

HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) BILL [AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Human Trafficking and Exploitation (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

2. The amended or new delegated powers provisions in the Bill are listed below, with a short explanation of what each powers allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

PART 2

**Section 8(2)(b)(i) - Power to specify period of provision of assistance to adult victims.
Section 8(8) - Power to modify circumstances of reasonable grounds or conclusive determination**

**Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Revised or new power: Revised in terms of 8(2)(b)(i) and new in terms of 8(8)
Parliamentary procedure: Affirmative Procedure**

Provision

3. Section 8 of the Bill contains provision for the Scottish Ministers to provide support and assistance to victims of trafficking in certain specified circumstances. Section 8(2)(b)(i) allows the Scottish Ministers by regulations to specify the period for which assistance must be provided to adult victims of trafficking under section 8(1). An amendment lodged by the Scottish Government at Stage 2 made this power subject to the affirmative procedure.

4. Section 8 of the Bill also sets out the circumstances in which support and assistance is to be provided to victims. There is a duty to provide such assistance following a decision that there are reasonable grounds to believe that a person may be a victim of trafficking and that duty continues until either the end of a specified period or until there is a conclusive determination of the victim's status by a competent authority for the purposes of the Council of Europe Convention on Action against Trafficking in Human Beings. Essentially, therefore, support and assistance rests in general terms on determinations made as part of the National Referral Mechanism. That process is currently under review and it is possible that the process around making reasonable and conclusive grounds determinations, what those determinations mean or require and who makes those determinations may change in the relatively short term.

5. An amendment at lodged by the Scottish Government at Stage 2 therefore added two new subsections to section 8. Subsection (8) sets out a regulation-making power for Scottish Ministers to modify existing subsections (6) and (7) to make further provision about the criteria for providing support and assistance to victims, in particular by making provision about the circumstances in which there are reasonable grounds and conclusive grounds to believe a person is a trafficking victim. Subsection (9) specifies that the regulation-making power can make further provision about the process for determining victim status more generally, including any procedure to be followed by any person making such a determination, the criteria they must apply and the persons who may be involved in that process.

Reason for taking power

6. The amendment in relation to the section 8(2)(b)(i) power was made in response to the Delegated Powers and Law Reform Committee's Stage 1 Report. The Scottish Government gave a commitment to the Justice Committee to amend the Bill so that any change to the 'specified period' under section 8(2)(b)(i) is subject to affirmative rather than negative procedure. In particular, the Scottish Government was persuaded that since the period specified under section 8(2)(b)(i) is integral to the scope of the primary duty, the scrutiny afforded by the affirmative procedure is appropriate in this case.

7. The purpose of the new power in section 8(8) is to ensure that any change to the National Referral Mechanism (NRM) process on which section 8 relies will not prevent or complicate the provision of assistance to victims of trafficking under that section. The UK Government Review of the NRM, published in November 2014, confirmed concerns about the effectiveness of the current NRM, both for identifying adult and child victims of trafficking. The Scottish Ministers will consider the outcome of the NRM pilots to help inform their thinking on future NRM processes.

Choice of procedure

8. As noted the affirmative procedure delivers on the commitment given in light of Delegated Powers and Law Reform Committee's Stage 1 report to make the power under section 8(2)(b)(i) subject to affirmative procedure.

9. Since the exercise of the power in subsection (8) may also affect the circumstances in which trafficking victims are provided support under section 8, It is the Scottish Government's view that it is also appropriate for regulations made under this power to be subject to affirmative procedure.

Section 8A - Power to provide support and assistance to victims of an offence under section 4.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Revised or new power: New
Parliamentary procedure: Affirmative Procedure

Provision

10. An amendment at Stage 2 of the Bill makes provision for a new section 8A which enables the Scottish Ministers to make regulations about providing support and assistance to an adult who is, or appears to be, the victim of an offence under section 4 of the Bill, which covers slavery, servitude, and forced or compulsory labour.

11. The new section 8A provides regulation making powers to make provision about how to determine whether an adult is a victim of a section 4 offence, the period during which support and assistance is to be provided, what types of support can be provided and the way in which it is to be provided. Those regulations may in particular make provision about how to determine whether an adult is a victim of a section 4 offence, the period during which support and assistance is to be provided, the period during which it is to be provided, what types of support can be provided and the way in which it is to be provided. This power is therefore intended to allow for provision to be made for support and assistance which is broadly equivalent to that available for trafficking victims under section 8. The Scottish Government will need to consider the outcome of the NRM pilots that will help to inform our thinking going forward.

