a victim but was a highly persistent and durable state which was increased by:

- the experience of exploitation itself

² Evidence from Migrant Help to the Inquiry, February 2011.

- the harmful impact of control techniques such as emotional dependence on traffickers; low or no pay; or violence
- dislocation from home and support

It was recognised that this evidence confirms the thinking behind the EU Trafficking Directive which sees the:

“... ‘social vulnerability’ of persons as the ‘principal root cause’ of trafficking, deriving from factors such as poverty, gender and other forms of discrimination, and personal circumstances such as age, health conditions, or disability.”³

The Inquiry stated that “...the experiences of victims both before and during trafficking must therefore be central to informing any future strategic response to trafficking and, particularly, the standard of care required to facilitate recovery from social, economic and psychological vulnerability.”

Extent and purpose of human trafficking in Scotland

As pointed out above, given the nature of human trafficking, it is difficult to estimate the actual number of individuals who may be victims.

The [National Referral Mechanism](#) (NRM) is a framework for identifying victims of human trafficking and ensuring they receive the appropriate protection and support. The NRM is also the mechanism through which the UK Human Trafficking Centre (UKHTC) collects data about victims. This information contributes to building a clearer picture about the scope of human trafficking in the UK. The NRM was introduced in 2009 to meet the UK’s obligations under the COE Convention. At the core of every country’s NRM is the process of locating and identifying “potential victims of trafficking”.

In 2013, at UK level, 1,746 potential victims of human trafficking were referred to the NRM. Of these potential victims, 55 were reported from agencies in Scotland⁴. Almost a third (30%) of victims experienced sexual exploitation, followed by labour exploitation (14%) and criminal exploitation (9%). While Romania was identified as the most common country of origin for victims, victims also came from another eighteen countries including Poland, Slovakia, Thailand, Vietnam, Ghana and Nigeria.

For 2014, the [NRM Statistics – End of Year Summary 2014](#) shows that the NRM received 111 referrals of potential victims of trafficking first encountered in Scotland. Of those referrals, 62 (56%) were female and 49 (44%) were male. Of all victims, 86 (77%) were referred for adult exploitation categories and 25 (23%) for exploitation as a minor.

With regard to the type of exploitation revealed for adults, sexual exploitation was the most common for females, with labour exploitation the highest for adult males. With regard to the types of exploitation suffered by minors, the same pattern emerged. Two minors who were identified as having been victims of sexual exploitation were UK nationals.

³ Article 2(2) EU Trafficking Directive.

⁴ The figure of 55 potential victims is a refinement of an earlier NRM figure which reported 99 referrals of potential trafficking victims from Scotland in 2013. The assessment figure of 55 potential victims reflects amongst other things, the removal of duplicate referrals, removal of referrals that received a negative reasonable grounds and negative conclusive grounds decision. Scottish Government officials have indicated that as such, the 2013 figures and 2014 figures are not comparable.

The 2014 statistics show that, for Scotland, a total of 26 countries of origin were identified for victims. Vietnam was the highest ranked country of origin for victims with a total of 20 victims. Other countries included Nigeria, China, Poland, Romania, Eritrea, Albania, Sudan and India. Three referrals in 2014 were for UK nationals.

With regard to the purpose of human trafficking in Scotland, the EHRC Inquiry received evidence of all the main purposes of human trafficking as set out in the EU Directive with the exception of the removal of organs. The Inquiry learned that the most common purposes of trafficking in Scotland are prostitution, forced labour, domestic servitude, and the exploitation of persons through forced criminal activities.

The EHRC found that evidence emerged relating to each of the different purposes of trafficking. For example:

- trafficked prostitution was not on-street but indoors and, in particular, located in private “sex flats”
- victims trafficked into forced labour were found in restaurants, hospitality, and agriculture - (the Inquiry was also made aware of some trafficking into social care and the construction industry in England and, while no evidence of this was found in Scotland, it may also happen here)
- domestic servitude tended to be contained within ethnic or national groups with victims serving those from their own ethnic or national community
- exploitation through criminal activities included victims being compelled to run bogus charity collections, to commit benefit fraud, and to cultivate cannabis

The Inquiry also found that there is an association in Scotland between certain trafficking purposes and particular nationalities or areas:

- Nigeria and sex trafficking
- the Baltic States and the Czech and Slovak Republics and trafficking into forced labour
- the Indian sub-continent and domestic servitude

The Inquiry points out that the fact that there are associations between certain trafficking purposes and particular nationalities or areas does not mean that victims only come from these countries. This is demonstrated by the fact that data on NRM referrals provided to the Inquiry were drawn from over 30 countries, approximately half of which were African, with a significant minority from Asia. It should also be noted that these associations do not mean for example, that Nigerians, Estonians and Bangladeshis are not exploited for other trafficking purposes, as evidence to the Inquiry demonstrated that they are.

