

HUMAN TRAFFICKING AND EXPLOITATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Human Trafficking and Exploitation (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

OUTLINE OF BILL PROVISIONS

3. The main purpose of the Human Trafficking and Exploitation (Scotland) Bill is to consolidate and strengthen the existing criminal law against human trafficking and exploitation and enhance the status of and support for its victims. The Bill will also give statutory responsibility to relevant agencies to work with the Scottish Government to develop and implement a Trafficking and Exploitation Strategy.

4. The Bill is in six parts.

5. Part 1 (Offences) includes provision on the creation of a single offence of human trafficking for all types of exploitation for both adults and children; establishes statutory aggravators of human trafficking for other crimes; and reframes the current standalone exploitation offence.

6. Part 2 (Protection of Victims) includes provision on prosecution of victims and assistance to victims.

7. Part 3 (Confiscation of Property) includes provision on detention and forfeiture of property and proceeds of crime.

8. Part 4 (Trafficking and Exploitation Prevention and Risk Orders) includes provision on two new preventive orders, trafficking and exploitation prevention orders and trafficking and exploitation risk orders.

9. Part 5 (Strategy and Reporting) includes provision on the Trafficking and Exploitation strategy and the duty on specified Scottish public authorities to notify and provide information about victims.

10. Part 6 contains general and ancillary provisions.

RATIONALE FOR SUBORDINATE LEGISLATION

11. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered carefully the importance of each matter against the need to:

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in light of experience without the need for primary legislation
- allow detailed arrangements to be kept up to date within the basic structures and principles set out in primary legislation
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Scottish Parliament; and
- make proper use of valuable Parliamentary time.

12. In deciding which form of Parliamentary procedure is appropriate for the subordinate legislation, a balance must be struck between the different levels of scrutiny involved in the negative and affirmative resolution procedures. In the Bill the balance reflects the view of the Scottish Government on the importance of the matter.

GENERAL SUBORDINATE LEGISLATION PROVISION

13. Section 37 (Regulations) contains general provision on the subordinate legislation which may be made under the Bill. Subsection (1) provides that any power conferred on the Scottish Ministers to make regulations allows different provision to be made for different purposes. Subsection (1) also permits the powers to be used to make incidental, supplementary, consequential, transitional, transitory or saving provisions. Subsection (2) provides for regulations made under sections 6(7), 12(2) and 29(1) to be subject to the affirmative procedure. In addition, regulations under section 38(1) which contains provisions that add to, replace or omit any part of the text of an Act are also to be subject to the affirmative procedure. Subsections (3) and (4) provide that all other regulations are subject to the negative procedure, with the exception of commencement regulations made under section 41 (which are subject to no procedure).

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

DELEGATED POWERS

Section 6(7) – Power to modify who is a public official and the definition of an international organisation for the purpose of section 6.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative Procedure

Provision

15. Section 6(7) allows the Scottish Ministers by regulations to modify what is meant by the term “public official” at section 6(5) and to modify what is meant by “an international organisation” for the purposes of the statutory aggravation involving a public official at section 6(6). Similar provision is contained in section 85(4) of the Criminal Justice (Scotland) Bill introduced on 20 June 2013. As noted in the Policy Memorandum, it is proposed that the people trafficking measures in that Bill are instead included within this Bill.

Reason for taking power

16. The Bill defines what is meant by the term “public official” and “an international organisation”. However, in light of experience, of the statutory aggravation operating in the courts, it may be necessary to modify those definitions. The power to do so therefore allows the flexibility to take that experience into account.

Choice of procedure

17. The power under this section is a power to amend the text of primary legislation. It is therefore considered appropriate that any regulations made under this provision should be subject to the level of parliamentary scrutiny that the affirmative procedure provides. This reflects a commitment given to the Delegated Powers and Legislative Reform Committee at Stage 1 of the Criminal Justice (Scotland) Bill to adopt this form of procedure in relation to this particular power.

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 Procedure

Provision

18. 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).

Reason for taking power

19. The period for which assistance is to be provided to adult victims of trafficking is agreed at UK level and may be subject to relatively frequent change. Indeed it is currently under

review. Flexibility is therefore required to ensure that the support period can be established and adjusted quickly and flexibly to reflect changing policy and practice.

Choice of procedure

20. The regulation will be subject the negative procedure. The negative procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny of a provision of this nature, given the technical nature of the provision and that the main provisions setting out the duty to secure assistance are included in the body of the Bill.

Section 12(2) – Power to amend list of relevant trafficking or exploitation offences for the purposes of Part 4.

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative Procedure

Provision

21. Section 12(1) sets out a list of relevant trafficking or exploitation offences for the purposes of Part 4 of the Bill. The importance of this list is that any person who has been convicted of, or received some equivalent disposal in relation to, a relevant trafficking or exploitation offence (or equivalent offence abroad) and is considered to present a risk of committing a further similar offence and may be subject to a trafficking and exploitation prevention order on sentencing or application. A trafficking and exploitation risk order may be made in respect of a person who, despite not having committed a relevant offence, is considered to present a risk of committing such an offence.

22. Section 12(2) allows the Scottish Ministers by regulations to amend the list of relevant trafficking or exploitation offences in section 12(1).