12. A further amendment at Stage 2 of the Bill makes a consequential change to section 31 of the Bill on the Trafficking and Exploitation Strategy, clarifying that support and assistance mentioned in the strategy can include support and assistance provided by virtue of section 8A.

Reason for taking power

13. The Scottish Government has responded to concerns raised in Stage 1 evidence that there was no provision in the Bill for support and assistance for victims of the section 4 offence.

14. The regulation making power here is modelled on the framework for support for trafficking victims under section 8 of the Bill, which covers support and assistance for adult victims of offences, and will ensure the Scottish Ministers can provide that the system of identification, support and assistance, similar to that provided to victims of trafficking, is extended to victims of a section 4 offence. Those regulations may in particular make provision about how to determine whether an adult is a victim of a section 4 offence, the period during which it is to be provided, what types of support can be provided and the way in which it is to be provided. The Scottish Government opted for the broad power rather than specifying the support and assistance on the face of the Bill to allow for the outcome of the National Referral Mechanism (NRM) pilots to be considered which will help to inform our thinking going forward.

Choice of procedure

15. The broad power is intended to allow for provision to be made for support and assistance which is broadly equivalent to that available for trafficking victims under section 8. Given the equivalence between the support to be provided under this section and the support to be provided under provision made in exercise of section 8A, it is the Scottish Government’s view that it is appropriate for the regulations to be subject to affirmative procedure.

Section 8B – Independent child trafficking guardians

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Revised or new power: New
Parliamentary procedure: Negative Procedure

Provision

16. An amendment at Stage 2 inserted a new section 8B placing a duty on Scottish Ministers to make such arrangements as they consider reasonable to enable a person (an “independent child trafficking guardian”) to be appointed to assist, support and represent a child where it is reasonably believed that the child may be a victim of human trafficking, and where there is no person in the United Kingdom who has parental rights or responsibilities in relation to the child. The section also requires a relevant authority making a determination that the child is eligible to receive a guardian, to bring the child to the attention of the person who will be providing the guardian service under arrangements made by Ministers. The person providing the service must then appoint a guardian to the child as soon as reasonably practicable after the child has been brought to their attention.

17. Section 8B further provides that the guardian appointed must be independent of any person who is responsible for exercising statutory functions in relation to the child, and that the guardian must at all times act in the best interests of the child. However, persons who are responsible for exercising statutory functions in relation to the child must recognise, and pay due regard to, the guardian’s functions.

18. Section 8B(7) allows the Scottish Ministers to make, by regulations, further provision about independent child trafficking guardians appointed under the section, including provision about the appointment of such guardians and the termination of that appointment, the conditions to be satisfied for a person to be appointed as a guardian, payments to or in respect of guardians, functions of guardians, the keeping of records in relation to the appointment of guardians and circumstances in which the guardian can continue to act for someone who is no longer a child. Section 8B(8)(j) allows the Scottish Ministers to add to the list of persons defined as having parental rights or responsibilities in relation to a child, for the purposes of determining the circumstances in which a guardian is to be appointed.

Reason for taking the power

19. At the Stage 1 evidence sessions there were contributions from both sides of the debate regarding placing guardians for child victims of trafficking on a statutory footing. The Justice Committee’s Stage 1 report concluded that, while the Committee recognised the important work

that the Scottish Guardianship Service carries out in providing support to separated children and young people from outside the European Economic Area who are in the asylum process, the Committee considered that this matter may be better addressed within the forthcoming strategy to be prepared under the Bill. After Stage 1 the Scottish Ministers asked officials to work with stakeholders to determine whether further measures were required- to include statutory provisions.