Convictions

In 2011, the first conviction under the Scots law offence of trafficking into prostitution was secured. In *HMA v Stephen Craig and Sarah Beukan*⁵, the accused, both Scots, pled guilty before trial and received custodial sentences of three years and four months and eighteen months respectively. In addition to custodial sentences, a confiscation order for £45,000 was granted against Craig.

The second convictions were in December 2012 under the UK offence of trafficking into exploitation for the purpose of forced marriages. This case involved three Slovaks who denied the charges but were found guilty and each received a three-year custodial sentence.

⁵ HMA v Craig and Beukan at Glasgow Sheriff Court, 3 October 2011.

To date, there have been 6 individuals convicted for human trafficking offences under either section 22 of the Criminal Justice (Scotland) Act 2003 or section 4 of the Asylum and Immigration Act 2004⁶ (see below).

Human trafficking and gender

Evidence from Scotland (as found by the EHRC) is commensurate with international evidence which shows the gendered nature of human trafficking. The [United Nations Office on Drugs and Crime](#) (UNODC) has previously estimated that the most commonly identified form of human trafficking is sexual exploitation (79%) with women and girls being the predominant victims of this. A major contributory factor is that females are often more likely to be vulnerable through poverty and marginalisation in source countries while demand for sexual exploitation focuses upon them. The EHRC stated that it is important therefore that gender analysis informs anti-trafficking strategy and practice.

Means of control

There are a number of ways in which victims of human trafficking are controlled both by those who traffic them and by the people for whom they end up working. The EHRC inquiry found evidence of a wide variety of such methods.

The Inquiry learned from victims and stakeholders that deception is the most common way for traffickers to gain initial control over their victims. For example, victims can be deceived about the reasons they are being brought to the country in terms of being offered a job which doesn't actually exist or which is substantially different from that which is promised. An example would be where someone may be offered a job working in a restaurant but is then forced into prostitution.

In other cases, a victim may know the type of work which they will be doing, but be deceived as to the actual conditions and end up in forced labour. Nearly all of the victims who provided evidence to the Inquiry had been deceived in some way.

Once control over a victim has been established, it is maintained in a number of ways with some methods more common within certain areas.

Control methods range from the subtle to the violent. Examples include cultivating psychological dependency, grooming and threats to victims themselves or to their families back home. Similarly, no pay or low pay, confiscation of identity documents, debt bondage and tied accommodation are all used to control victims. Both actual physical violence and the threat of such violence are also used to control victims.

The Inquiry report stated that:

“Learning the different ways that victims are controlled is a prerequisite to undermining stereotypical images which associate trafficking solely with sexual coercion and violence e.g. the women ‘chained to the radiator’.”

Traffickers

The Inquiry learned that, in the main, traffickers recruit, move and exploit victims from within their own ethnic or national community. As a result, the vast majority of the trafficking

⁶ Personal communication with Scottish Government officials.

encountered through the Inquiry was intra-community often associated with ethnicity or nationality.

The Inquiry found that this trafficking tended to be run either by organised crime groups or by smaller groups based on cultural or socio-economic hierarchies in the home society. In evidence to the Inquiry, the Scottish Crime and Drug Enforcement Agency (SCDEA) told the Inquiry they believed that there were organised criminals of African and Chinese background involved in sex trafficking and criminals from the Czech and Slovak republics involved in a range of trafficking purposes. Victims of these traffickers tended to be of the same ethnic background.

While much of the evidence highlighted trafficking in a variety of minority ethnic communities, the Inquiry report stated that it was vital that trafficking was not viewed as “a foreign problem” imported here and suffered by ethnic minorities only. It must also be recognised that Scots are also involved in human trafficking.

That involvement takes a number of forms, including as employers of trafficked labour and as users of trafficked sex services. In addition, the Inquiry pointed out that Scots may be implicated as unwitting consumers of goods and services which may have been produced or delivered by trafficked labour such as in fruit picking or fisheries or the hospitality industry.

Children

A scoping study into the nature and extent of child trafficking in Scotland: [Scotland: A safe place for child traffickers?](#) provides further information into the various factors which come into play when children are victims of trafficking.

The study, which was carried out on behalf of the Scottish Commissioner for Children and Young People (SCCYP), found that, while vulnerability was a factor for all victims of trafficking, this was particularly heightened for children. The study points out that, an exception to the definition of trafficking is made in the case of children where no evidence of coercion or deception is required for them to be identified as victims of trafficking. That is, that the element of coercion or deception does not require to be present in cases involving children whose relative immaturity, as well as their dependence on adults and lack of power within the family structure generally makes them easier to control.