Reason for taking power

23. The Bill provides a list of trafficking and exploitation offences for the purposes of trafficking and exploitation prevention and risk orders. The power to amend that list provides flexibility by ensuring that any future trafficking and exploitation offences created after the legislation has come into force could trigger the making of an order.

Choice of procedure

24. The power under this section is a power to amend the text of primary legislation. Further, adding an offence to this list could potentially lead to an individual being subject to an onerous court order. It is therefore considered appropriate that any regulations made under this provision should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 29(1) – Power to amend list of orders under section 28(2).

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative Procedure

Provision

25. Section 29(1) allows the Scottish Ministers by regulations to amend the list of orders a breach of which would constitute an offence under section 28. The order provides that the Scottish Ministers may add a “relevant UK order” to that list, or remove any order so added. The term “a relevant UK order” is defined at section 29(2).

Reason for taking power

26. The power will ensure that orders equivalent to those listed at section 29(2) made in other UK jurisdictions are to be recognised and enforced in Scotland as if they had been made in Scotland. The Scottish Government understands that such equivalent orders are likely to be introduced in both Northern Ireland and England and Wales during the passage of this Bill. The power in section 29(1) therefore provides the flexibility to ensure that provision can be made to ensure that breach of those orders (and any other future equivalent orders) in Scotland will be an offence as it would be in the jurisdiction to which the order relates.

Choice of procedure

27. The power under this section is a power to amend the text of primary legislation in a way which will expand the scope of a criminal offence. It is therefore considered appropriate that any regulations made under this provision should be subject to the level of Parliamentary scrutiny that the affirmative procedure provides.

Section 33(2) – Power to specify a Scottish public authority.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative Procedure

Provision

28. Section 33(1) places a duty on relevant authorities to co-operate with the Scottish Ministers in the preparation or review of the trafficking and exploitation strategy under section 31. Section 33(2) provides that the Scottish Ministers may by regulations specify a list of Scottish public authorities as relevant authorities for the purpose of co-operating on the strategy.

Reason for taking power

29. Giving the Scottish Ministers the power to specify and amend the list of relevant authorities provides flexibility and ensures that the list can be updated quickly, to remove, add or amend any bodies listed, as and when necessary (e.g. because bodies cease to exist, new bodies

are created or existing bodies become involved in anti-trafficking and exploitation initiatives). A key policy priority of the Scottish Ministers is to expand awareness of human trafficking amongst organisations over the course of time. The power to specify the list of relevant authorities ensures that the Scottish Ministers can respond flexibly as more bodies become involved in anti-trafficking and exploitation initiatives as a result of increased awareness.

Choice of procedure

30. The regulation will be subject to the negative procedure. The negative procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny of a provision of this nature, the main provision - the duty on Scottish public authorities to cooperate – being contained in the body of the legislation.

Section 34(3) – Power to specify a Scottish public authority and content of notification.

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations**
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.

Reason for taking power

32. Giving the Scottish Ministers the power to specify and amend the list of relevant authorities provides flexibility and ensures that the list can be updated quickly, to remove, add or amend any bodies listed, as and when necessary. A key policy priority of the Scottish Ministers is to expand awareness of human trafficking amongst organisations over the course of time. The power to specify the list of relevant authorities ensures that the Scottish Ministers can respond flexibly as more bodies become involved in anti-trafficking and exploitation initiatives as a result of increased awareness. The power to make provision by regulations about information to be included in a notification will ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in light of experience without the need for primary legislation

Choice of procedure

33. The regulation will be subject to the negative procedure. The negative procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny of a provision of this nature, the main provision - the duty on Scottish public authorities to notify and provide information about victims – being contained in the body of the legislation.

Section 38 – Power to make ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure if it amends the text of an Act, otherwise negative procedure

Provision

34. Section 38 provides the Scottish Ministers with the power to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under this Act.

Reason for taking power

35. Any body of new law may give rise to a need for a range of ancillary provisions.

36. This power is necessary to allow flexibility as provisions in the Bill are brought into force. The power is limited to the extent that it can only be used if Scottish Ministers consider it necessary. Without the power to make incidental, supplemental and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters which require to be dealt with to give full effect to the original Bill. That would not be an effective use of either the Parliament's or Government's resources.

Choice of procedure

37. Where the power is used to modify primary legislation, it would require the level of Parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative procedure which would be the normal procedure for the exercise of these powers. These procedures are typical for ancillary powers.

Section 41 – Commencement.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Laid, no procedure

Provision

38. Section 41 enables the Scottish Ministers to commence the Bill, including the making of transitional, transitory or savings provisions relative to that commencement. The Bill provides that certain provisions will come into force on the day after Royal Assent. The remainder will come into force on a day set by the Scottish Ministers by regulations

Reason for taking power

39. The decision on when and how the Bill is commenced is an administrative issue for the Scottish Ministers.

Choice of procedure

40. No procedure is provided for aside from laying in Parliament in line with the Interpretation and Legislative Reform (Scotland) Act 2010, which is typical for commencement powers. The power includes the usual ability to make transitional, transitory or saving provision in the commencement regulations to allow for straightforward transitional provisions connected to commencement of the provisions of the Bill to be made.

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

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