20. Officials worked with stakeholders to identify the areas of weakness in the current service and with advice, devised a mechanism to strengthen it. The amendment requires a relevant authority to refer the child to the guardian service as soon as reasonably practicable after it has determined that the child may have been trafficked and that they meet the eligibility criteria. The guardian also requires to be appointed to the child as soon as reasonably practicable after receiving this referral. There is also a duty on persons exercising statutory functions in respect of the child to recognise, and pay due regard to, the guardian's functions – this lack of recognition can currently be a barrier to the effective operation of the service. The aim of the amendment is therefore to ensure that the child's needs are identified swiftly by the right person being in place, and that consistency, in terms of referral, appointment and operation of the service, is achieved across Scotland. The guardian's central role – to assist, support and represent the child and to act in their best interests – together with the need for a guardian to act independently of statutory services for the child, are also reflected in the amendment.

21. Section 8B(7) allows for the detailed operation of the new policy on guardians to be considered, consulted on and set out, with flexibility to adjust with the benefit of practical experience. This particular provision is required to allow the Scottish Government to fully investigate with its stakeholders, the required framework from which a Guardian should be appointed and, subsequently, should work. These powers include the appointment and termination of an individual guardian (for example once the child no longer requires that service), circumstances in which the guardian's role may require to be extended (even after the person ceases to be a child), the skills and experience that will be required to fulfil the role properly, the functions of the role, and other administrative matters such as payment and record keeping. In setting out these powers, we want to make sure that there is sufficient consultation and flexibility around the appointment of independent child trafficking guardians, and the operation of their role, in order to make sure that such persons will be the best placed individuals to assist, support and represent the vulnerable children for whom they have been appointed. We also want to ensure that any changes to these matters which become necessary as a result of practical experience can be taken into account and the regulations amended as required. The detail to be specified in regulations does not alter the fundamental nature of the guardian's role in relation to the child; the fact that they must act independently and in the child's best interests; or the co-operation which they should receive from other agencies supporting the child. The regulations will therefore specify detail of the operation of the service, rather than creating or altering substantive issues of policy.

22. Section 8B(8)(j) allows the Scottish Ministers to react to any changes in Scottish or other countries' definitions of parental rights and responsibilities, by allowing for the definition of a "person with parental rights and responsibilities" in relation to a child to be supplemented to take account of such changes. It is considered helpful to have this power so that the definition set out in section 8B(8)(j) can keep pace with changes to other legislative definitions.

Choice of procedure

23. Section 8B(7) allows further detail to be set out about how independent child trafficking guardians are to operate, beyond what is already contained in section 8B. As noted, that section already sets out which children are eligible for the appointment of a guardian and how and when such a child should be referred to a guardian service. The section also expressly requires the guardian to assist, support and represent the child, to act in the child’s best interests and to act independently of any person responsible for operating statutory functions in relation to the child. Nothing to be provided in regulations will change these basic requirements. Accordingly, when the level of detail in section 8B(7) is considered, as compared with the nature of the detail which may be specified in regulations, it is considered that the negative procedure strikes the appropriate balance between the need for these requirements to be set out or amended in a practical and expeditious manner on the one hand, and the need for Parliamentary scrutiny on the other.

24. Section 8B(8)(j) allows the Scottish Ministers to take account of other legislative changes which might require the definition of “person with parental rights and responsibilities” to be supplemented so as to recognise these other changes. Any provision made under this section would not alter the text of the primary legislation, nor the policy intention behind this section. The nature of the definition makes it clear that this is a class of persons with parental rights and responsibilities, defined by reference to a list of currently relevant legislation. The power simply allows this list to reflect an up to date account of how persons may legally come to hold such rights and responsibilities. Accordingly, when the purpose of the power, and the nature of provision which might be made under it is considered, it is felt that the negative procedure strikes the appropriate balance between the need for such amendments to be made in a practical and expeditious manner on the one hand, and the need for Parliamentary scrutiny on the other.

Section 8C – presumption of age

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Revised or new power:	New
Parliamentary procedure:	Affirmative Procedure

Provision

25. An amendment at Stage 2 inserts a new section 8C which requires local authorities and health boards to assume that a person whom they have reasonable grounds to believe may be both a victim of trafficking, and a child, but whose age is uncertain, is a child. A separate amendment at Stage 2 means that a “child” is defined in the Bill as a person less than 18 years of age.

26. The new section 8C is intended to ensure that victims of trafficking whose age is uncertain, but who appear to be children, are presumed to be children for the purpose of receiving immediate age appropriate support and services until their age is formally established. The assumption would be made for the purposes of a series of support and assistance functions under specified children’s legislation, including the duty to provide accommodation under the Children (Scotland) Act 1995 and the duties to provide a named person service and child’s plan under the Children and Young People (Scotland) Act 2014.