The study also cited lack of educational opportunities as exacerbating children’s vulnerability as well as chaotic situations in source countries where there is conflict or an on-going post-conflict recovery period. Other possible factors aggravating children’s vulnerability include natural disasters and disruptions to family structures, such as the death of parents or guardians. The study also pointed to a lack of universal birth registration as another factor in making children particularly vulnerable to trafficking and exploitation.

With regard to modes of child trafficking, the study stated that children may be trafficked through a number of methods including abduction; being picked up if separated from their family as is likely during conflict or internal displacement; or the family agreeing to the child being taken in the belief the child will receive an education or suitable employment.

CURRENT LEGISLATIVE FRAMEWORK

As noted in the introduction to the briefing, the UK is bound by the COE Convention (see above) which involves signing up to a set of minimum standards on the identification, protection and support of trafficking victims. The COE Convention is a comprehensive treaty mainly focused on the protection of victims of trafficking and the safeguarding of their rights. It also aims to prevent trafficking as well as prosecute traffickers. The COE Convention applies to all methods of trafficking and includes, amongst other things, whether trafficking is national or transnational; whether or not it is related to organised crime; whoever the victim, women, men or children are; and whatever the form of exploitation, sexual exploitation, forced labour or services, etc.

The UK Government, as the Member State, has also opted into [EU Directive 2011/36/EU](#) on preventing and combating trafficking in human beings and protecting its victims. The Directive builds on the COE Convention and defines the minimum common rules for identifying and sanctioning offences of trafficking in human beings. The Directive identifies the following as punishable acts:

- the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, for the purpose of exploitation

Exploitation shall include as a minimum:

- exploitation for prostitution or other forms of sexual exploitation
- forced labour or services (including begging, slavery or practices similar to slavery, servitude, exploitation for criminal activities, or the removal of organs
- exploitation exists when a constraint has been exerted on a person (by means of threat or use of force, abduction, fraud, deception, etc.) whether or not the victim has given his/her consent
- where the victim is a child (a person below 18 years of age), these acts of exploitation are automatically deemed to be an offence of trafficking in human beings, even if none of the means of constraint mentioned above has been used
- incitement to undertake trafficking in human beings, as well as the aiding and abetting and attempt to do so shall be punishable

The policy memorandum to the Bill sets out a number of domestic measures which have been introduced in Scotland which relate to human trafficking:

- Section 22 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) created an offence of engaging in trafficking people into, within or out of the UK for the purpose of exploitation by way of control over an individual for prostitution or involvement in the making or production of obscene or indecent material, with a maximum penalty of 14 years.
- Sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“the 2004 Act”) created offences of trafficking people into, within or out of the UK for the purpose of exploitation. For the purposes of this offence, a person is exploited if the person is:
 - the victim of behaviour contravening Article 4 of the European Convention on Human Rights (ECHR)¹⁰ (slavery or forced labour);
 - encouraged, required or expected to do something which would mean an offence is committed concerning organ removal;

- subjected to force, threats or deception designed to induce the person to provide services or benefits or enable another person to acquire benefits; or
- requested or induced to do something, having been chosen on the grounds of being ill, disabled, young or related to a person, in circumstances where a person without the illness, disability, youth or family relationship would be likely to refuse or resist.

The maximum penalty for the offence is 14 years.

- Section 46 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) amended and extended the 2003 and 2004 Acts by extending the extraterritorial effect of trafficking offences in both Acts to ensure that the offence applies to anything done in or outwith the UK and creating a new offence of trafficking of persons into, within or out of a country other than the UK. These new offences apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies. The 2010 Act also expanded the definition of exploitation in the Act 2004 Act to include:
 - offences under human tissue legislation to apply to such conduct wherever it takes place;
 - removing body parts (including blood) which would amount to an offence other than under human tissue legislation i.e. for purposes other than transplantation;
 - cases where the role of the person being exploited is entirely passive and that person is being used to enable others to gain a benefit of any kind.
- Section 47 of the 2010 Act also created a standalone offence covering the exploitative behaviours of holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour, with a maximum penalty of 14 years.
- Section 99 of the 2010 Act also extended powers to police to close premises associated with human exploitation.

CONSULTATION BY JENNY MARRA MSP

In September 2013, Jenny Marra MSP lodged a proposal for a Members’ Bill in the Scottish Parliament which sought to require the creation of a Scottish anti-human trafficking strategy; provide for the special treatment of human-trafficking related crime within the criminal justice system; and provide for the support of survivors of human trafficking. The proposal was accompanied by a consultation document which sought the views of stakeholders on the proposals above. The consultation period ran from 9 September 2013 to 17 January 2014.

There were 51,624 responses to the consultation. 51,505 of those responses were submitted by individuals, following a global campaign organised by Walk Free - an organisation dedicated to ending Modern Slavery. Those responses were identical, and agreed with the entire proposal set out in the consultation. The remaining responses (119) were submitted by organisations and individuals who directly engaged with the questions in the consultation.

A [summary of the consultation responses](#) showed that there was a substantial majority of support from respondents for the overall aims of the proposed Bill with only one respondent disagreeing with its aims. There was also a substantial majority of support for the specific proposals outlined above.

One of the primary reasons for supporting the general principles of the proposed Bill was the measures within it to prevent victims of human trafficking from prosecution:

“It is important that Scotland has measures in place to ensure we do not prosecute victims of trafficking. We have significant concern about triple victimisation and in particular the sexual exploitation and forced labour amongst victims, mainly women and men.” (East Renfrewshire Child Protection Committee)

One of the most cited reasons for supporting the proposed Bill was the proposal to align Scots criminal law with international law, and so create clearer criminal law around trafficking. Police Scotland stated:

“(The) idea to galvanise current Scottish and UK trafficking law within one piece of legislation is considered welcome.”

It was also widely noted by respondents that a proposal for a Government-led strategy to tackle human trafficking systematically was a welcome and positive step.

On 17 March 2014, the then Cabinet Secretary for Justice Kenny MacAskill MSP gave the following indication under Standing Orders Rule 9.14.13(a):

“I hereby indicate that the Scottish Government will introduce a Bill, within the current session of the Parliament, which will include provisions to:

- (a) require the creation of a Scottish anti-human trafficking strategy;
- (b) provide for the special treatment of human trafficking-related crime within the criminal justice system; and
- (c) provide for the support of survivors of human trafficking.

Accordingly, the Bill will give effect to Ms Marra’s final proposal for a Human Trafficking (Scotland) Bill.”

As a consequence of this indication the Member did not secure the right to introduce her Members’ Bill.

THE BILL

The following paragraphs of the briefing have been taken largely from information provided in the policy memorandum and explanatory notes which accompany the Bill.

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 2014.

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”.⁷ The Bill would:

- create a single offence of human trafficking for all forms of exploitation for adults and children and increase the maximum penalty from 14 years to life imprisonment;
- 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

⁷ Policy Memorandum, paragraph 16.

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 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;
- establish 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.

Part 1 of the Bill deals with offences.

Creation of a single offence

As pointed out above, the requirement for human trafficking activity to be criminalised is set out in a number of international instruments including the COE Convention and the EU Directive on preventing and combating trafficking in human beings and protecting its victims (see above). International law envisages that human trafficking involves the three essential elements also set out above i.e. the act; the means; and the purpose. For child victims to be trafficked, the "means" are not required as a child is deemed to have been trafficked if the first and third elements are present. Also, the consent of an adult victim to be moved is not relevant if the "means", such as threats or deception, have been used.

The policy memorandum states that, "the current piecemeal legislative framework is acting as a barrier to successful prosecutions" and that a statutory definition of what human trafficking is along with clearer, simpler offences relating to human trafficking would improve the situation. Section 1 of the Bill creates a single offence of human trafficking dealing with all relevant forms of exploitation of adults and children and defines the conduct which constitutes the offence.

A person commits the offence of human trafficking if they arrange or facilitate another person's travel with a view to that person being exploited. Travel can be to or from within the United Kingdom or travel which is facilitated in the UK. It is irrelevant whether that other person consents to the arrangement or the facilitation of travel. In the case of UK nationals and habitual residents of Scotland who arrange or facilitate travel for exploitation, the offence is committed even if none of the arranging, facilitating or the travel itself occurs within the UK.

Examples of what constitutes arranging or facilitating another person's travel for the purposes of exploitation include (but are not limited to):

- recruiting the person with a view to transporting or transferring the person;
- transporting or transferring the person;
- transferring or exchanging control of the person;

- harbouring or receiving the person.

Under the approach proposed by the Bill, it is not necessary to prove that the exploitation took place, only that the person knew or should have known that the intended purpose was exploitation. The Bill will allow for the prosecution not only of those criminals who undertake the exploitation, but also those who commission or facilitate trafficking of a person with a view to their exploitation by a third party.

Exploitation for the purposes of the offence includes control over a person's prostitution and other forms of sexual exploitation, slavery, servitude and forced or compulsory labour, conduct related to forced organ removal, etc.⁸. and the provision of any other services or benefits through the use of force, threats, deception or abuse of a victim's vulnerability.

The current maximum penalty for conviction for a human trafficking offence on indictment is 14 years. The Bill increases the maximum penalty available on indictment to life imprisonment or a fine or both. The Bill provides that on summary conviction of the offence, the maximum penalty available is imprisonment for a term not exceeding 12 months, a fine not exceeding the statutory maximum or both.

The policy memorandum provides information on a number of alternative approaches which could have been taken and gives reasons for the Scottish Government's preferred approach. One specific issue considered was that a separate offence for the trafficking of children should be established. This was suggested by Scotland's Commissioner for Children and Young People.