27. The duty would apply only to local authorities and health boards in the first instance; however subsection (5) provides the Scottish Ministers with a regulation-making power to apply the duty in respect of other authorities and other support functions mentioned in other legislation.

Reason for taking power

28. At the Stage 1 evidence sessions, several witnesses gave evidence in support of the inclusion of a presumption of age clause in the Bill. Some witnesses from the children's services sector highlighted the difficulties faced by individuals with no identification documents and discussed cases of children receiving inappropriate adult services prior to an age assessment being completed. Other witnesses, such as the Faculty of Advocates, suggested that a presumption of age clause would be required to enable the Scottish Government to meet its obligations under EU Directive 2011/36/EU (the EU Human Trafficking Directive).

29. The list of relevant enactments in section 8C(3) will need to be monitored over time to ensure that the presumption is being applied in all of the relevant circumstances. If there is a future decision to apply the duty in respect of other authorities or support functions in other legislation, subsection (5) allows the Scottish Ministers to make regulations, should the need for such provision become evident through practical experience.

Choice of procedure

30. The relevant authorities to whom this duty would apply are local authorities and health boards. Regulations to add to or alter the list of relevant authorities and statutory functions would have the potential to alter the scope of the primary duty under section 8C. Given the treatment of powers with similar effect in section 8(2)(b)(i) and (8) it is the Scottish Government's view that it is appropriate for regulations under section 8C(5) also to be subject to the affirmative procedure.

PART 5

Section 34(4) – Power to specify a person and content of notification.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Revised or new power: Revised
Parliamentary procedure: Negative Procedure

Provision

31. Section 34(1) places a duty on a specified Scottish public authority to notify and provide information to Police Scotland about a victim of an offence under section 1 or section 4. Section 34(3) gives the Scottish Ministers the power by regulations to specify a Scottish public authority for the purposes of the duty to notify and gives Ministers the power to make provision about information to be included in such a notification.

32. An amendment at Stage 2 amends section 34 of the Bill by placing a subsequent duty on Police Scotland to notify any other person specified in regulations made by the Scottish

Ministers about a potential victim of trafficking about whom a notification has been received under section 34 (1) of the Bill.

33. The amendment at Stage 2 also amended section 34 to ensure that such a notification cannot contain personal data about adult victims unless the adult consents and permits regulations to otherwise specify what such a notification should contain. The Stage 2 amendment was drafted in a similar way to the approach taken at section 34(2) of the Bill, which makes clear that information should not be provided that either identifies a person or enables them to be identified, without their consent.

Reason for taking power

34. The amendment at Stage 2 will create further flexibility in respect of the notification of data about trafficking victims, allowing account to be taken of any changes to the National Referral Mechanism and creating increased scope for trafficking data to be collated at a UK, as well as Scottish, level. The original policy intent underpinning section 34 of the Bill was to allow for the collation and processing of wider information about trafficking activity in Scotland not currently collected through the National Referral Mechanism or criminal justice processes, ultimately providing a more accurate picture of the scale and scope of trafficking and a clearer basis for the requirement and provision of support services for victims.

Choice of procedure

35. The amendment to section 34 of the Bill allows the Scottish Ministers to specify both (i) bodies that are to provide to the police information about persons who appear to be victims of trafficking or exploitation; and (ii) bodies to which such information must be provided by the police. It is the view of the Scottish Government that the addition of the latter provision at Stage 2, should be consistent with the former. It was considered on introduction of the Bill that subjecting the exercise of the power in section 34(3) to negative procedure struck an appropriate balance between the flexibility to establish a list of authorities to be subject to the section 34(1) duty and the need for scrutiny of a provision of this nature. That continues to be the case in respect of this amendment. The main provision requiring the sharing of information is set out on the face of the Bill and the negative procedure is considered to afford an appropriate level of scrutiny in respect of the specification of the bodies to which the duty will apply. The Scottish Government therefore considers that it is appropriate for regulations under both section 34(3) and (6) to be subject to negative procedure.

This document relates to the Human Trafficking and Exploitation (Scotland) Bill as amended at Stage 2 (SP Bill 57A)

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