The policy memorandum points out that Scottish Ministers considered this option carefully and whether there would be benefits in having a separate child trafficking offence. Ministers agreed that there was a need for focussed awareness raising and training to help better identify potential child victims of trafficking and to ensure relevant support and protection for child victims. However, it was concluded that there was no clear basis or benefit in having a separate child trafficking offence and Ministers' preference was for a single, unified offence covering trafficking of all victims for all potential forms of exploitation. This is considered to be in line with established international norms.

Application of the offence in the UK and elsewhere

Section 2 of the Bill provides for the application of the human trafficking offence to conduct in the United Kingdom and elsewhere, reflecting the fact that human trafficking activity may involve activity that is completely or partly outwith Scotland.

Subsections (1) and (2) provide that a UK national, a person who at the time of the offence was habitually resident in Scotland, or a body incorporated under the law of a part of the UK, commits an offence of human trafficking regardless of where the arranging or facilitating of travel takes place, or where the travel itself takes place. Whether or not a person is "habitually resident" in Scotland will be determined in the light of all the facts and circumstances of the case.

⁸ This covers the removal of body parts for research, sacrificial rites, consumption, etc. For these purposes, a part of the body comprises all parts of the body, including blood.

Subsection (3) provides that any other person commits the offence of human trafficking only if any part of the arranging or facilitating of travel takes place in the UK, or the travel consists of arrival in or entry into, departure from, or travel within, the UK.

Exploitation for the purposes of the offence of human trafficking

Section 3 of the Bill describes what constitutes exploitation for the purposes of the offence of human trafficking. By virtue of subsection (1), only exploitation of a type mentioned in subsections (2) to (8) is to be regarded as exploitation in this context.

Subsection (2) provides that a person is exploited if the person is the victim of conduct which involves the commission of an offence under section 4 of the Bill (slavery, servitude and forced or compulsory labour) or would be if the conduct occurred in Scotland.

Subsections (3) to (5) deal with prostitution and sexual exploitation and provide that a person is exploited if:

- another person exercises control, direction or influence over the person's prostitution in a way which shows that the other person is aiding, abetting or compelling the prostitution
- another person involves the first person in the making or production of obscene or indecent material; or
- the person is the victim of conduct constituting one of a number of listed sexual offences (or which would constitute such an offence if that conduct occurred in Scotland).

The categories of exploitation related to prostitution and the making of indecent material are drawn from the existing offence in section 22 of the 2003 Act. The category related to other forms of exploitation in connection with sexual offences is a new development in Scots law, though it has some precedent under the Sexual Offences Act 2003 in England and Wales.

Subsection (6) deals with exploitation relating to the removal of organs, etc. It provides that a person is exploited in that context if they are encouraged, required or expected to do anything constituting either an offence under Part 1 of the Human Tissue (Scotland) Act 2006 which deals principally with removal of organs for transplantation, or any other offence under the law of Scotland involving removal of a part of the human body (or anything which would constitute such an offence were it done in Scotland). This latter category ensures that the removal of organs or tissue for purposes other than transplantation is caught by the trafficking offences. This covers the removal of body parts for research, sacrificial rites, consumption, etc. For these purposes, a part of the body comprises all parts of the body, including blood.

Subsections (7) and (8) make more general provision. Subsection (7) establishes that a person is exploited if force, threats or deception are used to induce the person to provide services or benefits or to enable another person to acquire benefits. Subsection (8) provides that a person is exploited if another person takes advantage of the person's vulnerability to use or attempt to use the person to provide services or benefits (or to enable another person to acquire benefits). This will ensure the offence captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.

Slavery, servitude and forced or compulsory labour

As pointed out above, section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act") currently criminalises holding a person in slavery or servitude or requiring a person to perform compulsory or forced labour. The policy memorandum states that the Bill will repeal section 47 of the 2010 Act and replace it with strengthened provisions.

The Bill provides that the new offence will allow the court to consider, in assessing whether a person has been a victim of an offence, the victim's characteristics such as age, physical or mental illness, disability or, where relevant, family relationships. The Bill also increases the maximum penalty for conviction on indictment from 14 years for the current offence, to life imprisonment.

In considering any alternative approach, the policy memorandum states that the existing criminal offence, as provided for in the 2010 Act, would still allow for prosecution of individuals who hold a person in slavery or servitude or require a person to perform compulsory or forced labour. However, doing nothing would mean that the offence would not be revised to include consideration of the victim's characteristics, nor would the maximum penalty for the offence be increased.

Statutory aggravations of human trafficking

The Bill makes provision for a statutory aggravation which applies in cases where an accused commits any other offence and that offence has a connection with a human trafficking offence.

It has been recognised that there may be other offences (e.g. immigration offences, brothel-keeping, drugs offences, etc.) where there is insufficient evidence to raise proceedings under the proposed human trafficking offence, but where there is evidence that the offence has been committed against a background of human trafficking. The policy memorandum states:

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

The EHRC published the report of its Inquiry into Human Trafficking in Scotland in November 2011. Among other recommendations, the EHRC recommended that a trafficking background should be made a statutory aggravation in the sentencing of those convicted of related criminal offences. The EHRC's recommendations were arrived at following a consultation process with organisations having an interest in tackling trafficking or supporting victims.

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

The Bill provides that where an indictment or complaint libels or specifies that an offence is aggravated by a connection with human trafficking activity and it is subsequently proved that the offence is aggravated, the court must state on conviction that the offence is so aggravated. The court must also record the conviction in a way that shows that the offence was aggravated and take the aggravation into account when determining the appropriate sentence. The court must also state the difference in the sentence imposed in light of the aggravation or, if there is no difference, state the reasons for that.

To meet obligations under the EU Directive (see above) the Bill also proposes to apply a statutory aggravation where a human trafficking offence has been committed by a public official

while acting, or purporting to act, in the course of the official's duties. The Bill therefore requires the courts to take into account any link between an offence and human trafficking activity, and when dealing with a human trafficking offence, to take into account the fact that a person who committed it did so by abusing his or her position as a public official.

Part 2 of the Bill provides for the protection of victims of human trafficking and a duty to secure support and assistance for victims.

Protection of victims

With regard to the protection of victims, section 7 of the Bill places a duty on the Lord Advocate to publish guidance about the prosecution of credible trafficking victims who have committed offences.

Article 8 of the EU Directive relates to the non-prosecution and non-application of penalties to the victims of human trafficking. Article 8 states:

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

The policy memorandum points out that Article 8 of the Directive has been interpreted by some stakeholders as indicating that identified victims of human trafficking should be protected automatically from prosecution, although in practice the Article only requires that authorities should be “entitled” not to prosecute. It is generally accepted that there will be circumstances where victims of human trafficking will be compelled to commit offences by others as part of their exploitation. Currently, under [guidance issued by the Lord Advocate](#), prosecutors have discretion not to prosecute in such circumstances.

The current guidance instructs that, where there is credible evidence that the accused person is a possible victim of human trafficking and that the specific offence was committed as a direct consequence of the person's trafficked status, there should be a presumption against prosecution. Any decision by a fiscal where it is considered in the public interest to act against this presumption must be referred for consideration by the National Lead Prosecutor for Human Trafficking and Exploitation.

Section 48 of the Scotland Act 1998 protects the independence of the Lord Advocate in taking decisions about the prosecution of crime. However, the Bill will, to demonstrate clear compliance with Article 8 of the EU Directive, place a duty on the Lord Advocate to prepare and publish guidelines for prosecutors. These will provide prosecutors with guidance in relation to the non-prosecution of confirmed victims of trafficking and of the slavery, servitude and forced or compulsory labour offence. While it is pointed out that the Bill will not provide blanket immunity from prosecution for these victims in all circumstances, the policy memorandum states that:

This approach demonstrates the existence of protective measures that are in place to avoid further victimisation of trafficked victims or those who have been victims of slavery, servitude or forced or compulsory labour and to encourage them to act as witnesses in criminal proceedings against traffickers and those who exploit others.

Support and assistance

As pointed out above, human trafficking can have a significant physical, emotional and psychological impact on victims. It is also recognised that many victims will continue to suffer considerably from the effects of their ordeal long after they have been freed from the immediate circumstance of their trafficking. Often alone, removed from any family ties and without a support network in place, victims will often need immediate and longer-term support. Immediate support will include, amongst other things, medical attention and emergency accommodation. Longer-term support will include things such as gaining access to benefits, permanent housing, assisting law enforcement authorities, relocation, etc.

The policy memorandum points out that currently, there is no statutory basis for potential adult victims of trafficking to access the support and assistance that they are entitled to under the terms of the COE Convention and the EU Directive. In line with its obligations under the Convention and the Directive, the Scottish Government currently provides grant funding to support agencies to deliver this support and assistance but it is recognised that this funding could be withdrawn at any time. There is therefore benefit in placing such support and assistance on a statutory footing.

The Bill provides that where there are reasonable grounds to believe that an adult is a victim of human trafficking, the Scottish Ministers must secure the provision of such support and assistance as is necessary given the adult's needs and for a relevant period. The relevant period begins on the day that it is determined that there are reasonable grounds to believe that the adult is a victim of human trafficking. The period ends on the earlier of either the end of a period specified in regulations or the date on which there is a conclusive determination that the adult is or is not a victim of a human trafficking offence.

The Bill provides that Scottish Ministers must ensure that, in securing the provision of support and assistance, assistance is only provided where an adult consents and the provision of assistance is not made conditional on the adult assisting with a criminal prosecution or investigation. A non-exhaustive list of the kind of support and assistance that may be provided for adults includes accommodation; day to day living; medical advice and treatment; language translation and interpretation; counselling; legal advice; information about other services available; and repatriation.

The policy memorandum acknowledges that children are also victims of trafficking and other forms of abuse and neglect and it is accepted that their needs, and the appropriate means of meeting these, do not always match exactly with those of adults. The majority of provisions in the Bill have equal application to adult and child victims of trafficking, including the development of a trafficking and exploitation strategy (see below). However, the provisions relating to support and assistance for victims are explicitly aimed at providing a statutory basis for support to adult victims. The policy memorandum states that this is because the necessary support for children who may be victims of trafficking is already enshrined in legislation which provides for all vulnerable children: the Children (Scotland) Act 1995 ("the 1995 Act"); the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"); and the Children and Young People (Scotland) Act 2014 ("the CYPA"):

The provisions of the 1995 Act, the 2011 Act and the CYPA provide for the needs of vulnerable children in all circumstances to be assessed and addressed. Guidance for public authorities in identifying and meeting the needs of vulnerable children specifically references child trafficking, while recognising that vulnerable children may have additional needs that do not arise solely from their trafficked status. The existing

children's legislation, therefore, provides for services to be provided to potentially trafficked children: this applies to children under the age of 18. It is, therefore, a priority to ensure that existing legislation with reference to children, including elements of the CYPA, when commenced, is applied appropriately. However, this is a matter for effective engagement and good practice rather than further legislation.

Part 3 of the Bill provides for the confiscation of property and amends proceeds of crime legislation to categorise all trafficking and exploitation offences as "lifestyle offences".

A conviction of a lifestyle offence triggers assumptions under the Proceeds of Crime Act 2002 Act that the accused has a criminal lifestyle and that the accused's property is recoverable as criminal proceeds.

Powers currently exist under the Immigration Act 1971, for the detention and forfeiture of vehicles, ships and aircraft used in the commission of certain trafficking offences. It is suggested that those powers are little known and not widely used by police or prosecutors and do not apply to all forms of trafficking offences (e.g. trafficking for prostitution under section 22 of the Criminal Justice (Scotland) Act 2003).

The Bill, therefore, includes provisions to consolidate the existing powers in the Immigration Act 1971 and applies them to the human trafficking offence. These powers will allow the police to detain, without the requirement for a warrant, vehicles, ships or aircraft owned or possessed by persons arrested on suspicion of a trafficking offence if there are reasonable grounds to believe that, on conviction of that person, the property could be subject to forfeiture. A separate power for courts to order forfeiture of such property when used in the commission of the human trafficking offence is also contained in the Bill. This measure is intended to disrupt and deter trafficking activity by preventing further criminality or disposal of assets. Consolidating existing powers in this Bill is intended to highlight their availability to police and prosecutors and in turn encourage their increased use.

Trafficking and exploitation prevention and risk orders

The policy memorandum to the Bill points out that there is currently a range of civil preventative orders⁹ in place which may cover some of the activities carried out by those involved in human trafficking and exploitation. However, given the wide range of offences which could be involved in human trafficking and exploitation, this means that some offences would not reach the threshold that law enforcement agencies would usually consider when making an application for existing measures e.g. the less organised end of labour exploitation.

Similarly, the Scottish Government is currently seeking a Legislative Consent Motion to extend to Scotland serious crime prevention orders (SCPOs) via the UK Serious Crime Bill. The existing SCPOs, which cannot be used to impose travel restrictions, are generally used in relation to organised criminality and would not be used in some of the situations where human trafficking has taken place, primarily domestic servitude outside of organised crime.

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

⁹ For example, sexual offences prevention orders (SOPOs) in the Sexual Offences Act 2003 and the Risk of Sexual Harm Order (RSHO) in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

Where an individual has been convicted of a trafficking or exploitation offence or an offence with a statutory trafficking aggravator, a TEPO may be imposed where the court is satisfied there is a risk that that individual may commit a further human trafficking offence. Section 12 of the Bill sets out the list of relevant trafficking or exploitation offences for the purposes of imposing a TEPO. The Bill provides that the court may make a TEPO at its own instance or on the motion of the prosecutor.

The policy memorandum states that it will be necessary to impose the order to protect people from the physical or psychological harm that may occur if a further offence was committed. A TEPO will be time limited and will prevent the offender from engaging in activities specified in the order. For example, the order might include the employment of staff, making travel arrangements for other people, travelling overseas, having contact with children, etc. Positive requirements may also be imposed under a TEPO. For example, the requirement to report to a police station at a prescribed time and place; a requirement to inform the police of a change of address, mobile telephone numbers, etc. The courts may also impose an interim TEPO while it is considering the application for a full TEPO.

The Bill sets out the three circumstances where the court may make a TEPO against a person on sentencing.

The first is conviction of an adult of a relevant trafficking and exploitation offence (as set out in section 12 of the Bill). The second is acquittal of such an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) (which provides a defence where a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct). The third circumstance is a finding of unfitness for trial in relation to such an offence under section 53F of the 1995 Act (which provides that a person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in that trial). In relation to the third circumstance there must also be a finding that the adult has done the act constituting the offence.

The maximum penalty available for breach of a TEPO will be up to five years in prison or a fine or both.

Where a person has not been convicted of a trafficking or exploitation offence but a court considers that the person presents a significant risk of harm to others through the individual committing a trafficking or exploitation offence, the court can impose a Trafficking and Exploitation Risk Order (TERO). The TERO will also be time limited and will restrict specific activities or impose requirements on the individual. Interim TEROs will also be made available while the court considers a main application. As with TEPOs, the maximum penalty available for breach of a TERO will be up to five years in prison or a fine or both.

The Bill also provides that the Chief Constable may apply to a sheriff for a TEPO against an adult and sets out the tests for making such an application.

The sheriff must be satisfied that the person in respect of whom the order is sought is a “relevant offender” (see below); that since the person first became a relevant offender, the person has acted in a way which means that there is a risk the person will commit a relevant trafficking or exploitation offence; and it is necessary to make the prohibitions or requirements in the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the person committed such an offence.

The Bill provides that a person is a “relevant offender” if any of the court disposals listed at section 15(2) of the Bill have been made in relation to that person and in respect of a relevant trafficking or exploitation offence:

- the adult has been convicted of a relevant trafficking or exploitation offence
- the adult has been acquitted of a relevant trafficking or exploitation offence by reason of the special defence set out in section 51A of the 1995 Act (criminal responsibility of persons with mental disorder)
- the adult has been acquitted of a trafficking or exploitation offence by reason of insanity
- a court has made a finding that the adult is under a disability and has done the act constituting a relevant trafficking or exploitation offence or
- the adult has, in England and Wales or Northern Ireland, been cautioned after admitting a relevant trafficking or exploitation offence

Subsections 15(3) to 15(5) of the Bill deal with findings of courts and tribunals outside the United Kingdom.

Subsection (3) provides that a person is a relevant offender if, under the law of a country outside the United Kingdom, a listed disposal is made in respect of a person in relation to an offence which is equivalent to an offence listed in section 12 (i.e. a relevant trafficking or exploitation offence). In particular, such offences are acts which constitute offences under the law of the country concerned and which would constitute a relevant trafficking or exploitation offence under the law of Scotland if committed in the UK, by a UK national or person habitually resident in Scotland or as regards the UK (e.g. by virtue of the fact that travel was arranged into, out of or within the UK).

Strategy and reporting

There have previously been calls for Scottish Ministers to take a clear, strategic lead in co-ordinating the response to human trafficking in Scotland. One outcome from the summit hosted by the Scottish Government in October 2012¹⁰ was that, while there was a need to strengthen current legislation in this area, many other necessary actions did not require legislation. These included actions to raise public awareness and understanding of human trafficking; the provision of training for frontline workers who may come into contact with potential victims of trafficking; and improved data collection and intelligence gathering.

The policy memorandum states that placing a strategy on a statutory basis will ensure that the Scottish Parliament has the opportunity to scrutinise formally the strategic, multi-agency approach to tackling and preventing human trafficking in Scotland:

The Bill does not seek to place new statutory burdens on individual organisations, but to ensure that all relevant agencies, from the public, private and third sector, law enforcement, Scottish Government and local authorities are fulfilling their existing functions in a manner that responds effectively to trafficking and exploitation and are contributing actively to this agenda. (Policy memorandum, para 84)

The Bill places a duty on Scottish Ministers to prepare, publish and regularly review and update a trafficking and exploitation strategy. The strategy and subsequent updates will be laid before Parliament. The strategy may in particular set out:

¹⁰ The Summit agreed [12 actions](#) to be taken forward.

- actions to raise awareness of the conduct which constitutes an offence under the Act
- arrangements to facilitate the detection and prevention of such conduct
- support and assistance which is, or to be, available to adults or children who are, or appear to be, victims of a human trafficking offence under the Act

In response to a [parliamentary question](#) (October 2014) from Patrick Harvie MSP on whether there would be opportunities for people who have been trafficked to be involved in the development, implementation and review of the proposed anti-trafficking strategy, the then Cabinet Secretary for Justice Kenny MacAskill MSP responded:

“It is the intention that Scottish Ministers will work with all relevant agencies to prepare, implement and review an anti- trafficking strategy. As part of this process we will engage closely with those organisations who provide assistance and support to potential and confirmed victims of trafficking. In developing, implementing and reviewing the strategy we will seek the views of these organisations about how best to take account of the experiences of those potential and confirmed victims of trafficking.”

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